BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

NZTDT 2018/95

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**

AND **TEACHER E**

DECISION OF TRIBUNAL
DATED 2 APRIL 2020

HEARING: Held at Gisborne on 24 July 2019

TRIBUNAL: Theo Baker (Chair)
Maria Johnson and David Spraggs (members)

REPRESENTATION: Ms Tahana, Ms Underhill-Seb and Ms Fitzherbert for the CAC
Ms Kennedy for the respondent

1. A panel of the Tribunal convened in Gisborne on 24 July 2019 to hear a referral from the Complaints Assessment Committee (**CAC**), who alleged that the respondent was guilty of misconduct as a result of her relationship with a student, referred to in this decision as Student A. The allegation was that the respondent had formed an inappropriate relationship with Student A. In particular, between the dates of November 2015 and February 2017 the respondent allowed Student A to share her bed. There was no allegation of sexual impropriety. The CAC invited the Tribunal to make an adverse finding and impose penalties under s 404 of the Education Act 1989.

2. In a preliminary decision dated 5 August 2019 we notified our decision that the respondent's conduct amounted to serious misconduct, and we invited submissions on penalty and costs.

The Notice of Charge and the Disciplinary Regime

3. On 19 July 2019, following a hearing of the respondent's objections to certain aspects of the Notice of Charge, the charge was amended. According to the amended charge a CAC had received a mandatory report,[1] in which it was alleged that in her role as a teacher employed at 'the school' the respondent "had an inappropriate relationship with a 15-year-old male student who was her student and who subsequently resided with her in what was explained as a whāngai relationship." The charge also stated that on 7 June 2018 the CAC found that the respondent's behaviour in allowing a 15-year-old male student to share her bed with her, reached the threshold of misconduct and required a disciplinary response.

4. At the pre-hearing conference on 19 July I suggested that the amended charge should reflect that the parties had not reached agreement as to outcome. This is because the charge that was submitted did not allege serious misconduct, but only "misconduct". Because the CAC can deal with a matter that it does not consider "may possibly amount to serious misconduct",[2] it is appropriate that the Notice of Charge makes it clear to the Tribunal why the matter has been referred to us.

5. The powers of a Complaints Assessment Committee are set out in s 401 of the Act:

[1] The Act specifies various grounds for mandatory reporting including an employer's obligation to report possible serious misconduct under s 394.
[2] Education Act 1989, s 401(4)

401 Powers of Complaints Assessment Committee

(1) The Complaints Assessment Committee may investigate any report, complaint, or matter referred to it under section 400.

(2) Following an investigation, the Complaints Assessment Committee may do 1 or more of the following:

(a) resolve to take the matter no further:

(b) refer the teacher concerned to a competency review:

(c) refer the teacher concerned to an impairment process, which may involve either or both of the following:

(i) assessment of an impairment:

(ii) assistance with an impairment:

(d) if there has been made a finding of misconduct that is not serious misconduct, by agreement with the teacher and the person who made the complaint or report or referred the matter, do 1 or more of the following:

(i) censure the teacher:

(ii) impose conditions on the teacher's practising certificate or authority, such as (without limitation) requiring the teacher to undergo supervision or professional development:

(iii) suspend the *teacher's practising certificate or authority for a specified period, or until specified conditions are met:*

(iv) annotate the register or the list of authorised persons in a specified manner:

(v) direct the Education Council to impose conditions on any subsequent practising certificate issued to the teacher.

(3) The Complaints Assessment Committee may, at any time, refer a matter to the Disciplinary Tribunal for a hearing.

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

6. Most cases that are heard by the Tribunal fall into two categories: either the matter is referred under s 401(4) and it is alleged that the conduct amounts to serious misconduct, or the teacher has been convicted of an offence in the District or High Court. It is rare for the Tribunal to hear a referral outside of those categories, but occasionally we do so because the respondent and the person who made the report (usually the school) have not reached agreement and so the CAC cannot exercise its powers under s 401(2)(d).

7. That is why it is reasonable for a Notice of Charge to include the fact that the CAC made a finding that a teacher's behaviour amounted to misconduct. Because there is no agreement, this Tribunal considers the matter afresh. It is open to us to make any of the following findings:

   a. the alleged conduct is not established on the evidence we have heard;

   b. the established conduct does not amount to misconduct or serious misconduct;

   c. the established conduct amounts to misconduct; or

   d. the established conduct amounts to serious misconduct.

8. The respondent objected to certain matters, including the admissibility of a transcript of the respondent with the CAC on 8 June 2018. These objections were dealt with on 19 July 2019 and a minute was issued recording the Chair's rulings.

Evidence

Pre-hearing matters

9. On 24 July 2019 before we heard any evidence, Ms Tahana asked for a further opportunity discuss the charge with Ms Kennedy to see if agreement could be reached on any matters. In particular she said that the CAC would be willing to resolve the charge on the basis of an admission of misconduct.

10. After an adjournment, the parties advised that no progress had been made. Ms Kennedy said that none of the facts as pleaded by the CAC were admitted, and in particular it was not admitted that between November 2015 and February 2017 the respondent shared a bed with a 15-year-old student (Student A) with whom she had a whāngai relationship. However, Ms Kennedy did accept that the respondent was a teacher at the school from 2010, that in December 2015 she and Student A and his younger brother, Student B started living with her as whāngai sons, and that they were students at the school before they came to live with her.

11. Ms Kennedy repeated her objection to the admissibility of a transcript of the respondent's meeting with the CAC on 7 June 2018 (exhibit 3),[3] and renewed it at the

[3] Referred to as exhibit 8 in the Brief of Evidence.

end of the CAC case. The basis of the objection was that the respondent did not understand what the purpose of the meeting with the CAC was.

