

BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

NZTDT 2018/126

UNDER the Education Act 1989

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

BETWEEN **THE COMPLAINTS ASSESSMENT COMMITTEE**

AND Teacher M [REDACTED], registered teacher,
teacher registration [REDACTED]

Respondent

DECISION OF NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

HEARING: 9 March and 29 May 2020 (on the papers)

TRIBUNAL: John Hannan (Deputy Chair), David Hain, Megan Cassidy

DECISION: 10 June 2020

COUNSEL: E J McCaughan for Complaints Assessment Committee
D King for Respondent

Introduction

1. By notice of charge dated 19 November 2019 the Complaints Assessment Committee (CAC) charges that the respondent engaged in serious misconduct and/or conduct otherwise entitling the Disciplinary Tribunal to exercise its powers.
2. The particulars of charge are that in 2019 the respondent;
 - (a) sent inappropriate messages to a 17-year-old student at the school by way of Instagram; and/or
 - (b) sent inappropriate messages, including a photo exposing her breast, to an 18-year-old recent former learner of the school, by way of Instagram.
3. The CAC says that this conduct amounts to serious misconduct pursuant to section 378 of the Education Act 1989 and Rule 9 (1) (b) and/or (e) and/or (k) of the Education Council Rules 2016 (as they were after amendment on 18 May 2018) or alternatively is conduct which otherwise entitles the Disciplinary Tribunal to exercise its powers under section 404 of the Education Act.
4. An agreed summary of facts has been prepared. The respondent has applied for permanent name suppression. There are other applications for name suppression associated with her family.

Facts

5. The agreed summary of facts is as follows.

Introduction

1. [REDACTED] was first fully registered as a teacher on [REDACTED] 2007 and began teaching [REDACTED] subjects at [REDACTED].
2. [REDACTED] (school) is a co-educational secondary school located in [REDACTED]. The school has a roll of over [REDACTED] students from Years 9 to 13.

Reporting of conduct

3. On 21 March 2019, a House Dean at the school provided the school Principal — [REDACTED] — with copies of Instagram messages between [REDACTED] and a current Year 13 student of hers (CS).
4. The House Dean also provided [REDACTED] with copies of Instagram messages between [REDACTED] and a former student (FS) who graduated from the school in December 2018. Both sets of Instagram messages (sent in or around

March 2019) contained sexual references (as detailed further below).

5. At the time the messages were sent, [REDACTED] was approximately 38 years old.
6. On receiving copies of the Instagram messages [REDACTED] discussed them with [REDACTED]. [REDACTED] acknowledged sending and receiving the messages and subsequently tendered her resignation (effective from 5 July 2019).
7. On 25 March 2019, a Deputy Principal forwarded a copy of the explicit photo discussed below to [REDACTED]. The Deputy Principal had received the photo from a former student.
8. On 28 March 2019, the Teaching Council of Aotearoa New Zealand (Teaching Council) received a mandatory report from [REDACTED] relating to the Instagram messages. That same day, [REDACTED] signed a voluntary undertaking not to teach.

ALLEGATION ONE: IN 2019 SENT INAPPROPRIATE MESSAGES TO A 17-YEAR-OLD STUDENT AT THE SCHOOL BY WAY OF INSTAGRAM

9. The Instagram messages between [REDACTED] and CS began in about late February 2019, after [REDACTED] added CS on Instagram. The pair continued to message one another into March 2019.
10. At the time, CS was 17 years old and in Year 13. He was a student in [REDACTED] - [REDACTED] class.
11. A table of the messages between [REDACTED] and CS is attached as appendix one. Given that the messages were provided to [REDACTED] in "screen shot" format, it is not possible to determine the precise date and time they were sent.
12. In the course of their messages [REDACTED]:
 - a. asked CS whether he was planning on attending the upcoming school ball, and encouraged him to do so, saying she would be there and wanted to "impress" him. She stated:

My dress is sizzling, it will be [a] shame not to wear and display. Plus I am the so called angel of [REDACTED] so need to go [emoji].
 - b. described herself as "a bit cheeky" and "like a school girl" with "a crush".
 - c. told CS that she was "looking after" him, that he should "be flattered" she had her eye on him, and that other boys CS's age "would be envious". She went on to tell CS that "many" had asked her out after leaving school, "and other things we wont mention". She stated:

Thys (sic) year alone you have seen a Valentines rose for me a flower for my birthday and you know of some love and sex notes from last year it is not easy for me [emoji] Cant help being a stunning [REDACTED] [emojis] Other teachers at school wonder why this happens to me? They know I have a fan club
 - d. on being told by CS that he had a girlfriend, responded as follows:

[REDACTED]: Hahaha Haha oh I see! I should not talk to you then [emoji] Were you talking about a girlfriend or about me? [emojis]

CS: Nah my girlfriend is also going to ball and would be upset with me [...]

