

BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

UNDER THE Education and Training Act 2020

IN THE MATTER disciplinary proceedings pursuant to Part 5 of
the Act

BETWEEN **COMPLAINTS ASSESSMENT COMMITTEE**

AND [REDACTED] **[NAME PERMANENTLY
SUPPRESSED – TEACHER H]**, Teacher
(Registration Number [REDACTED])

Respondent

DECISION OF THE TRIBUNAL

Hearing: 11 August 2021

Tribunal: Jo Hughson (Deputy Chairperson),
Kiri Turketo, Simon Walker
(Members)

Counsel: Ms D P Neild and Ms A Oliver for the Complaints
Assessment Committee
Ms J Martin, NZPPTA Te Wehengarua, for
for the Respondent
Ms G Stone for the School Board of Trustees (in
respect of application for non-publication order)

Decision: 23 August 2021

Summary

- [1] The Respondent fully registered as a teacher in January [REDACTED]¹. At the time of the relevant conduct, he worked as a [REDACTED] teacher at a secondary school [REDACTED] (School).
- [2] The Complaints Assessment Committee (the CAC) charged that between March 2020 and September 2020, while teaching at the School, the Respondent formed an inappropriate relationship with one of the School's Year 13 students.
- [3] This conduct was alleged to amount to serious misconduct pursuant to section 10 of the Education and Training Act 2020 (the Act). Alternatively, it was alleged the conduct amounted to conduct which otherwise entitles the Tribunal to exercise its powers pursuant to section 500 of the Act.
- [4] The hearing proceeded on the papers based on an Agreed Summary of Facts².
- [5] The Respondent admitted the conduct and accepted that his behaviour was serious misconduct. Despite the Respondent's admissions it was for the Tribunal to reach its own view as to whether the conduct, if established, amounted to serious misconduct; and if so, what, if any, penalty should be imposed.
- [6] Written submissions were received from Counsel for the CAC and from the Respondent's representative, addressing the issues of both liability and penalty.
- [7] The Tribunal found the charge established. It had no difficulty concluding that the conduct was serious misconduct. The Tribunal made orders of censure and cancellation of the Respondent's registration, and costs orders.
- [8] The Respondent made an application for the permanent suppression of his name and any details which may identify him. This application was supported by the Respondent's [REDACTED] and by the School Board of Trustees on the basis that were he to be named the student, and the Respondent's [REDACTED] (and the School) would be identified. The School Board of Trustees sought a permanent suppression order in respect of the name and any identifying particulars of the

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

² Above, fn.1. Signed and dated 16 June 2021 by the parties' representatives.

school, including its location and any other details that could identify the school and its community.

[9] The Tribunal considered that there is a real risk that the student (A) could be identified and harmed were the Respondent and the School, to be named in connection with the Charge. The Tribunal considered that the public interest strongly favoured the suppression of the name and any identifying details of Student A. It followed that it was proper for there to be a permanent order suppressing her name and identifying particulars from publication and the Tribunal made an order accordingly.

[10] For reasons given below, the Tribunal concluded that it was proper to exercise its discretion to permanently prohibit from publication the names and identifying details of the Respondent, [REDACTED] and the School. Permanent orders were made accordingly.

[11] The Tribunal also made a permanent non-publication order in respect of the evidence it received relating to the [REDACTED] since the misconduct in question came to the light in early September 2020.

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

Facts

[13] The Tribunal made the following findings of fact³:

[14] The Respondent was employed at the School between January [REDACTED] and August 2020 as the Head of Department (HOD) of [REDACTED]⁴.

[15] Student A was a [REDACTED] at the School.

Relationship between Respondent and Student A

[16] In 2018 Student A was in Year 11.

[17] On one occasion in 2018, Students A and B missed the bus for a [REDACTED] field trip.

³ ASF at [2]-[34]

⁴ Principal's Affidavit in support of Application by the School Board of Trustees for a Non-Publication Order dated 31 May 2021, at [2]. According to the Principal at [2], the Respondent was a very popular teacher.

- [18] The Respondent offered both students a ride. During the ride, Student A fought to sit in the front seat next to the Respondent.
- [19] In 2019 Student A was in Year 12.
- [20] During lunch time, Student A would play four square and games with other students and the Respondent.
- [21] Beginning mid-way through 2019, Student A would spend time at school with the Respondent before and after classes. The Respondent also worked with other students.
- [22] During 2019, Student A would receive rides in the Respondent's private vehicle to [REDACTED] training (close to the School) from the Respondent as she did not have a vehicle. On some occasions another student would be present.
- [23] In 2020 Student A was a Year 13 student. The Respondent was her [REDACTED] coach and [REDACTED] teacher.
- [24] During the Year 13 Student Retreat, the Respondent supervised the water slide. Student A and the Respondent had a play fight in which Student A chased the Respondent and tackled him, causing him to receive a bleeding nose.
- [25] Student A continued to receive rides to [REDACTED] training from the Respondent although Student A's friends regularly offered her rides.
- [26] On one occasion in 2020, Student C visited a fitness room before 7am one morning and found the Respondent and Student A doing boxing together.
- [27] During late February or early March 2020, the Year 13 [REDACTED] class went on a [REDACTED] field trip to another town.
- [28] On one occasion during the trip, Student A stood in the Respondent's room in the facility where the class was staying, to enquire about first aid supplies, talking to him while the other students stayed in their tents.
- [29] On another occasion during the trip, Student A and the Respondent played cards together in the lounge at the facility while other students were in the lounge.
- [30] Throughout the trip, Student A ensured that she was placed at the front of the line of [REDACTED] close to the Respondent.