12. There was no dispute that the record of the respondent's statements in that meeting was accurate. The respondent was aware that a recording was being made of the hearing. There was no suggestion that the respondent did not know about the mandatory report. The investigative and disciplinary powers of the CAC are clearly set out in s 401 of the Act and the respondent was accompanied by her lawyer, Ms King.

13. The respondent had not been arrested or detained, so any advice set out under s 23 of the Bill of Rights Act 1993 was not required. The respondent was not being questioned by the Police and so the Chief Justice's Practice Note on Police Questioning (s 30(6) Evidence Act 2006) is not relevant.

14. In short, we could not find any basis for an argument that the respondent's statements to the CAC were improperly obtained. If this were a criminal matter, the prosecution could offer evidence of statements made by the accused under s 29 of the Evidence Act 2006. Applying the civil evidence rules, the respondent's acknowledgements that Student A had slept in her bed are admissions under s 4 of the Evidence Act 2006 and are admissible under s 34 of the Evidence Act 2006. Therefore the ruling remained that the record of the respondent's meeting with the CAC on 7 June 2018, and in particular her admissions were admissible and received as evidence.

CAC Evidence

15. Before the hearing the parties filed briefs of evidence. The CAC filed evidence from:

    a. Principal of the school (Ms S);

    b. A teacher at the school (Ms Q);

    c. Cherise Fa'atui, a CAC Coordinator at the Teaching Council (the Council), who had attended the CAC meeting with the respondent on 7 June 2018 and produced minutes of it;

    d. Ms N who provided an opinion on whether the respondent's relationship with the student amounted to a whāngai relationship under Ngati Porou/Te Aitanga-a-Hauiti tikanga.

16. We heard from only the first two witnesses in person, but the latter two statements were received as evidence.

17. Ms Q is a teacher at the school and is also related to the respondent. The two had grown up in the same whānau and had known each other since Ms Q was about 8 or 9. Ms Q's first teaching job was at the school and the respondent had been her mentor and whānau support.

18. Ms Q told us that on 1 February 2017 respondent's (adult) daughter, V, "confided in" Ms Q "about her mother's relationship" with Student A. Ms Q said that she would have to take this information to Ms S.

19. The next day Ms Q told the respondent that she needed to discuss something with her quite urgently, but the conversation did not take place. On 3 February Ms Q went to Ms S's office, but she was not available. On Monday 7 February Ms Q told the respondent that she had been given information about an inappropriate relationship between her and Student A and that Student A slept in the same bed as her. She told the respondent she was not judging her, but she had to inform Ms S. She said that out of respect for their whānau, she wanted to let the respondent know what she was going to do. The respondent said that she understood and that Ms Q should do what she needed to do.

20. In questioning from the Tribunal, Ms Q was asked what the respondent had said in response to the allegation that Student A and she slept in the same bed. Ms Q said that the respondent had neither admitted nor denied this.

21. After her conversation with the respondent, Ms Q then told Ms S what V had told her.

22. In response to questions from the Tribunal, Ms Q acknowledged that she had seen V be a bit jealous of the respondent's relationship with Student A.

23. Ms Q also confirmed that she had raised concerns about the respondent's closeness with other students, such as cuddling, or having social conversations with them where you would not know that she was a teacher.

24. The next CAC witness, Ms S told us that Student A and Student B had enrolled at the school in August 2015, having moved to the area to live with their

mother, her partner, and their two siblings. The respondent met the boys for the first time in her role as a teacher at the school.

25. Because their mother and her partner were often working outside the area, the boys were left to their own devices and so the respondent offered to care for them. They began living with her in about November 2015 when Student A was 15 years old. Ms S believed this arrangement was a temporary measure and she encouraged the respondent to obtain support form the Ministry of Social Development.

26. On 7 February 2017 Ms S gave her a letter outlining the allegations that V had made to Ms Q. The respondent was placed her on discretionary leave pending the completion of an investigation. Parts of the evidence concerning an investigation conducted and an investigation report were excluded by consent on 19 July 2019. However, the respondent's reply to the draft report remained as exhibit 5 and the following excerpt was set out in Ms S's brief evidence:

> *In the investigator's report it states that the heart of the matter is V's allegations that [Student A] sleeps in the same bed as myself. Right from the outset, I did not deny this allegation.*

27. The Board of Trustees formed the view that a disciplinary process should take place and following this the respondent was dismissed.

28. Under cross-examination, Ms S acknowledged that from the end of 2015 and the beginning of 2017 she had no concerns about the respondent's care of the boys and she did not provide any professional guidance.

29. The Tribunal asked Ms S why following the CAC investigation, the school had not agreed with the CAC proposal that the conduct amounted to misconduct rather than serious misconduct. She said that the Board was unanimous that it was serious misconduct because a female teacher was sleeping with15-year-old boy almost every night. This view was formed based on statements made by V.

30. Ms S acknowledged that at the time the boys went to live with the respondent they were in dire circumstances. She understood that the respondent had formed a relationship with them and had taken them home the odd night. The respondent came to see Ms S to say that she was taking them in, and Ms S appreciated that.

31. Ms S said that there were lots of incidents where students who were needy socially and emotionally were attracted to her.

32. Ms S described Student A as a 15-year-old boy with serious emotional and social needs sleeping in a female teacher's bed. She felt it posed a risk for the student and teacher of an emotional and possibly sexual relationship. Even if the child had been living with the teacher from birth, Ms S would still have been concerned if it was every night.