[REDACTED]: I see yeah. Well I should not talk to you then should I? I am a big flirt. That is my problem [emoji]
 - e. asked CS to let her know if and when he was single (after leaving school):

Hey be honest and tell me... if you did not have a girlfriend and once you left school... you would be ok with flirting with me. Right? Again this is a secret [emoji] Sorry if I am blunt. I am [REDACTED] and it goes with the territory. Straight to the point [emojis]
 - f. told CS that the fact of their messages needed to be kept a "secret", that they should "play dumb" in class, and noted that she would be "screwed" if others found out.

13. Many of the emojis that ██████████ included in her messages to CS were of a winking face.
14. While CS responded to a number of ██████████ messages, on several occasions he stated that he wanted to maintain a purely "student-teacher relationship" and resume "usual lessons". At one point, CS told Ms ██████████ that he would prefer to talk during school hours only. In response, ██████████ made various comments to CS including:

The lessons will be dry and boring from now on.

Different ██████████ teacher from now on. Only focused on work... [emoji] No more fun...

It might be better for everyone if I change my approach to my classes or just don't show up or better still quit. That way you can all have someone else teach you.

ALLEGATION TWO: IN 2019 SENT INAPPROPRIATE MESSAGES, INCLUDING A PHOTO EXPOSING HER BREAST, TO AN 18-YEAR-OLD RECENT FORMER LEARNER OF THE SCHOOL, BY WAY OF INSTAGRAM

15. In around March 2019, ██████████ sent a request via Instagram to "follow" FS. After FS accepted that request, the pair sent a number of Instagram messages to one another.
16. At the time, FS was 18 years old and no longer a student at the school. He completed Year 13 in December 2018, having been a student in ██████████ ██████████ class that year.
17. A table of the available Instagram messages between ██████████ and FS is attached as appendix two. Again, the exact dates and times that these messages were sent is not known.
18. In the course of their messages, and in response to a message from FS querying what she would do if he was in front of her, ██████████ told FS that she would be "super naughty" with him. She went on to detail how she would take all of his clothes off, kiss him "all over", and give him a "sensuous bj" before "going further" if he wanted. She told FS that this was her dream and that she wanted her dream to "take its course in real life".
19. ██████████ then discussed with FS arrangements to meet in person, including suitable dates and times, as well as who would be responsible for picking the other up. Despite these arrangements, the pair did not meet in person.
20. In addition to her typed Instagram messages, ██████████ also sent to FS a photograph of herself showing her face and upper body, with her left breast fully exposed.
21. FS subsequently advised the Principal that he had shared that photograph with other people, and that it was now circulating amongst students of the school.

TEACHER'S RESPONSE TO INVESTIGATION

22. The Complaints Assessment Committee (CAC) of the Teaching Council met on 10 October 2019 to consider the mandatory report made by ██████████. While ██████████ did not attend that hearing, she provided a written response to the investigation report in which she stated that she wished to:
 - a. acknowledge her unprofessional conduct and emphasise her awareness of having breached professional boundaries; and
 - b. accept that what she had done was wrong.
23. In her response, ██████████ also noted the following (among other things):
 - a. apart from the matters detailed in the mandatory report, her 13-year teaching career had been successful, rewarding, and without incident;
 - b. the Instagram messages had been sent at a time in her life when she was under

significant stress and suffering from anxiety; and

- c. *she had experienced a significant period of remorse, shame, and distress as a result of her conduct.*

Additional facts

6. To more fully convey the flavour of the Instagram messages sent by the respondent we reproduce a selection. These are messages to student CS. We have omitted the student's replies;