- [31] In early March 2020, after the [REDACTED] trip, six or seven Year 13 students prepared a letter expressing their concerns about the close relationship between the Respondent and Student A.
- [32] After a discussion about the letter between the Respondent, the Principal and the School's guidance counsellor in early March 2020, the Respondent apologised to the Year 13 [REDACTED] class and requested that he was no longer to be called [his nickname] by students. The Respondent told the Principal he would place games out for the students during lunch and then leave the students to complete the games without him and that he would refer students to other teachers for ongoing pastoral support. At this time, the Respondent denied there was any inappropriate relationship between him and Student A.
- [33] In late March 2020, New Zealand entered a Level 4 national lockdown due to Covid-19. During this time, Student A [REDACTED]
- [34] Student A returned to the school in May 2020.
- [35] After returning to the school, Student A and the Respondent continued to spend time together at lunch times. On one occasion, Student A and the Respondent were part of a group of Year 13 students eating lunch on the [REDACTED]. Student A and the Respondent were sitting on a step and were facing each other with their knees close together, almost touching. Both were chatting and smiling.
- [36] In approximately May/June 2020, Student A and the Respondent began exchanging Facebook messages describing their romantic feelings towards each other.
- [37] Around this time Student A and the Respondent arranged through Facebook messenger to meet at an outdoor location outside the school, approximately once a week in the mornings prior to school to walk and talk.
- [38] An intimate sexual relationship, including oral sex, developed between Student A and the Respondent in late July/early August 2020.
- [39] In late August 2020, Student A's friends observed that Student A was receiving a number of texts from an individual named in Student A's phone with a sunflower emoji.
- [40] Believing that Student A was in a secret relationship, Student A's friends accessed Student A's phone while she left it charging.

[41] In accessing the phone, Student A's friends identified a number of Facebook messages between the Respondent and Student A⁵, including:

41.a.1 A message from the Respondent to Student A, stating "*I love you forever*".

41.a.2 A message from the Respondent to Student A, stating "*We never expected our love to be this real, deep and everlasting either, we are just realising how much our love means*".

[42] After Student A's friends contacted the Principal, the Principal spoke to the Respondent. During the conversation between the Respondent and the Principal, the Respondent admitted the inappropriate relationship and showed clear distress and remorse.

[43] The Respondent resigned from his position at the School on 1 September 2020 and signed a voluntary undertaking not to teach.

[44] On 2 September 2020 the Principal made a mandatory report to the Teaching Council alleging that the Respondent had developed an inappropriate relationship with Student A.

[45] The Respondent admitted (to the CAC) that the relationship between himself and Student A was inappropriate. He stated that he felt very stressed about the situation.

[46] The Respondent has shown and expressed a deep regret and remorse for all hurt caused to Student A, the School, the teaching profession, and [REDACTED].

Legal Principles - Liability

[47] The onus of proof of the charge rested on the CAC.

[48] As to the standard of proof, the appropriate standard was proof to the reasonable satisfaction of the Tribunal on the balance of probabilities. This is a static standard. However, as the seriousness of an allegation rises, so does the cogency of the evidence required to satisfy the standard⁶. The allegation in this case was very

⁵ Screenshots of the messages themselves were not produced to the Tribunal.

⁶ *A v A Professional Conduct Committee of the Medical Council of New Zealand* [2018] NZHC 1623 at paras [11] – [16] and as confirmed in *Z v Dental Council Complaints Assessment Committee* [2009] 1 NZLR 1 (SC) endorsing the comments of Dixon J in *Brigginshaw v Brigginshaw* (1938) 60 CLR 336.

serious and therefore the cogency of the evidence required to prove it was higher than in less serious cases that have come before the Tribunal.

[49] “Serious misconduct” is defined in section 10 of the Act as follows:

Serious misconduct means conduct by a teacher –

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

[50] This test for serious misconduct is conjunctive⁷. As such, as well as being conduct that has one or more of the adverse professional effects or consequences described in subsection (a)(i)-(iii) the conduct must also be of a character or severity that meets the Teaching Council’s criteria for reporting serious misconduct. Those criteria are set out in Part 3, Rule 9 of the Teaching Council Rules 2016 (in this case, as drafted after amendments on 18 May 2018) (the Rules).

[51] As Counsel for the CAC identified, unlike the Rules prior to 19 May 2018, the criteria for reporting serious misconduct now, and at the time of the Respondent’s conduct, also engage the Code of Professional Responsibility (the Code). The Code documents the minimum standards for ethical and professional behaviour that are expected of every registered teacher. As such the Code sets out the commitments that teachers make to the profession, learners, families, and whānau and to society.

[52] As the criteria in Rule 9 now directly engages the Code, the conduct specified in Rule 9(1)(a) through (k) represent examples of conduct that is of the ‘nature and severity’ to be a serious breach of the Code.

[53] Whether or not there has been serious misconduct and the severity of any such misconduct is assessed by objective standards.

⁷ *Teacher Y v Education Council of Aotearoa New Zealand* [2018] NZDC 3141, 27 February 2018, at [64].

- [54] The CAC submitted that the Respondent's conduct engaged all three limbs of the definition in section 10(a) of the Act. It was submitted further that the conduct engaged section 10(b) as it was a serious breach of the Code as demonstrated by the examples given in Rule 9 (1)(e) and (k) of the Rules. As such, the CAC submitted that the test for serious misconduct was met.
- [55] When determining whether established conduct is likely to have had an adverse effect on a student for the purposes of the definition of serious misconduct in section 10(a)(i), the Tribunal is not required to be satisfied that there has been an actual adverse impact on a student's or students' wellbeing or learning. While there may be no direct evidence of adverse consequences for a student, the Tribunal is entitled to proceed on the basis that such consequences are a logical outcome or likely occurred because of the teacher's conduct. Further, the CAC is not required to prove that the teacher intended to actively exploit the student⁸.
- [56] Previous Tribunal decisions demonstrate that the term "fitness to practise" in the definition of serious misconduct in section 10(a)(ii) extends beyond competence issues and includes conduct that, when considered objectively, will have a negative impact on the trust and confidence which the public is entitled to have in the teacher and the teaching profession as a whole, including conduct which falls below the standards legitimately expected of a member of the profession, whether of a teaching character or not.⁹
- [57] When considering whether particular conduct would bring the teaching profession into disrepute (for the purposes of section 10(1)(a)(iii); and Rule 9(1)(k)) the question to be asked is whether reasonable members of the public, informed and with the knowledge of all the factual circumstances, could reasonably conclude that the reputation and good-standing of the teaching profession was lowered by the behaviour of the teacher concerned.¹⁰ Put another way, if breaches of well-known fundamentals of a teacher's role would cause members of the public to doubt whether