33. Ms S could not remember if they had offered counselling to the boys but thought that the boys were not interested in interventions. Counselling was offered after this.

34. Ms S acknowledged under cross-examination that the boys thrived in the respondent's care. She accepted that she did not ascertain whether Student A had shared a bed with the respondent every night.

35. Ms S also did not accept that this was a whāngai relationship. Even if she had, it would not have alleviated her concern. She said that is not the practice of whāngai parents, and it was not the experience of culture and knowledge of members of the board.

36. The sole purpose of the evidence of **Cherise Fa'atui** was to produce the minutes of the CAC meeting with the respondent on 18 June 2018.

37. Ms N provided an opinion that the respondent's relationship with the student amounted to a whāngai relationship under Ngati Porou/Te Aitanga-a-Hauiti tikanga. Attached to her statement was a document in which she set out a history and background of the concept of whāngai. In particular, she discussed:

    a. What is whāngai?

    b. The benefits of whāngai?

    c. The enemy of whāngai

    d. Examples of whāngai within Ngati Porou and Te Aitanga a Hauiti.

38. The following are excerpts from her report:

    The concept of whangai is one iteration of Ngati Porou/Te Aitanga a Mahaki domestic personal living experience. It is therefore premised upon genealogical relationship

such as those expressed between Ngati Porou and Te Aitanga a Hauiti as grandfather and grandchild. The time stamps of when these two male ancestors worked the land and their leadership were quite different. However they descend from a single stock of genealogy that of the eponymous ancestor Porourangi te Tuhi Maraiekura te Mataatara a Whare or Rauru.

...

1.3 The essence of the concept of whangai is: a duty of care, to protect, to nurture,, to shelter to cherish, to grow, to enable family wellbeing. Whangai is a critical institution in Ngati Porou thought as the family is the core foundation of the power, prestige of the individuals, sub tribes and the wider tribal grouping.

...

The enemy of whangai is legislation and western thought.

...

Insult upon the concept of Whangai began when government legislation disregarded it because it was not recognised in law. However, it appeared in the first instance in the Maori Land Court in relation to addressing succession of lands belonging to Maori who had deceased.

39. In her statement Ms N concluded:

    Based on my knowledge of tikanga, it is appropriate to characterize the relationship between the respondent and the student a whangai relationship.

40. Ms N was not required for cross-examination and so we did not hear from her orally. It would have been helpful to explore and understand the basis for her conclusions.

41. **Cherise Fa'atui** was present at the CAC meeting with the respondent on 7 June 2018 and produced a copy of the transcript of that meeting.

Admissibility revisited

42. At the conclusion of the CAC case, Ms Kennedy argued that there was no case to answer given the lack of direct evidence of bed-sharing, which allegation was denied.

43. Ms Tahana for the CAC took us to admissions that had been made.[4] Exhibit 3 was the Transcript of the respondent's meeting with the CAC. On page 10 of the transcript,[5] is the following:

> *CAC 1: So from Day 1 that he moved into your house umm him and his brother were bedsharing with you or just [Student A].*
>
> *[The respondent]: No no when they first came it was … their own beds…*

44. And on page 15:

> *CAC 1: And so they did bring up with you about the bed sharing?*
>
> *The respondent: They did, absolutely.*

45. And on page 16:

> *CAC 4: At that point you had the family concerns or the whanau concerns in and I would be interested to hear this from you, did the bed sleeping stop?*
>
> *The respondent: Oh my gosh yes it stopped totally. That's when I actually saw it from other people and I thought wholly crap okay, alright, yeah.*

46. There was also reference to sharing a room on page 12.

47. We were satisfied that there was a case to answer. Although there was no direct witness of the respondent and Student A sharing a bed, the respondent had not denied it when Ms Q had told her what V had said, and it is evident from the excerpts above that the respondent had accepted that she had shared a bed with Student A. We ruled that the CAC had established a case to answer.

The respondent

48. The respondent gave evidence. Her prepared brief of evidence did not refer to sharing a bed with Student A, and in particular there was no denial of this. It read as follows:

> 1. *My full name is Teacher E.*
> 2. *I was living in the Bay until the flood in 2018 essentially destroyed my house and many belongings.*

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[4] In fact references to Exhibits 1 and 2 had been excluded.

[5] Ms Tahana referred to page 40 of the Bundle of Documents, but as there are several versions of the Bundle, the numbering on the transcript has been used.

3. I have been a registered teacher since 2006.

4. I started work at the school in 2010.

5. It was my dream job really, to be teaching at home, teaching my own people and it was what I loved and I was able to teach a number of subjects. Actually, in a small school like that they do ask you to teach a lot of things and I gained a lot of knowledge from there and I am very grateful for the experience and time that I had at the school.

6. As a result of the deprived circumstances of [Student A] and his brother [Student B] and with the support of their biological parents the boys became my whāngai sons.

7. The school was informed.

8. Student A has thrived in my care and continues to do so.

49. Under cross-examination Ms Tahana put to the respondent a number of statements, almost all of which the respondent agreed with. She agreed that she shared her bed with Student A on many occasions. She made no attempt to deny or avoid answering questions. There was nothing in her evidence before this Tribunal that was inconsistent with her prior statements. The following is a summary of the accepted facts.

50. Student A and Student B were enrolled at the School in August 2015 and before the two boys came to the School, she did not know them. Although it is possible that she is related to them somehow, there is no evidence of this in her immediate whakapapa.

51. Having heard that the boys' mother had left them to go shearing, the respondent understood that they were in dire circumstances and so she decided to take them into her home. This was at the end of December 2015.[6] At this time she was Student A's teacher. She was 42 and Student A had turned 15 in November. The respondent did not discuss this with the School until January, near the end of the holidays.