- *[After exchanges of messages relating to attending the school ball] No seriously I don't go to the ball to sit on a chair and have dinner. I can do that at home like an old person. My dress is sizzling, it will be shame not to wear and display. Plus I am the so called angel of [REDACTED] so need to go [emojis]*
- *Imagine if I was a student in the [REDACTED] class. You would never get any work done. Hahaha [emojis]*
- *I see yeah. Well I should not talk to you then should I? I am a big flirt. That is my problem [emoji]*
- *Thanks [CS]. You are a nice person. This has to be a secret. Please please do not tell anyone. Otherwise I am screwed! [emoji]*
- *Haha good! I can too. This is going to sound selfish but one day if you are without a girlfriend let me know [emoji] once you leave school it does not matter. See I was going to go to the ball and impress you [emojis]*
- *Other boys your age would be envious*
- *Bothering me I mean. Many have asked me out once they left school and other things we wont mention. It is hard being a teacher sometimes.*
- *Thys (sic) year alone you have seen a Valentines rose for me a flower for my birthday and you know of some love and sex notes from last year it is not easy for me [emoji]*

7. Messages to student FS included the following. We have omitted the student's replies:

- Hahaha oh yeah I would definitely teach you some stuff. I would be super naughty with you. I would take all of your clothes off and hide them. Kiss you all over and then give you a sensuous bj and then...go further if you want. This is my dream. To be naughty with the one and only handsome [FS]. Do you want to talk again tomorrow? I will go to bed soon and dream of you. Would (sic) love to see you and let my dream take its course in real life [emoji]
 - Good morning handsome [FS]. Did you sleep well? Let me know if that time on Saturday will suit you? Really really looking forward to it. Can't wait to see you [emojis]
8. The respondent provided an affidavit in support of her application for permanent name suppression. She says that she had previously worked at the College for a total of around 13 years and that her teaching has always been appraised at the highest level, with no other substantial concerns as to her conduct. She says that excellence in education is important to her and she has produced many excellent students.
 9. She expresses deep regret and says she has apologised to the school and the board; she says that having her name published would have a disproportionate effect on her and "devastating consequences" for her family.
 10. She says that her mental and physical health has suffered tremendously from this process. She says she already suffered from anxiety but this process has seriously escalated it. She says she struggles to function on a day-to-day basis.
 11. She says that she regularly has suicidal thoughts and has been seeing a psychiatrist. She produces a letter from her psychiatrist and a letter from her GP.
 12. She has a new role which is important to her but it is publicly facing and publicity and media coverage would make it impossible for her to continue this employment.
 13. She says that her husband is a [REDACTED] who has recently been promoted to a senior position at [REDACTED]. Having her husband's name associated with her in relation to these disciplinary proceedings would have a very

disproportionate impact on his employment and reputation. He also suffers from anxiety and stress. His GP provides a letter in support.

14. She is also concerned about the potential effect on her 4-year-old daughter. She fears her daughter will be bullied and will suffer anxiety.
15. She says her parents are both working professionals with high profile roles. They both suffer from severe health issues – she produces a GP letter in support – and she fears that having her name published will cause them to suffer public humiliation and exacerbate their health issues.
16. Also, her husband's parents are not currently aware of the case and are frail and suffering from health issues. Her father-in-law suffers from a serious medical condition. She is concerned about the impact of publication on them.
17. She also refers to her sister-in-law who is a teacher and thus has a public role and expresses concern that publication of her name could have a damaging effect on her sister-in-law's reputation.
18. In terms of behaviour change solutions, she says that she is doing everything she can to educate herself to ensure this does not happen again. She has attended counselling sessions with EAP services and a report has been provided. She and her husband have attended a series of marriage counselling sessions. She has attended sessions with a psychiatrist.
19. The Tribunal has received two letters from the respondent's psychiatrist, the most recent dated 6 March 2020. The letter says that this sequence of events has generated an experience of significant distress for the respondent. The psychiatrist opines that she has progressively accumulated a profile of symptoms consistent with an episode of major depression which is now of significant severity. The psychiatrist says that she suffers frequently recurring thoughts of suicide as being her only solution should her name be publicised. He expresses the opinion that there is a clear and significant risk that she would take measures to end her life should publication occur. He says she has a "full house" of depressive symptoms, that she is in definite need of comprehensive treatment of her condition and that she should be established on antidepressant medication as a matter of urgency, coupled with a period of psychotherapy from a clinical psychologist. He concludes by repeating that in the event of publication "there is an absolute risk of [the respondent] in taking her life by suicide".