8 *CAC v Teacher R.*

9 This is the approach taken to "fitness to practise" for the purposes of the Health Practitioners Competence Assurance Act 2003. it is serious misconduct which should never have occurred at all. It diminishes the reputation of the profession."

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

or to what extent the profession is observing its obligations then the conduct likely brings the profession into disrepute. This objective test is applied regularly by the Tribunal.

[58] It is well established that a teacher's actions in his or her personal life may reflect adversely on the teacher's fitness to be a teacher and bring the profession into disrepute¹¹. The principal question is not whether the incident occurred in a teacher's private or professional capacity, but rather, whether the teacher's actions, wherever and whenever they took place, reflect adversely on his or her fitness to be a teacher and/or bring the teaching profession (as a whole) into disrepute.

[59] As to the requirement that the conduct must also be of a character or severity that meets the Teaching Council's criteria for reporting serious misconduct, relevantly, Rule 9(1)(e) relates to where a teacher has breached professional boundaries in respect of a child or young person with whom the teacher is or was in contact as a result of the teacher's position as a teacher (for example (i) engaging in an inappropriate relationship with a child or young person and (ii) engaging in, directing, or encouraging behaviour or communication of a sexual nature with, or towards, the child or young person). Rule 9(k) encompasses an act or omission that brings or is likely to bring the teaching profession into disrepute.

[60] Subjective matters personal to the respondent teacher are not to be considered in any significant way when objectively assessing whether there has been serious misconduct¹². Personal factors may be given full consideration at the penalty stage if a charge is found to have been established.

Relevant standards

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

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

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

¹² See *Martin v Director of Proceedings* [2010] NZAR 333 and *Cole v Professional Conduct Committee of the Nursing Council of New Zealand* [2017] NZHC 1178, at [126]-[130].

- [62] By acting with integrity and professionalism, teachers and the teaching profession maintain the trust and confidence that learners, families and whānau, and the wider community place in teachers to guide their children and young people on their learning journey and to keep them safe¹³.
- [63] Conduct that damages this trust and confidence breaches the expectation set out in Clause 1.3. That may include conduct outside of work that interferes with their performance as a teacher, that affects the trust and confidence that others have in them as a teacher, or that reflects badly on the integrity or standing of the teaching profession.
- [64] Clause 2.1 of the Code of the Professional Responsibility relates to a teacher's commitment to learners and requires teachers to work in the best interests of learners by promoting their wellbeing and protecting them from harm.
- [65] Clause 2.2 of the Code states that teachers will work in the best interests of learners by engaging in ethical and professional relationships with learners that respect professional boundaries. The Guidance provided in the Code about this clause specifically refers to the following behaviour which may breach the Code: encouraging learners to develop an inappropriate emotional dependency on the teacher; adopting a role with a learner that is inappropriate and beyond the scope of the teacher's teaching position, such as treating the learner as a friend, communicating with learners about very personal matters and/or sexual matters without a valid context; and engaging in a romantic relationship or having sexual or intimate contact with a learner or with a recent former learner.
- [66] The Tribunal assessed the conduct against those standards.

Findings on the Charge

- [67] The Tribunal considered the established facts and the submissions for the parties carefully.
- [68] The Tribunal was satisfied the evidence established that between March 2020 and September 2020 the Respondent formed an inappropriate relationship with a Year 13 student at the School (Student A), whom he taught.

¹³ Clause 1.3 Code of Professional Responsibility.

[69] The Tribunal had no difficulty concluding that the conduct it had reviewed was serious misconduct, and therefore that it was entitled to exercise its powers pursuant to section 500 of the Act.

Serious misconduct – limb (a)(i)

[70] As to the first limb of the test for serious misconduct, the Tribunal accepted the submissions for the CAC and was satisfied this limb of the test was met, for the following reasons.

[71] Given the implicit power imbalance in a teacher-student relationship, and the breach of trust that is involved where there is a breach of the professional boundary, in the Tribunal's opinion any such breach will likely adversely impact on the wellbeing and learning of the student involved, even where the student may appear to be a consenting party to the relationship.¹⁴ As the Tribunal observed in *Teacher K*¹⁵, maintaining appropriate professional boundaries is a fundamental skill, obligation, and professional discipline for all teachers:

Teachers who lack the ability to [maintain appropriate professional boundaries] 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.

[72] Although no evidence had been provided directly from Student A about the impact of the Respondent's conduct on her, in her affidavit in support of the School Board of Trustees' application for permanent name suppression the Principal expressed some concern about Student A's [REDACTED] following the disclosure of her relationship with the Respondent¹⁶.

[73] In any event, inappropriate relationships, by their very nature, are likely to adversely affect the student's well-being and learning in the long-term and in the Tribunal's opinion that is a logical and likely outcome of the Respondent's conduct here.

¹⁴ *CAC v Teacher F* NZTDT 2018/32 at [280].

¹⁵ NZTDT 2018/7, 21 August 2018 at [23].

¹⁶ Above fn. 4 at [8].