52. When the boys moved in, the respondent gave up her bedroom for them to share because it was bigger. There was only one bed in the room that she slept in. Student A would sometimes come into her (new) bedroom and talk. When he first arrived he did not say much. Once the lights were out in the bedroom, Student A would open up and

[6] The respondent did not agree that they had been to her house before then.

talk about his personal situation. The respondent felt aroha for both boys. She was shocked and disgusted by what she heard about his upbringing.

53. The respondent stopped going to some whānau gatherings because she now had two teenage boys who were not good communicators. They would shut down. Her decision to go to fewer gatherings and not go to large gatherings was her protective strategy for the boys.

54. The whānau did not raise the issue of bed-sharing with her until after V's "disclosure".

55. V was jealous at times. The respondent felt she had to protect the boys from this. When V raised with her the issue of bed-sharing, it had already stopped.

56. As a result of a call from the Principal, CYFS became involved and moved the boys but Student A has since returned. She and Student A do not now share a bed.

57. The respondent had spoken with the boys' father before Christmas about the boys being with her and he had discussed this with the boys. In Term 4 of 2015 she had taught both boys.

58. The bedsharing occurred on many occasions between November 2015 and February 2017 and also stopped between those dates.

59. The respondent did not know how Student B felt about her sharing a bed with Student A. She did not speak to him about it because it was not an issue. Student B was generally more open than Student A.

60. In answer to questions from the Tribunal, the respondent said that she sees those boys as her sons. When they first lived with her they called her Ms S."[7] It took a long time for them to settle and it looked as though they were going to take off. Then they started putting their things in a drawer, rather than in their bag. The mother/son relationship started about the end of January and by the end of the first term they were calling her "Nan".

[7] "Mother" or "aunty"

Mr W

61. The respondent also filed an affirmation of (Mr W), who is the respondent's brother. He said that he did not profess to be an authority on Māori culture, genealogy and history, but said that he is recognised as one.

62. Mr W described his understanding of what determines a whāngai relationship, based on his own upbringing as a whāngai child and his life experience as a whāngai parent. He provided examples of whāngai relationships that were established where there was no known blood relationship.

63. Mr W was not required for cross-examination.

Findings

64. The respondent seemed open and honest when giving her evidence. There was no attempt to retract, resile from, or explain earlier admissions. It was not clear to us why we were required to spend so much time considering the admissibility of the respondent's prior statements, when she made no attempt in the course of her evidence to deny the matters she had earlier admitted to the CAC, a disciplinary body of her professional regulator.

65. We did not hear from Ms N in person. Presumably the respondent did not want to cross-examine her. The opinion that there was a whāngai relationship between the respondent and Student A did not enhance the CAC case. We assumed that the opinion was put before us in the interests of fairness. We do not know why the CAC did not require Mr W for cross-examination.

66. Had we heard from Ms N and/or Mr W in person, we would have explored with them their assumptions about the circumstances in the whāngai relationship developed. In each of the examples provided by Mr W at the time the child went into the care of another adult, there was an agreement between the adults that the child was to be raised in a whāngai situation.

67. We would have liked to have understood better when a relationship between an adult and a child might not be characterised as a whāngai relationship. We would also have been interested in their views on bed-sharing with a teenager who had known the adult only a matter of months.

68. In our preliminary decision we recorded the following findings:

a. Student A aged 14, and his younger brother, Student B started at the school in August 2015.

b. Before this, the respondent did not know the boys.

c. The respondent taught both boys in Term 4 of 2015.

d. Before Christmas 2016, the respondent took both boys into her home on the basis of concerns that they were not in the care of either parent, and were living an unsettled life that might be described as itinerant or even homeless.

e. Over the Christmas holidays she obtained parental consent to this arrangement.

f. Towards the end of the holidays, which we find is late January 2016, she informed the Principal.

g. By the middle of 2016, the respondent was allowing Student A, (now aged 15) to share her bed on many occasions.

h. Student A was emotionally and socially needy.

i. There is no evidence of any sexual relationship or physical impropriety.

j. The respondent believed this arrangement was a whāngai situation.

k. The boys continued to call the respondent 'Ms S' until about the middle of 2016.

69. In summary we found that within 12 months of knowing Student A, the respondent was allowing him (aged 15) to share her bed.

70. Without hearing any evidence from the boys, the boys' parents, or having the opportunity to hear from Ms N and Mr W we are not prepared to find that this was a whāngai relationship at the time the boys first moved into the respondent's home. Even if it were a whāngai situation from December 2015, that does not alter the fact that it was only through the respondent's situation as the boys' teacher, that these came to live with the respondent. If she had not been his teacher Student A would not have been in the respondent's bed.

71. The crux of the charge is that in her role as a teacher employed at the school, the respondent had an inappropriate relationship with a 15-year-old male student who was her student and who subsequently resided with her in what was explained as a whāngai relationship.

72. We find the charge proved. This is because in our view, the factual findings that we made, as set out above, are evidence of an inappropriate relationship with a student. It is not an answer to the charge that the respondent was simply sharing a bed with her teenage son. She was sharing her bed on a regular basis with a teenage boy that she known only because he was a student at the school where she taught, and she had known him only a few months. We would expect a teacher to be very careful with the emotions of any student, but also to recognise that a teenage boy's hormones are often referred to as "raging". By failing to put clear boundaries in place, the respondent's actions had the potential to confuse Student A.