20. The principal of the College has submitted a letter in support of the respondent's application for name suppression. This letter also requests that the school's name is suppressed as publication of its name would generate media interest and cause friends of the students involved to endure emotional turmoil and anxiety.
21. A letter from the respondent's GP dated 30 January 2020 expresses the opinion that any additional stress would be harmful to the respondent's health. The same GP also provides a letter advising of the serious illnesses suffered by the respondent's parents.
22. A letter from the respondent's husband explains that he is a [REDACTED] at a [REDACTED]", with a public profile including exposure to the media. He says he works extremely long hours under high pressure and struggles with stress and anxiety. This has become amplified by the stress and media scrutiny over their family. He has had to seek medical help. He gives evidence of the potential adverse effect of publication on his parents who he says are elderly and suffer fairly serious health issues. He says the respondent, while extremely intelligent and organised, suffers terribly from mental health issues including anxiety, depression and low self-esteem. He says that it is possible that "some of these issues may have contributed to her poor decisions". He says that "even before these events she would regularly talk about suicide and was clearly in a precarious mental state".
23. Finally a letter from the respondent's husband's GP certifies that as at 4 February 2020 year he had been seen several times with symptoms of anxiety, which appeared to be substantially linked to the respondent's situation. The GP says that he believes that naming the respondent in the public arena would significantly aggravate her husband's symptoms of anxiety
24. It is notable that in all this material there is no medical evidence that the behaviour which is the subject of the charges before the Tribunal was the result of the respondent suffering from an adverse mental health condition. The medical material all suggests that it is the impact on the respondent of the possibility of publication which has given rise to her current adverse mental health state
25. It is also notable that while the principal has provided a letter in support of the respondent's application for name suppression, his letter does not say anything about the respondent's capacities or abilities as a teacher.

Submissions for CAC

26. The CAC submitted that the respondent's conduct constituted serious misconduct at a level of seriousness such that cancellation is the only appropriate outcome.
27. The CAC first outlined the definition of serious misconduct under section 378 of the Education Act. It then referred to the relevant rules under the Teaching Council rules 2016. The CAC says these are Rule 9 (1) (b) – emotional abuse that causes harm or is likely to cause harm to young person; Rule 9 (1)(e) – breaching professional boundaries in respect of a young person with whom the teacher is or was in contact as a result of their position as a teacher; Rule 9 (1) (k) – an act that brings is likely to bring the teaching profession into disrepute.
28. The CAC referred to *CAC v Teacher*¹. This case involved a teacher who breached professional boundaries by sending nude photographs of herself to a student who was then aged 14 or 15 years old by Snapchat. This student was a student at the teacher's former school. The teacher had sent the photographs while intoxicated and was as a result of various life events suffering significant psychological distress at the time. This teacher did not intend to return to teaching or work with children. She self-reported before she was approached by the CAC. She suffers from a serious depressive condition and had attempted suicide. The Tribunal cancelled the respondent's registration. In the circumstances, and which there was evidence from a psychiatrist that if the respondent's name was published she would suffer a deterioration in her mental health and be a significant suicide risk, the Tribunal also made a non-publication orders with regard to the respondent's name.
29. In *CAC v Teacher L*² a teacher with many years' experience had taught a female student in years 12 and 13. After concluding her secondary education the student contacted the teacher to thank him for his contributions. They met for approximately 45 minutes. An exchange of emails followed, then a chat step conversation which the teacher later moved to Facebook where the teacher set up a Facebook page under a false name to communicate with the former student D under a pseudonym to avoid his wife learning of the profile. Communications by these means included communications late at night, and

¹ NZTDT 2018/28

² NZTDT 2018/23

with the respondent asking the former student intimate questions such as “how many times had sex”. The respondent was aged 49, the former student was aged 18. In this case the Tribunal found serious misconduct clearly established and cancelled the respondent’s registration. It should be noted the respondent did not resist cancellation. The Tribunal observed that the respondent might have been allowed to continue to teach if he had been able to satisfy it that he would not pose an extant risk to students. But the Tribunal also observed that the majority of cases where a teacher has formed an inappropriate bond with a student that has a sexual element will fall into a category where cancellation is virtually automatic, even where a physically intimate relationship does not develop. The Tribunal found that the teacher blurred the teacher-student boundary through the intimate private communications. The former student saw the teacher as someone to whom she could turn for advice after she left school and so the teacher had retained a position of trust and responsibility, and had taken advantage of this in making persistent attempts to initiate a more intimate relationship.