[74] The Tribunal accepted the submission for the CAC that the Respondent's conduct likely also adversely affected the well-being or learning of other students at the School. The School is a [REDACTED] school with [REDACTED] facilities and Student A was a [REDACTED]. In the Tribunal's opinion, the disclosure of an inappropriate relationship between the Respondent and Student A would likely have caused upset and anxiety among other students, particularly but not exclusively other [REDACTED] (and Year 13 students), during what was already a very unsettling time (including due to the uncertainties brought about by the Covid-19 situation in 2020). The Tribunal accepted the submission for the CAC that the Respondent's conduct would have undermined students' trust in other teachers at the School and would have impacted their ability to engage fully with their learning and develop appropriate professional relationships with teachers, at the relevant times in 2020.

Serious misconduct – limb (a)(ii)

[75] The Tribunal had no difficulty concluding that the Respondent's conduct in engaging in an inappropriate relationship with Student A, which involved a sexual element and included oral sex, reflects adversely on his fitness to be a teacher. As the Tribunal observed in *CAC v [REDACTED]*¹⁷, if there was an inappropriate relationship that contravenes Rule 9(1)(e) then it would almost inevitably follow that the teacher's behaviour reflected adversely on his or her fitness to practise (and risked bringing the profession into disrepute).

[76] The Respondent's conduct in forming an inappropriate relationship could be said to have focussed on meeting his own emotional and sexual needs, not on protecting Student A's wellbeing and learning. After the Respondent's meeting with the Principal in March 2020, when he was warned about his professional boundaries with students, the Respondent could have chosen to adjust his behaviour. His subsequent failure to develop appropriate boundaries between himself and Student A, including forming an inappropriate, sexual, relationship with her after her return to the School following the lockdown, was very concerning for the Tribunal. The Tribunal accepted the submission for the CAC that the Respondent's behaviour was suggestive of a lack of insight into appropriate professional boundaries and an unwillingness to respect appropriate professional boundaries with students. There

¹⁷ NZTDT 2018-41, 17 June 2019 at [23]

can be no doubt that such conduct reflects adversely on the Respondent's fitness to be a teacher.

Serious misconduct – limb(a)(iii)

[77] In terms of the definition in section 10(a)(iii) (and Rule 9(1)(k)) the Tribunal accepted the submission for the CAC that it is self-evident that maintaining professional boundaries is of fundamental importance in the professional teacher-student relationship. Failure to maintain these boundaries almost inevitably brings discredit to the teaching profession. That is because breaches of such a well-known fundament of a teacher's role would cause members of the public to doubt whether or to what extent the teaching profession was observing its obligations.

[78] Members of the public are entitled to expect that teachers will not engage in inappropriate relationships with students that transgress professional boundaries. As was said in *CAC v Huggard*¹⁸ “

even if the student has wanted to continue contact at this level, it would have been unacceptable for the teacher to do so. As the adult and a teacher, the respondent has a responsibility to maintain professional boundaries. The two were not contemporaries. They could not be friends. He was in a position of power and responsibility, where he should role model appropriate behaviour. His actions should attract esteem, not discomfort, or fear. Students and parents should be able to trust that when a student seeks mentorship, counsel or comfort from a teacher, the teacher will respond in a way that has the student's wellbeing as paramount.

[79] Student A's parents were entitled to trust the Respondent to maintain the professional boundary with their daughter when she was [REDACTED] [REDACTED] at the School. They could reasonably expect that their daughter would not find herself in a situation with a teacher which risked adverse effects on her wellbeing and learning. The Tribunal was satisfied that because the Respondent did not behave in a way that had Student A's wellbeing as paramount, the teaching profession has been brought into disrepute. The conduct should never have occurred, and the Tribunal was satisfied it diminished the reputation of the teaching profession.

¹⁸ *CAC v Huggard* NZTDT 2016-33.

[80] For those reasons, the Tribunal concluded that the Respondent's conduct has or has had all three of the adverse professional effects or consequences described in the definition of serious misconduct in section 10(a) of the Act.

Serious misconduct – limb (b)

[81] The Tribunal was also satisfied the second limb of the test for whether there has been serious misconduct, was met. The Respondent's conduct was an extremely serious breach of the Code of Professional Responsibility as demonstrated by the examples described in Rule 9(1)(e) and (k) of the Teaching Council Rules 2016 and therefore was of a character and severity that met the reporting criteria specified in Rule 9.

[82] The conduct was a significant falling short of the high standards of ethical and professional behaviour expected of every member of the teaching profession in New Zealand.

[83] It was for those reasons the Tribunal was satisfied the Charge of serious misconduct was established.

Penalty

[84] Having made an adverse finding of serious misconduct, the Tribunal was entitled to exercise its powers pursuant to section 500 of the Act. The Tribunal could do one or more of the things set out in section 500(1).

[85] It is well established that the primary purposes of the imposition of disciplinary penalties under the Act are to maintain professional standards (through general and/or specific deterrence), to maintain the public's confidence in the teaching profession, and to protect the public through the provision of a safe learning environment for students¹⁹.

[86] The Tribunal accepted as the appropriate sentencing principles those contained in *Roberts v Professional Conduct Committee of the Nursing Council*²⁰ where Collins J identified the following eight factors as relevant whenever an appropriate penalty is being determined in professional disciplinary proceedings. In particular, the Tribunal should consider what penalty:

¹⁹ As discussed in *CAC v McMillan* NZTDT 2016/52.

²⁰ [2012] NZHC 3354 at [44]-[51].

- (a) Most appropriately protects the public and deters others.
- (b) Facilitates the Tribunal's important role in setting professional standards.
- (c) Punishes the practitioner (although this is not a primary purpose)²¹.
- (d) Allows for the rehabilitation of the practitioner.
- (e) Promotes consistency with penalties in similar cases.
- (f) Reflects the seriousness of the misconduct.
- (g) Is the least restrictive penalty in the circumstances (which meets the seriousness of the case and discharges the Tribunal's obligations to the public and the profession)²²; and
- (h) Looked at overall, is the penalty which is fair, reasonable and proportionate in all the circumstances.