73. We therefore find that the nature of this relationship was therefore inappropriate.

Disciplinary threshold

74. At the end of the hearing the CAC invited the Tribunal to make an adverse finding and impose penalties under s 404 of the Education Act 1989. The CAC confirmed that it was open to the Tribunal to make a finding of serious misconduct. A possible finding of serious misconduct was explored with counsel.

75. Section 404 of the Act provides:

> ***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.*

76. Before exercising our disciplinary powers under s 404, we must be satisfied that the conduct warrants an adverse finding.[8]

77. It is well-established that the fact that this conduct occurred outside the school setting does not preclude it from disciplinary sanction. We have repeated endorsed the comments in *CAC v Teacher* NZTDT 2009-5,[9]

> The Tribunal has said in a number of earlier cases that the actions of a teacher may constitute misconduct or serious misconduct, or otherwise be actions in respect of which the Tribunal is obliged to respond, even although they take place outside the school gates and outside school hours. The legislation is simply not structured in such a way as to draw a line between a teacher's private and professional life. The principal question is never whether some incident took place in a teacher's private or professional capacity. The principal question is always whether the teacher's actions, wherever and whenever they took place, reflect adversely on his or her fitness to be a teacher. That is not to say that the question of where and when actions take place may not be relevant to the Tribunal's determination. Often they are.

CAC submissions

78. In oral submissions, the CAC submitted that there is no dispute that the boys were in her care, but it was not a whāngai relationship. This submission was made despite the evidence of Ms N that this was a whāngai relationship.

79. Ms Tahana submitted that but for the teacher student relationship, Student A would not have come to live with the respondent.

80. Ms Tahana referred to evidence of the respondent and Ms S that Student A was a vulnerable young teenager.

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[8] *Complaints Assessment Committee v S*, Auckland DC, CIV 2008 004001547, 4 December 2008, Judge Sharp, at [47]; CAC v Teacher NZTDT 2009-1;*CAC v Bird* 2017-5, 22 June 2017
[9] *CAC v Teacher* NZTDT 2009-5, 11 May 2009

81. The talking that occurred and the bed-sharing paved the way for there to become even more dependence for Student A on the respondent.

82. The CAC accepted that the respondent's intentions were good, but submitted they were clearly misguided. The respondent accepted her obligations under the Code of Professional Responsibility but remains wedded to the mother/whānau relationship as justification.

83. Ms Tahana submitted that the conduct was wrong because the Code of Ethics that was in place until 30 June 2017 states that teachers strive to *develop and maintain professional relationships with learners based upon the best interests of those learners.*[10]

84. Ms Tahana referred to the following statement in *CAC v Teacher K* NZTDT 2018-7:[11]

> Maintaining appropriate professional boundaries is a fundamental skill, obligation and professional discipline for all teachers.

85. Ms Tahana referred to the short length of time the respondent had known Student A before he moved into her home. She also referred to the age disparity and the obligation of the respondent to keep this adolescent male safe; the respondent had created a slippery slope to a sexual relationship.

86. It was submitted that the respondent has not modelled the positive values that are widely accepted in society and she was therefore in breach of paragraph 3 of the Code of Ethics which required teachers to: *teach and model those positive values which are widely accepted in society and encourage learners to apply them and critically appreciate their significance.*

87. Ms Tahana noted that these events occurred in a small community. There was something that was alarming about this for V, Ms Q, Ms S and members of the Board of Trustees.

88. Once the boys had moved in, there was a professional boundary breached and that element of grey required the respondent to be more vigilant.

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[10] Paragraph 1 of the Teachers Council Code of Ethics for Registered Teachers which was replaced by the Code of Professional Responsibility on 30 June 2017.
[11] *CAC v Teacher K* NZTDT 2018-7, 21 August 2018 at paragraph 23.

Respondent submissions

89. Ms Kennedy submitted that this is not a case about a student and teacher. She said that there is no evidence that when the boys became her whāngai sons there was any favouritism. She submitted that there is nothing wrong with letting a child come in and talk and share a bed when it is your own child.

90. The respondent has done this with the full knowledge of the community. Ms S provided no professional guidance.

91. Ms Kennedy submitted that if we found fault with the respondent's conduct, that would have implications for any teacher considering fostering or whāngai arrangements.

Discussion

92. Section 378 of the Act provides:

> ***serious misconduct*** *means conduct by a teacher—*
>
> *(a) that—*
>
> *(i) adversely affects, or is likely to adversely affect, the well-being 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.*

93. The criteria for reporting serious misconduct are found in r 9 of the Teaching Council Rules 2016. Conduct that occurred before 18 May 2018 is covered by earlier Rules, [12] which read:

> ***Criteria for reporting serious misconduct***
>
> *(1) The criterion for reporting serious misconduct is that an employer suspects on reasonable grounds that a teacher has engaged in any of the following:*
>
> *…*

[12] Clause 3 of Schedule 1 of the Teaching Council Rules 2016 provides that possible serious misconduct by a teacher that occurred before 19 May 2018 must be reported and dealt with in accordance with the principal rules that were in force immediately before that date.

(e) being involved in an inappropriate relationship with a student with whom the teacher is, or was when the relationship commenced, in contact with as a result of his or her position as a teacher:

…

(o) any act or omission that brings, or is likely to bring, discredit to the profession.

94. We appreciate the points Ms N made about the imposition of pakeha culture on the practice of whāngai. We acknowledge that the effects or colonisation are that many customary practices have not been recognised and were even legislated against.

95. We have considered the facts of this case. Student A and Student B were not the respondent's sons. Although it is possible and even probable that if the respondent and the boys traced their respective whakapapa, there would be some common ancestry, there was no known familial relationship between the respondent and these boys. The respondent knew them solely because she had taught them at the school when she was employed. Within five months of meeting them, they had moved in with her. There was no evidence that this was to be an indefinite arrangement where she raised the children. In the absence of this evidence we do not find that when they moved in (December 2015) there was a whāngai relationship or an intention of this at that time. That position may well have changed, but we are viewing the respondent's conduct between 2015 and 2017.