30. In the present case, the CAC submitted that there are a number of significant aggravating factors;

- the respondent is a relatively experienced teacher;
- Two students (one a former student) were involved. Therefore, the behaviour cannot be categorised as a one-off lapse in judgment by an inexperienced teacher close in age to the students involved;
- the messages the first student was sent over a period of at least some number of days and possibly weeks. This student was at that time a student in one of her classes. The messages were sent in February/March 2019 at the start of the school year;
- with regard to the first student, the respondent attempted to convince him that the messages needed to be kept secret;
- when the first student tried to disengage, the respondent made various comments apparently intended to encourage him not to do so;
- with regard to the second student, the respondent was responsible for initiating the communication via Instagram;

- although that student was no longer a student at the school, he had only finished at the school the previous year;
 - some messages to the second student were highly sexual in nature;
 - the respondent attempted to arrange to meet with that student although that did not occur.
31. The CAC said that to the respondent's credit she had admitted to sending and receiving the messages once she was confronted. She signed a voluntary undertaking not to teach. She accepted that what she had done was wrong and resigned.
32. The CAC says that these behaviours clearly satisfy the definition of serious misconduct; the conduct was at least likely to adversely affect the well-being or learning of the first student. It is clear from the messages that he became uncomfortable.
33. The CAC further submitted that the conduct against both students reflects adversely on the respondent's fitness to be a teacher and that the conduct with both students plainly brings the teaching profession into disrepute.
34. The CAC submitted that it is self-evident that the messages breached the respondent's professional boundaries with the first student.
35. With regard to the second student, the CAC primarily rested its submissions on Rule 9 (1)(k) – an act likely to bring the teaching profession into disrepute (the CAC submissions erroneously refer to Rule 9 (1) (o), but we take it that the intended reference is to Rule 9 (1) (k)). The CAC noted that the second student was a former student over the age of 16 and therefore did not fall within the definition of "young person" for the purposes of Rule 9 (1) (e).
36. The CAC submitted that the respondent's conduct reflects adversely on her fitness to teach and would give rise to serious concerns by any reasonable member of the public. As well it brings the teaching profession into disrepute.

Submissions for respondent

37. In brief submissions, counsel for the respondent says that the respondent accepts that her behaviour constitutes serious misconduct. Counsel says that the issues for consideration are mitigation, and the appropriate outcome.

38. In particular counsel for the respondent's submits that "the respondent was unwell at the time the behaviour occurred". Accordingly counsel submitted that while this conduct was serious it was not such as to fall into the category of cases where the only outcome that is appropriate is cancellation. Counsel notes that the respondent admitted her behaviour, recognised it was improper and damaging to the students, signed an undertaking not to teach, and resigned. She has sought medical help. Counsel submits "her behaviour at the time was influenced by poor emotional health".

Decision

39. Section 378 of the Education Act 1989 defines "serious misconduct" as behaviour by a teacher that has one or more of the following outcomes, in that it:
- (a) adversely affects, or is likely to adversely affect, the well-being or learning of one or more students; or
 - (b) reflects adversely on the teacher's fitness to be a teacher; or
 - (c) may bring the Teaching profession into disrepute.
40. As well as having one or more of these effects, the conduct must also be of a character or severity that meets the Teaching Council's criteria for reporting serious misconduct, as found in the Teaching Council Rules 2016 (the Rules).
41. The Tribunal considers that the respondent's conduct clearly amounts to serious misconduct, and towards the upper end of the scale. There was a deliberate attempt to set up contact with the students. There was a sexualisation in the communication with both students. The communications from the respondent speak for themselves as to their inappropriateness.
42. The first student had the maturity to step back from the respondent's attempts to initiate a relationship. Had the first student not had the level of maturity he did in fact exhibit, even more inappropriate behaviour on the part of the respondent might have ensued. But burdens such as this should not be placed on students; avoiding such situations is part of a teacher's responsibility for maintaining professional standards on this dimension. (The Tribunal does not have any evidence about why the respondent's plans to meet the second (former) student did not result in a meeting.)