[87] The CAC submitted that given the seriousness of the breach of professional obligations by the Respondent, cancellation is required to ensure students' well-being is being promoted and public trust and confidence remains in the teaching profession.²³ Further, that imposing cancellation would be consistent with previous decisions of the Tribunal.²⁴ As was said in *CAC v Teacher E*²⁵:

We emphasise the long-settled position that, for a teacher to have a sexual relationship with a student at the school at which he or she teaches, is serious misconduct at a high level. The Tribunal has repeatedly said that a teacher's professional obligations to his or her students do not end outside the classroom, and it is crucial that teachers maintain and respect the professional boundary placed between them and their charges. There can be no doubt this is known to those in the profession.

²¹ *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 (SC) at [128].

²² *CAC v Teacher* 2019/101, 11 May 2020 at [27].

²³ Education Act 2989, section 404(1)(g).

²⁴ *CAC v Teacher E* NZTDT 2017/28; *CAC v Teacher B* NZTDT 2018/10; *CAC v Teacher* NZTDT 2016/68.

²⁵ *CAC v Teacher E* above fn. 24.

[88] It was submitted for the CAC that the Respondent's conduct amounted to a severe breach of, and lack of appreciation for, the professional boundaries that should exist between teachers and students. As such, the only available penalty in this case was cancellation of the Respondent's registration.

[89] The Respondent agreed with the submission for the CAC that the appropriate penalty outcome was cancellation of his registration (and censure)²⁶ given the seriousness of his misconduct.

Aggravating features

[90] There were several aggravating features as follows. The nature of the relationship was plainly inappropriate between a teacher and his student and was intimate and sexual in nature. Other students noticed that the relationship between the Respondent and Student A appeared to be close and was inappropriate and therefore, were affected by the Respondent's conduct. They were sufficiently concerned that they raised their concerns with the Principal in March 2020. At that time the Respondent denied any inappropriate behaviour with Student A. However later in the year, post lockdown, his relationship with his student intensified. The Respondent has admitted he communicated with Student A, outside of School hours, by Facebook Messenger. He has also admitted that he met Student A outside of school and they engaged in oral sex. Because of the emotional and sexual intimacy that developed, the Respondent would have placed an emotional burden on Student A and emotional harm was likely caused, or will be caused, to her.

[91] Those features aggravated the conduct and placed it at the higher end of the spectrum in terms of seriousness, in the Tribunal's opinion.

Mitigating features

[92] The Tribunal had regard to the following mitigating features, although concluded that they were insufficient, either alone or in combination, to mitigate the penalty that needed to be imposed:

- (a) The Respondent was honest and cooperative with the School and the CAC investigation, including admitting the relationship, resigning from his position at the School and signing a voluntary undertaking not to teach.

²⁶ Written Submissions on behalf of the Respondent dated 14 July 2021.

(b) The Respondent has engaged in and been cooperative with both the CAC process²⁷ and the Tribunal's process including by agreeing the facts and admitting the conduct (and that it was serious misconduct) from the outset.

(c) [REDACTED]

(d) Through his representative, the Respondent has indicated he remains remorseful to all parties affected by his actions, and he deeply regrets his actions.³⁰

(e) Those actions indicated to the Tribunal that the Respondent has insight into the gravity of his offending and the impact it has had on others. It indicates that the conduct is unlikely to be repeated, although the Tribunal could not be assured about that.

(f) Character references³¹ provided by the Respondent attest to the high regard he was held in by his teaching colleagues at the School, and to his skill as a teacher including his drive to deliver rich experiences and varied learning opportunities to students, his innovative, creative and reflective classroom practice, his genuine care for students, and his positive relationships with and positive influence on many students. They attest

²⁷ Respondent's Affidavit, above fn. 2 at [2].

²⁸ Respondent's Affidavit, above fn. 2 at [7].

²⁹ [REDACTED]

³⁰ Written Submissions on behalf of the Respondent at [3.3].

³¹ The Respondent provided 7x character references including from teaching colleagues at the School, former teaching colleagues, and close [REDACTED] friends. Counsel for the CAC filed a Memorandum dated 9 August 2021 indicating that although the CAC did not oppose the inclusion of the character references in the common bundle, it was submitted that the references were of limited relevance in determining serious misconduct and penalty. While the CAC accepted that the Respondent was entitled to put forth evidence of his general character, the focus must remain on the specific conduct in respect of which the Respondent was charged. The Tribunal accepted those submissions but had some regard to the references when it considered penalty, as recorded.

also to his qualities of kindness and community, and his hardworking and selfless nature. He has been spoken of as being a responsible, considerate, and caring [REDACTED] and friend.³² Referees wrote of finding it difficult to make sense of the Respondent's conduct and the "shock" when learning about it, because he has previously upheld high ethical standards. His behaviour has been described as out of character and the impact on him and [REDACTED] and friends, "devastating".

- (g) The Respondent has no prior professional disciplinary history.