96. We acknowledge that there are times when children (including teenagers and adults) share a bed with a parent or other family member, in particular when beds are in short supply, including when on holiday or having a number of relatives or other visitors to stay. We think it is fair to say that most teenage boys do not regularly share a bed with their mothers. We would have thought that many of Student A's peers would have thought it unusual if he was regularly sleeping with his mother (including whāngai mother). We think they would have found it very strange that he was sharing a bed with their teacher.

97. Dealing first with the test under s 378, we consider the respondent's conduct had the potential to adversely affect the wellbeing of Student A. In particular, in a very short time of knowing the respondent as his teacher, he was sharing a bed with her. He was

a teenage boy and navigating his relationship with the respondent was likely to be confusing for him. In *Teacher K* NZTDT 2018-7,[13] we said:

> Teachers who lack the ability to maintain appropriate professional boundaries are likely to step onto a "slippery slope" of tangled relationships with students which ultimately are highly likely to be damaging to students, will be confusing, will set poor role models and may result in even more serious misconduct. Mutual emotional dependency can arise and in the worst cases sexual relationships can develop. Teachers are guides, not friends in the usual sense.

98. We find that the respondent's conduct reflects adversely on her fitness to be a teacher. She should have recognised that having brought Student A and Student B into her home, she had to exercise care. In the early stages of that set-up, she was still first and foremost a teacher from his school. It is her behaviour as a teacher that we are judging.

99. We also find that the respondent's conduct was likely to bring the teaching profession into disrepute under paragraph (c), and for the same reasons was likely to bring discredit to the profession under r 9(1)(o). We find that reasonable members of the public, fully informed of the facts and circumstances, would consider that the reputation of teachers is lowered by the respondent's conduct. The respondent herself has said that she ceased sharing a bed with Student A when she realised how it would look to others. When asked at the CAC meeting whether the bed sharing stopped, her reply was, "Oh my gosh yes. It stopped totally. That's when I actually saw it from other people and I thought, 'Holy crap. Okay. Alright. Yeah."

100. We have already found that the respondent was involved in an inappropriate relationship with Student A and that she was in contact with him as a result of her position as a teacher. The criterion in r 9(1)(e) is also therefore met.

101. The two limbs of the definition of serious misconduct in paragraphs (a) and (b) of s 378 are therefore established.

[13] Above, note 10

Penalty

102. In our preliminary decision, we acknowledged the contribution that the respondent has to offer the teaching profession and children and young people, but expressed our concern about her ability to understand her boundaries as a teacher and how to conduct herself. We proposed the following penalty:

   a. Censure;

   b. Annotation of the register for a period of three years;

   c. Conditions on the respondent's practising certificate as follows:

      i. Not to teach until she has completed professional development about professional boundaries, to the satisfaction of the Senior Manager, Professional Responsibility;

      ii. Not to teach without showing any employer (including prospective employers) a copy of the final decision;

      iii. Once she commences teaching, to have a senior syndicate leader as a mentor for a period of two years;

103. We invited submissions on penalty and costs, noting that we were minded to order more than 50% in light of the several opportunities the respondent had to reduce the hearing time needed and to avoid a hearing.

CAC submissions

104. The CAC did not file any further submissions. Ms Kennedy objects to the late filing of submissions. Although we sometimes extend some leniency in compliance with timetabling directions, there does not appear to be any reason for this delay and we agree that any further submissions should not be considered.

105. In the earlier submissions filed before the July 2019 hearing, the CAC had put forward the following as aggravating features:

   a. Student A's vulnerability;

   b. The age disparity;

   c. The seriousness of the conduct;

d. The repeated nature of the conduct; it was not a one-off event.

106. Ms Tahana also submitted that the respondent's explanation and response demonstrates a lack of insight for the following reasons:

a. The respondent's characterisation of the allegation as parenting at home in a Māori context and under a whāngai relationship was at odds with the school's view and the respondent's whānau members;

b. The respondent's claim that the initial disclosure by her daughter was a privacy breach was ill-founded;

c. The respondent fails to appreciate that a teacher's professional obligations extend beyond the school grounds.

107. The CAC sought a censure and conditions on the respondent's practising certificate that she enrol in a professional development course directed at ensuring the respondent is aware of the proper boundaries between teachers and students and the effective means of maintaining them, and that she advise current/future potential employers of this decision.

Respondent submissions

108. Ms Kennedy took issue with the suggestion this matter was before the Tribunal because of some failure on the part of the respondent to attempt to resolve this matter. She said it would not be appropriate for the respondent to disclose without prejudice discussions, but she expected that counsel for the CAC would confirm that failure to resolve by agreement at the CAC stage was not a failure on the part of the respondent. She said that she expected that counsel for the CAC would confirm that the CAC was of a mind in June of 2018 to censure only and that there was no basis for requiring professional development or other conditions, or annotation of the register but that resolution could not be achieved for reasons that did not include any disagreement by the respondent or failure to compromise by her.

109. Ms Kennedy said it was therefore unclear on what basis the CAC then proposed a greater penalty (censure and conditions) in paragraph [35] of the CAC's 4 June 2019 submissions to the Tribunal. She also noted that the Tribunal has proposed a greater penalty than that sought by the CAC.

110. It was submitted that the penalty proposed by the Tribunal in this case is excessive, unreasonable, and not proportionate in the circumstances, and is also inconsistent and a greater proposed penalty than has occurred in more serious cases.