43. Maintenance of appropriate professional boundaries is fundamental as a skill, obligation and professional discipline for all teachers. Failure to do so creates serious dangers both for students and for teachers. Failure to maintain appropriate boundaries may result in even more serious misconduct.
44. The respondent clearly knew that her behaviour was inappropriate because of her mentioning to the first student the need to keep their communications secret.
45. The respondent has not advanced any medical evidence suggesting that her behaviour towards the students was the result of any mental health or similar issue, even though she has produced extensive medical evidence about her adverse mental state in support of her application for non-publication. That evidence speaks of her anxiety and distress and ill-health being caused by these professional disciplinary proceedings and concern about the possible publication of her name. The only evidence suggesting that her behaviour towards the students may have been the result of an adverse mental health condition was that of her husband. It would therefore be inappropriate for the Tribunal to draw any sort of inference that the nature of the behaviour was such that it must have been the result of an adverse mental health or similar condition, or that the behaviour occurred while the respondent was in some way out of control. The Tribunal can only approach the matter on the basis that there is no such explanation for the behaviour.
46. We do not consider that because the second (former) student had ceased attending the school, the matter with respect to that student is of lessened seriousness. It is not just in situations in the school context and while the student is a current student of the teacher that an inappropriate crossing of professional boundaries may occur and may amount to serious misconduct. Inappropriate relationships which occur immediately or shortly after the student has ceased to be a student are concerning, on the basis that the teacher's influence over the student by reason of their previous role as a teacher may have continued effect on how they interact, by creating a power imbalance. It is the failure to maintain professional boundaries that is of concern. Such incidents indicate that the teacher has an inadequate appreciation of the need to maintain boundaries and/or when of a risky situation is developing; both of those possibilities reflect adversely on the teacher's fitness to teach. For those reasons, any reasonable member of the

public would regard the profession in a lesser light as a result of this behaviour and so it falls within Rule 9(1)(k) of the Teaching Council Rules 2016

47. In terms of the definition of serious misconduct in section 378 of the Education Act 1989, the conduct with respect to both students therefore reflects adversely on the respondent's fitness to practice and alternatively or additionally was capable of bringing the teaching profession into disrepute. As well, it was of a character or severity that meets the Teaching Council's criteria for reporting serious misconduct as stated in Rule 9 of the Teaching Council Rules 2016. It clearly breached professional boundaries.
48. With regard to the first student, the conduct was of the character identified by Rule 9(1)(e) (breaching professional boundaries) and (k) (an act likely to bring the teaching profession into disrepute). In relation to Rule 9(1)(b), emotional abuse that causes or is likely to cause harm to a child or young person, it is conceivable that the respondent's conduct was likely to cause harm to the student.
49. With regard to the second (former) student, the conduct could not be of the character identified by Rule 9(1)(b) or (e) as that student, at the age of 18 and as a former student, was not "at the relevant time, a learner at a school..." and thus was not a "young person" as defined in Rule 3(1). However as discussed above, the respondent's behaviour with regard to the second student can certainly be characterised within Rule 9(1)(k) as an act likely to bring the teaching profession into disrepute.
50. In determining what should be the appropriate outcome we have reviewed the previous decisions involving failure to maintain appropriate professional boundaries referred to us by the CAC and the respondent.
51. The primary purposes of professional disciplinary proceedings are the protection of the public and the maintenance of professional standards. In discharging its responsibilities to the public and profession, the Tribunal is required to arrive at an outcome that is fair, reasonable and proportionate in the circumstances. It also must seek to apply the least punitive sanction which is appropriate in the particular circumstances. If rehabilitation appears a reasonable possibility that will be a highly relevant consideration.
52. On balance we have concluded that the only possible outcome is censure and cancellation of the respondent's registration. We have serious concerns about

her fitness to practice. There is no real evidence that she was suffering some form of impairment at the time of the behaviour involved in this charge. We cannot see these matters as a one-off error of judgment. The respondent has exhibited some insight into her condition, expressed remorse, and has undergone counselling/treatment. But the medical/psychological interventions seem more directed at her ongoing distress about her situation and about the possible consequences of publication of her name than at rehabilitation as a teacher.

53. Should the respondent later reach a point where she wishes to resume teaching and believes that, based upon counselling and treatment or other steps, she can demonstrate rehabilitation and satisfy the Teaching Council that she demonstrates fitness to teach, she can apply for reregistration.

Orders

54. The Tribunal orders as follows:
- (a) The respondent is censured;
 - (b) the respondent's registration is cancelled.

Non-publication Orders

55. The respondent applied for an order permanently prohibiting the publication of her name and any details capable of identifying her. She also requests orders prohibiting publication of the names of her husband, her husband's parents, and her parents.
56. The CAC requests an order permanently prohibiting publication of the names of the students and any details capable of identifying them.
57. The principal of the College seeks suppression of the school's name on the grounds that publication could lead to the identification of the students involved which would adversely impact them and their friends due to media interest and the potential for bullying.
58. The respondent's evidence in support of her application for non-publication orders has already been outlined. Her counsel also filed submissions.