Findings on Penalty

- [93] The Tribunal considered the relevant sentencing principles including the aggravating and mitigating factors and comparative cases. The Tribunal was satisfied that it was appropriate and necessary to impose a formal penalty. For the reasons given below, the Tribunal considered that the least restrictive penalty which meets the seriousness of the case and discharges the Tribunal's obligation to the public and the teaching profession is a censure to express the Tribunal's serious disapproval of the conduct which occurred (section 500(1)(b)), together with cancellation of the Respondent's registration as a teacher (section 500(1)(g)).
- [94] The Tribunal accepted that cancellation of registration should not be ordered if an alternative penalty can achieve the objectives sought. Further, that rehabilitation of the teacher is a factor requiring careful consideration. Ultimately, the Tribunal must balance the nature and gravity of the offending and its bearing on the teacher's fitness to practise against the need for removal and its consequences to the individual. As was said by the Privy Council in *Dad v General Dental Council*³³ at [1543]:

Such consequences [cancellation or suspension] can properly be regarded as inevitable where the nature or gravity of the offence indicates that a dentist is unfit to practise, that rehabilitation is unlikely and that he must be suspended or have his name erased from the register. In cases of that kind greater weight must be given to the public interest and to the need to maintain public confidence in the

³³ Referred to in *Patel v Dentists Disciplinary Tribunal* (High Court, Auckland, AP77/02, 8 October 2002, Randerson J) at [31]

profession than to the consequences of the imposition of the penalty to the individual.

[95] The Tribunal considered whether there were any alternatives to cancellation of registration which would achieve the objectives of protecting the public and maintaining the standards of the teaching profession, having regard to the gravity of the Respondent's offending and its bearing on his fitness to be a teacher. The Tribunal concluded that there were no alternatives to cancellation of registration. Cancellation was inevitable.

[96] In addition to a cancellation order the Tribunal made an order censuring the Respondent as a mark of its serious disapproval of his conduct, and to uphold professional standards. Engaging in an inappropriate relationship with a student cannot be tolerated in the teaching profession.

[97] Given that the Tribunal has ordered the cancellation of the Respondent's registration the Tribunal declined to order annotation of the register pursuant to section 500(1)(e).

[98] [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] However, presently, the Respondent remains a risk and the public requires protection from him. That was another reason why cancellation of registration was appropriate and necessary, in the Tribunal's opinion.

[99] Should the Respondent ever intend to seek a return to the teaching profession he will be entitled to make an application for reregistration, to the Teaching Council. When the Teaching Council is considering any application for the Respondent's re-registration, the Council will need to take account of the censure and cancellation orders which the Tribunal has ordered in these proceedings, and the factual circumstances of the Respondent's offending as outlined in this decision. Further, there would be a need to take account of any matters the Respondent may put forward to the Council, as the registration authority, that there is no possibility he will

reoffend, that the public is adequately protected from him and that he will maintain the standards of the teaching profession.

Costs

- [100] It is usual for an award of costs to be made against a teacher once a charge is established. When considering the appropriate quantum of costs, the Tribunal must take account of the need for the teacher who has come before the Tribunal to make a proper contribution towards the costs that have been incurred. As has been said in previous decisions of the Tribunal, the teaching profession as a whole should not be expected to fund all the costs of the disciplinary regime under the Act.
- [101] The CAC indicated that the costs of its investigation and prosecution amounted to \$5,813.48 excluding GST. It was submitted that as the Respondent has cooperated throughout the CAC's processes, a 40% contribution to the CAC's costs was appropriate.
- [102] The Respondent accepted that a 40% contribution to the CAC's costs was appropriate.
- [103] The Tribunal agreed that a 40% contribution to the CAC's costs was reasonable and appropriate. That is in line with recent decisions of the Tribunal.
- [104] Accordingly, the Tribunal made an order pursuant to section 500(1)(h) that the Respondent is to pay the sum of \$2325.30 to the CAC.
- [105] As to the hearing costs the Tribunal made an order that the Respondent make a 40% contribution towards those costs, being payment of the sum of \$458.00 to the Teaching Council. That order is in line with the Tribunal's Costs Practice Note and is made under section 500(1)(i).

Non-publication orders

- [106] Interim non-publication orders had been made at a pre-hearing conference on 1 June 2020.³⁴ Those orders were made in respect of the Respondent, the School, and the student (although her name was not before the Tribunal).

³⁴ Minute of the Chairperson, Theo Baker, dated 1 June 2020.

[110] The CAC acknowledged the [REDACTED] alleged, especially about the Respondent's [REDACTED], and concerns regarding the identification of Student A. In that regard, the Tribunal was told that the CAC had contacted Student A to obtain her views on publication of the Respondent's name and that she (Student A) supported non-publication of his name, stating that publication would affect the [REDACTED] of all the parties involved.³⁶ Further, that Student A had stated she was "not coping well currently" and was "finding everything still difficult".

[111] While the CAC noted the presumption in favour of open justice that applies in the context of disciplinary proceedings, it considered [REDACTED] arising from publication of the Respondent's name was high. In view of Student A's support for the Respondent's application and the [REDACTED] which may arise from publication, the CAC indicated that it supported the Respondent's application for non-publication orders.

[112] An application for non-publication orders was also made separately by the School Board of Trustees, in respect of the name of the School and any identifying particulars of the School³⁷. The interim orders were sought to be made permanent. In her affidavit in support, the Principal deposed that she supported the Respondent's application for permanent name suppression because of her concerns about the potential impact for Student A (whom she described as "the victim") and [REDACTED] were the Respondent to be named publicly. The Principal stated that she is "quite sure" that Student A would be adversely affected by publication of the Respondent's name.

[113] Based on the Principal's evidence, it was submitted that a non-publication order in respect of the School was proper because:

- (a) It would provide additional protection for Student A who may otherwise be identified if the name of the school were published and were subjected to considerable scrutiny and preventable distress (likely including media interest and (further) unwanted attention and comments on social media).
- (b) Without an order the student would easily be identified given the [REDACTED] [REDACTED] students in the Year 13 cohort in 2020 and the fact that she is

³⁶ Email from Timothy Yee, Investigator at the Teaching Council, dated 23 June 2021.

³⁷ Application dated 31 May 2021. Affidavit of [the Principal] sworn on 2 June 2021.