111. Ms Kennedy submitted that in all the circumstances of this case, given the delays, the time that has lapsed (over 2 years now), and the evidence from the respondent, and the CAC's own witnesses that Student A continues to thrive in the respondent's care the primary submission is that this is a case where there should be no further action. And in support of this she referred to the decision in the Legal Complaints Review Officer's decision in LCRO 168/2014 (11365) where no action was taken.

112. Ms Kennedy said that the respondent has always been open to professional development, but to date this has not occurred as the school did not provide or suggest any and the CAC's view at the CAC meeting in June 2018 was that it was not required. The respondent was however still open to agreeing to attend relevant professional development on a voluntary basis.

113. Ms Kennedy submitted that alternatively, only a censure with no conditions or annotation was appropriate based on the following:

a. The relationship was and is a whāngai relationship – this is confirmed by the CAC's expert witness;

b. There is no evidence that there was any risk to Student A living with and being cared for by the respondent;

c. The evidence is that Student A was at risk if he did not live with and be cared for by the respondent, Ms S's evidence was that she did appreciate the respondent caring for the boys as they desperately needed that care and support – she actively supported and encouraged the arrangement;

d. Student A and his brother thrived in the respondent's care – this was also confirmed by the CAC's witnesses;

e. There was no sexual relationship, predatory behaviour, or sexual impropriety or grooming;

f. The school and school principal were aware that the two boys were staying with and being cared for by the respondent and supported this arrangement and did not provide the respondent with any professional guidance around the situation;

g. As soon as the school principal raised a concern the respondent ceased allowing Student A to share her bed;

h. Student A has continued to live with and be cared for by the respondent.

i. Contrary to the CAC's submissions: there is no evidence in this case that Student A was vulnerable or emotionally dependent – also it is unclear how that is relevant where the evidence is that Student A thrived in the respondent's care and the biological parents and school supported and agreed with the respondent caring for Student A and his sibling;

j. the age of the respondent and Student is an irrelevant factor in this case – there will be an age difference between a child and their parent (be that a parent who is the biological, adopted, or whāngai adopted parent) – where the school supported the respondent caring for the boys and the cultural expert evidence supports the respondent's view that the relationship was and is whāngai;

k. Insofar as it is relevant in any event, there is no direct evidence from the respondent's whanau that the respondent's family had any concerns with the respondent allowing Student A to sleep in the same bed if he so wished whilst in the respondent's care.

114. Ms Kennedy submits that the CAC has alleged the conduct amounted to an inappropriate relationship which has clearly not been established. She referred to the Tribunal's previous comments that the Tribunal is "reluctant to find an "inappropriate relationship" where there is no sexual or emotional impropriety."[14]

115. Ms Kennedy submitted that the cases the CAC referred to are more serious and distinguishable from this matter.

116. This case is distinguishable from *CAC v Sowerby* and other cases cited by the CAC because, unlike the teacher in the other cases cited:

[14] No reference provided.

a. the respondent received no caution against or professional guidance from the school or its professional leader about the boys living with and being cared for by the respondent;
b. the school and professional leader in fact supported the boys living with and being cared for by the respondent;
c. at no stage was the respondent told to stop caring for the boys;
d. there is no evidence that her relationships with other students was adversely affected;
e. there was no sexual or emotional impropriety;
f. Student A was not adversely affected and in fact thrived under the respondent's care;
g. Student A's parents had full knowledge and agreed to the boys living with and being cared for by respondent;
h. There was no evidence that the respondent was emotionally and mentally unstable or relying on the student in that way;
i. the respondent was acting in a caring, nurturing and culturally appropriate manner, this is supported by the CAC's own Maori cultural expert Ms N –who concluded:

   "*..the biological parent, the father has no concerns or dissatisfaction with the relationship or the care his son is receiving. In fact, he is very happy with the care his son is receiving as a whangai from Teacher E. He also sees his son is flourishing. These are the benefits that come with being a whangai. They are extensive and value added*."

Discussion

117. In large part, the factors advanced by the CAC as aggravating features have been taken into account in our finding of that the relationship was inappropriate and in our finding of serious misconduct.

118. We agree that at times the respondent has lacked insight into the inappropriateness of her conduct, but she did acknowledge to the CAC that once she realised how it would look to others, she ceased the bed sharing.

119. Before the hearing, Ms Kennedy had objected to the Notice of Charge including the basis for the referral to the Tribunal (that is the basis of the disagreement on the CAC decision), but now wants to have the CAC confirm that it was not because of the

respondent's lack of agreement. We accept that the initial referral to the Tribunal was because of the school's lack of agreement.

120. The CAC is not bound by any early suggested penalties, and the Tribunal is not limited by that proposed by the CAC. We consider the matter, reach our own conclusions and impose a penalty as we see fit. Our proposed penalty was based on our hearing from the respondent and other witnesses. It is intended to support the respondent to return to teaching, something that she demonstrates a passion for, while providing appropriate protection to the public. She needs to be very clear about her boundaries so that she can keep herself and students safe.

121. We accept that the respondent received no guidance from the school, but we do not expect a teacher needs to be told not to share a bed with a student of the school.

122. We accept that the respondent was not asked to stop caring for the boys and that there is no evidence that the boys or other students were actually adversely affected.

123. We agree that there is no evidence that the respondent was emotionally or mentally unstable, and in this instance we do not attach any significance to the age disparity.

124. We did not hear from the parents and so we do not accept that the parents had full knowledge that Student A was sharing a bed with the respondent. We do not know the basis upon which Ms N reached the conclusion set out above at paragraph 116 i. It is not evident from her report that she spoke with either parent.