[REDACTED]. This would result in serious distress for Student A and her family.³⁸

- (c) An order would serve to prevent added upset to the Year 13 cohort, the wider student, and staff body as well as the greater “tight knit” school community who have recently been rocked by [REDACTED]. The Principal deposed that the effects of [REDACTED] on the school community has been distressing and extensive, particularly for the Year 13 cohort from 2020 [REDACTED], and on staff. There was also the further disruption to learning caused by the Covid-19 lockdown in 2020.
- (d) It would prevent real risk of compounding distress on the student body and wider community and prevent another disruption to students’ learning.
- (e) It would prevent the professional harm and distress that would arise from speculation around staff if the Respondent was granted name suppression, but the School was not.
- (f) [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[114] The CAC acknowledged the concerns raised by the School. In the light of the increased risk of identification of Student A should the School’s name be published, the CAC supported the making of a permanent non-publication order in respect of the School.

³⁸ Principal’s affidavit at [4a.]

Discussion

- [115] The default position is that the names of teachers who are subject to Tribunal proceedings are published.
- [116] The Tribunal's jurisdiction to make non-publication orders is found in section 501 of the Act. An order can only be made under section 501(6) (a)-(c) if the Tribunal is of the opinion that it is proper to do so, having regard to the interest of any person (including, without limitation, the privacy of the complainant, if any) and the public interest.
- [117] The Tribunal may make any one or more of the following orders under section 501(6):
- (a) An order prohibiting the publication of any report or account of any part of the proceedings before it, whether held in public or in private.
 - (b) An order prohibiting 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.
- [118] The principle of open justice is reflected in section 501(3) of the Act which requires Tribunal proceedings to be held in public unless the Tribunal orders otherwise. The primary purpose behind the open justice principle in a disciplinary context is the maintenance of public confidence in the profession concerned through the transparent administration of the law.³⁹
- [119] The starting point in any consideration of name suppression is this fundamental principle of open justice. Various High Court and Court of Appeal decisions have confirmed this approach. The Court of Appeal in *Y v Attorney-General*⁴⁰ observed:

Given the almost limitless variety of civil cases and the fact that every case is different, the balancing exercise must necessarily be case dependent. Sometimes the legitimate public interest in knowing the names of those involved in the case (either as party or as witnesses or both) or knowing the details of the case, will be

³⁹ *CAC v Teacher* NZTDT 2016/27, at [66].

⁴⁰ [2016] NZCA 474, (2016) PRNZ 452 at [32].

high. *Hart v Standards Committee (No. 1) of the New Zealand Law Society* was such a case. As this Court observed:

the public interest in open justice principles generally favour the publication of the names of practitioners facing disciplinary charges so that existing and prospective clients of the practitioner may make informed choices about who is to represent them. That principle is well-established in the disciplinary context....

Consequently, a professional person facing a disciplinary charge is likely to find it difficult to advance anything that displaces the presumption in favour of disclosure.”

[120] However, as the High Court observed in *Director of Proceedings v Johns*⁴¹ every decision will necessarily be case and fact dependent and will require the weighting of the public interest with the particular interests of any person in the context of the facts of the case under consideration. As previous decisions of the Tribunal (considering the equivalent section 405 of the Education Act 1989 (repealed)) demonstrate, there may well be cases where there are private factors that outweigh the public interest considerations at stake, and which displace the presumption in favour of disclosure of name and identifying details. This may include cases where it can be demonstrated that publication would not serve the objectives of the Tribunal, including protection of the public (for example, where publication would stand in the way of the teacher’s rehabilitation and therefore be counterproductive)⁴² and the maintenance of professional standards.

[121] Counsel for the CAC referred to there being a two-step approach to be taken by the Tribunal when determining the issue of name suppression. This approach has been adopted by the Tribunal in previous cases⁴³. The two-step approach has been stated to involve a first step threshold question, which requires deliberative judgement on the part of the Tribunal, whether, having regard to the various interests identified in section 405, it is “proper” to make non-publication orders. If it is then at the second step the Tribunal may exercise its discretion and make the order sought.

⁴¹ [2017] NZHC 2843, at [169] – [171].

⁴² See the discussion of Moore J in *Director of Proceedings v Johns* above at [173]-[178].

⁴³ Above, NZTDT 2016/27, at [67],

[122] In *Dr N v A Professional Conduct Committee of the Medical Council*⁴⁴ the High Court considered the issue of the proper approach to appeals against the Health Practitioners Disciplinary Tribunal's decisions on name suppression. That Tribunal's power to make an order suppressing the name of a practitioner who is before it is found in section 95(2) of the Health Practitioners Competence Assurance Act 2003. Section 95 contains a similar provision to section 501 except that the Health Practitioners Disciplinary Tribunal must be satisfied it is "desirable" to make an order rather than be of the opinion that it is "proper", as this Tribunal is required to be. Mallon J stated at [45]:

In my view the two-step approach is not the correct one. I agree with the submission for the PCC that the requirement of desirability is inevitably subsumed into the overall discretion of the Tribunal (that is, whether the Tribunal "may" make the order is determined by whether it is "desirable" to do so). It is difficult to envisage any case where the Tribunal would consider that the threshold of desirability is met and yet then go on to decline to make an order. That is because anything relevant to the discretion will have already been considered as part of the private and public interest considerations that are relevant to whether suppression is desirable.⁴⁵...

[123] For the same reasons, the Tribunal considered that the requirement in section 501(6) that it must be of the opinion that it is "proper" to make a non-publication order, is subsumed into the overall discretion of the Tribunal (that is whether the Tribunal "may make the order" is determined by whether it is "proper" to do so). Like the High Court in *Dr N* the Tribunal cannot imagine any case where the Tribunal would consider that the threshold of "proper" is met and yet then go on to decline to make an order.

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

⁴⁴ [2013] NZHC 3405.

⁴⁵ As Mallon J went on to state in footnote 20. of her decision, "In *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZHC 933, [2013] NZAR 1055 at [32], at [38] Wylie J noted that, while there might be some overlap, "the threshold question [of desirability] focuses more on matters of general principle, for example, the public interest and the interest of others, including complainants, and the discretionary element to the decision will focus more on matters personal to the applicant arising out of the charge, and the Tribunal's findings in relation to it". But the factors personal to the applicant will be considered as part of the Tribunal's regard to "the interests of any person". That was how the Tribunal (in my view, correctly) took those factors into account in relation to *Dr N*."

interests, forms the view that non-publication is “proper” then it follows that it may make an order.

[125] In *Director of Proceedings v Johns*⁴⁶ the High Court (Moore J) accepted Counsel for the practitioner’s submission that the threshold of desirability under section 95(2) of the Health Practitioners Competence Assurance Act 2003 is considerably lower than the ‘exceptional’ test commonly used in the Courts. Adopting the same reasons as those adopted by other Judges of the High Court, Moore J at [166] stated he was:

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

[126] The Tribunal, as presently constituted, adopted the same approach to the threshold of “proper” for the purposes of section 501(6)⁴⁷. Exceptionality is not required⁴⁸ and nor even something out of the ordinary. However, there must be sound reasons for finding that the presumption favouring publication is displaced.⁴⁹ What must be struck is a balance between considerations of open justice and the interests of the person in respect of whom non-publication orders are sought.⁵⁰

[127] In terms of previous decisions of the Tribunal, in *CAC v Teacher K*⁵¹ the Tribunal noted that it may be proper to order suppression where there is a real risk that publication will either exacerbate an existing condition, or adversely affect a practitioner’s rehabilitation and recovery from an illness or disorder.

⁴⁶ Above, with reference to the comments of Chisholm J in *ABC v Complaints Assessment Committee* [2012] NZHC 1901, [2012] NZAR 856 at [44]. It is noted that in the *Johns* case the High Court did not refer in its decision to *Dr N* case referred to above.

⁴⁷ In previous decisions this Tribunal has commented that the thresholds of “proper” and “desirable” are not considered to be dissimilar.

⁴⁸ As was recognised in *CAC v Finch* NZTDT 2016-11.

⁴⁹ *Y v Attorney-General* above fn. 29 at [29].

⁵⁰ *Y v Attorney-General* above fn. 29 at [31].

⁵¹ NZTDT 2018/88 at [27].

- [128] In *CAC v Y*⁵² where an inappropriate relationship with a student had occurred, permanent suppression of the Respondent's name and the student's name was granted because there was an appreciable risk of harm to the teacher's well-being when all information was considered together.
- [129] In *CAC v Teacher*⁵³ the Tribunal recognised that the teacher's behaviour might impact on the ability of her spouse, who was also a teacher, to discharge his teaching duties effectively.
- [130] In *CAC v Teacher M*⁵⁴ which dealt with a similar situation of a teacher's inappropriate relationship with a student, the Tribunal held that its default position of publication informed by the public interest of open justice applies with the greatest force to the name of the teacher concerned, rather than to the school. This was justified by the Tribunal's interest in protecting the student involved from distress and embarrassment. The Tribunal noted that the non-publication order sought by the School Board of Trustees in this case was made primarily to protect the interests of Student A (although also to protect the interests of the School and its community).

Respondent's application

- [131] In respect of the Respondent's interests, the Tribunal was satisfied on the evidence before it that [REDACTED] [REDACTED] were he to be named in connection with these proceedings. Publication of his name and identifying details would likely have [REDACTED] and therefore may be counterproductive in terms of protecting the public. [REDACTED] [REDACTED] Further, were the Respondent's name to be published there would be a real risk that Student A would be identified, and the order to be made in respect of her name would be undermined.
- [132] On those bases the Tribunal considered it was proper for there to be a permanent order in respect of the Respondent's name and identifying details. The Tribunal was also of the opinion that it followed it was proper to permanently suppress [REDACTED]

⁵² NZTDT 2018/103 at [66]-[68].

⁵³ NZTDT 2016/27 at [65].

⁵⁴ NZTDT 2018/75 at [51].

on her health and wellbeing, and possibly her future learning. Further, there is a public interest in Student A's name and identifying particulars being permanently suppressed from publication.

Conclusion

[137] The Charge was established. The Respondent is guilty of serious misconduct.

[138] The Tribunal's formal orders under the Education and Training Act 2020 are:

- (a) The Respondent is censured for his serious misconduct pursuant to section 500(1)(b).
- (b) The Respondent's registration as a teacher is cancelled pursuant to section 500(1)(g).
- (c) The Respondent is to pay \$2325.50 to the CAC as a contribution to its costs pursuant to section 500(1)(h),
- (d) The Respondent is to pay \$458.00 to Teaching Council in respect of the costs of conducting the hearing, under section 500(1)(i).
- (e) There is an order under section 501(6)(c) permanently suppressing from publication the name of the Respondent and any of his identifying particulars.
- (f) [REDACTED]
- (g) There is an order under section 501(6)(c) permanently suppressing from publication the name of Student A and any particulars that are likely to identify her.
- (h) There is an order under section 501(6)(c) permanently suppressing from publication the name of the School, and its location and any other identifying particulars.
- (i) [REDACTED]

Dated at Wellington this 23rd day
of August 2021



Jo **Hughson**
Deputy Chairperson

NOTICE

- 1 A teacher who is dissatisfied with all or any part of a decision of the Disciplinary Tribunal made under section 500 of the Education and Training Act 2020 may appeal against that decision to the District Court (section 504, Education and Training Act 2020).
- 2 An appeal must be made within 28 days of receipt of written notice of the decision, or any longer period that the District Court allows.
- 3 Clauses 5(2) to (6) of Schedule 3 of the Education and Training Act 2020 apply to an appeal under section 504 as if it were an appeal under Clause 5(1) of Schedule 3.