125. We have reviewed our proposed penalty on the basis of the respondent's submissions and also considered what guidance and support the respondent needs. We are aware that courses or programmes specifically addressing teaching and professional boundaries are scarce or non-existent. We think that the most important thing is that any school the respondent teaches at is aware that there is a risk of her overstepping her role as a teacher.

126. We therefore impose the following penalty:

  a. The respondent is censured under s 404(1)(b)

  b. Under s 404(1)(c), it is a condition of the respondent's practising certificate for a period of two years that:

i. she show any prospective, future or current employer (in the education sector where she will be in contact with children or young people) a copy of this decision;

ii. Once she commences teaching, she has a senior syndicate leader as a mentor for a period of two years;

c. The register will be annotated for a period of three years under s 404(1)(e).

Costs

127. Ms Kennedy submitted that an award of costs over 50% is extremely rare and have generally only occurred in cases where the respondent has not participated in the CAC and Tribunal process.

128. Ms Kennedy submitted the approach of the prosecution, including seeking to rely largely on hearsay evidence, has necessitated and put the respondent to the expense of interim applications by the respondent to the Tribunal, which were opposed by the CAC, where the respondent was successful in the interim applications. She submitted that to penalise the respondent for not agreeing to disputed facts ultimately found in her favour is inappropriate.

129. Ms Kennedy said that the hearing time on Wednesday 24 July 2019 was just over half a day, commencing at 12.25 pm and apart from breaks, completed at approximately 5.30pm that day. A hearing was required, to enable the referrer's witnesses to be cross-examined (as the respondent is entitled to do as a matter of natural justice) and given that key factual matters were in dispute (including whether or not the relationship was a whāngai relationship), and that the referrer was alleging in the notice of referral that the respondent had an inappropriate relationship (unspecified in paragraph 1 of the notice of referral) before and subsequent to the time Student A resided with the respondent, where there was no direct evidence produced by the referrer or from the alleged complainant to that effect.

130. Ms Kennedy submitted that both of the respondent's witnesses in fact confirmed in cross-examination that they had not witnessed anything inappropriate at any time, including at school, between Student A and the respondent.

131. Ms Kennedy submitted that the respondent's approach in fact reduced the hearing time by:

a. offering for the witnesses' evidence in chief to be taken as read;
b. not objecting to the CAC's proposal that Ms N, Ms Faatui, and Mr W not attend in person this was on the basis that the CAC accepted the evidence of its own witnesses;

132. Ms Kennedy then referred to the case of *W v Health Practitioners Disciplinary Tribunal and A Professional Conduct Committee of the Nursing Council of New Zealand [2019] NZHC 420* on the question of the admissibility of hearsay evidence.

133. Ms Kennedy also said that there would have been no objection to the hearing taking place in Wellington.

Discussion

134. Any suggestion of costs lying where they fell was on the basis of an agreed outcome proposed by Ms Tahana at the commencement of the hearing. Irrespective of the CAC costs, we may order a contribution to Tribunal costs.

135. Over the past three or four years, costs of 40% have usually ordered where the case has been dealt with by agreement on the papers. That was not the case here.

136. Of course the respondent is entitled to a hearing of the evidence and to have the CAC case tested. However when a party is unsuccessful, there are costs implications. In the present case, Ms Kennedy stated at the beginning of the hearing that it was not admitted that the respondent and Student A shared a bed between December 2015 and February 2017. This was despite admissible evidence that the respondent had previously admitted to the CAC that she had done so, and then her free admission of this before us.

137. We make no comment on pre-trial applications and hearsay.

138. The hearing commenced at 11am. We then adjourned to enable further discussions to take place. We had sat until 5.30pm with a shortened lunch hour. This was a day's hearing.

139. Argument on whether this was a whāngai relationship was not part of the hearing, and did not contribute to hearing time. Most of the hearing was on the factual dispute, that is, whether the respondent had shared a bed with Student A. The CAC's case was successful on this factual dispute.

140. In conclusion, we are satisfied that 50% is an appropriate starting point for costs.

141. Ms Kennedy also filed a statement of the respondent's financial means. Although not signed by the respondent, the CAC has not objected to this.

142. The Tribunal secretary has filed a costs schedule for the Tribunal totalling $7,579. We do not understand that having the hearing in Wellington would have saved any cost given the usual residences of the witnesses (and Tribunal members).

143. We have some sympathy for the respondent's financial situation, and on that basis we revise our earlier indication of costs. We make the following orders:

(a) Under s 404(1)(i), the respondent will make a contribution to the Tribunal costs totalling $3,000, which represents just under 40%.

(b) Under s 404(1)(h) the respondent pay 40% of the CAC's actual and reasonable costs. The CAC is to send a copy of its costs schedule to the respondent by 16 April **2020**. Under s 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 14 days of the date the CAC has sent the costs schedule. If submissions as to costs are received from the respondent, the Tribunal delegates to the Chair the task of fixing the amount of the CAC's costs.

Non publication

144. We agree that permanent orders for non-publication of the names of Student A and B are required and therefore the names of the respondent, the school and witnesses will also be suppressed.

Theo Baker
Chair

NOTICE

1. A person who is dissatisfied with all or any part of a decision of the Disciplinary Tribunal under sections 409(2) or 404 of the Education Act 1989 may appeal to a District Court.

2. An appeal must be made within 28 days of receipt of written notice of the decision, or within such further time as the District Court allows.

3. Subsections (3)-(6) of section 356 apply to every appeal as if it were an appeal under subsection (1) of section 356.