Counsel referred to *CAC v Finch*³ and *CAC v Kippenberger*⁴. Counsel said that the medical evidence provided establishes that the consequences the respondent fears and identifies are likely to follow. Counsel submitted that publication would constitute an appreciable or real risk to her emotional well-being and that of her family. She submitted that the hardship the respondent and others would be likely to suffer is likely to go well beyond the “ordinary” hardships which any teacher found guilty of serious misconduct will suffer. Counsel mentioned the respondent’s new career.

59. The CAC took a neutral position on permanent name suppression. It acknowledged that if appropriate medical evidence was provided about the respondent’s mental health this would provide a sufficient basis for suppressing the respondent’s name given the range of issues mentioned by her.
60. The CAC submitted that suppression of the name of the school involved is not required to protect the identity of the students, given that it is a large school. However the CAC said that if the Tribunal orders suppression of the names of the respondent and the students, it is a matter for the Tribunal to determine if there is any public interest in naming the school.
61. The CAC referred to *CAC v Jenkinson*⁵ where a college was investigating a complaint that a teacher had pornographic material on his mobile phone, and the teacher concerned provided the school with a fraudulent letter seeking to demonstrate that this material had got on the phone as a result of a virus. The charge was in relation to the fraudulent letter. The respondent’s practising certificate was suspended for 6 months. He sought permanent name suppression. He referred to the potential impact on his wife in her training and employment, to stress on the family, to upset to his elderly mother, and to the impact on his new employment outside the education sector.
62. The Tribunal declined to order name suppression. It considered that the evidence provided was not sufficient to displace the normal requirement of open justice. Letters were received from the respondent's general practitioner saying that he had been prescribed medication after having become medically depressed. There was a similar letter from a counsellor. The Tribunal

³ NZTDT 2016/11

⁴ NZTDT 2016/105

⁵ NZTDT 2018/14

considered that the letters from the GP and counsellor fell into the heading of advocacy rather than appropriately qualified medical opinion of a risk of sufficiently serious harm to warrant a non-publication order.

63. Section 405 (6) of the Education Act provides that the Tribunal may make an order prohibiting publication of the name or particulars of the affairs of any person if the Tribunal is "of the opinion that it is proper to do so, having regard to the interest of any person... and to the public interest".
64. The default position is that Tribunal hearings are to be conducted in public and that the names of teachers who are the subject of disciplinary proceedings are to be published. This reflects the principle of open justice which applies to the Tribunal's proceedings.
65. A balance must be struck between open justice considerations and the interests of a party who seeks name suppression. The Tribunal has previously stated that a "high threshold" must be met before an order will be made for name suppression; *CAC v Adams* NZTDT 2018/11. But on the other hand the threshold is not as high as that which applies to such applications in the criminal context, and the statutory test is whether the Tribunal considers it "proper" to order non-publication in the circumstances, taking the relevant competing interests into account. This is a two-stage process; refer *CAC v Finch* ⁶. Once the Tribunal has concluded that it is "proper", it may exercise its discretion to order nonpublication.
66. In order to justify a conclusion that it is proper to order name suppression there must be a real risk that publication will significantly adversely affect a teacher's rehabilitation or recovery from a mental illness or other serious impairment, or that in other ways the teacher (or in appropriate cases their family) will be affected in a serious way, beyond the ordinary embarrassment, distress, anxiety and shame which will afflict any teacher who is the subject of a published disciplinary decision. The evidence must provide sufficiently detailed information about the condition(s) suffered by the teacher which might cause such particular adverse effects. A bare assertion by a teacher that a condition exists or that they will suffer beyond the norm will usually not be sufficient. If the condition is a medical condition, appropriate specialist evidence may be required.

⁶ NZTDT 2016/11

67. It may in addition be appropriate to order suppression of respondent's name where publication of that name would be likely to lead to identification of the student involved in a sensitive and difficult situation.
68. The evidence put forward by the respondent satisfies the Tribunal that she does indeed have current mental health difficulties of some seriousness and that there is a real potential that publication will have very significant adverse effects upon her. The unequivocal medical evidence from her psychiatrist is that her mental state is such that her life would be at risk in the event of publication of her name in reports of this disciplinary proceeding. She also has evidence from her GP which confirms her adverse mental health. Collectively this evidence establishes that the risk of adverse effects of publication on the respondent goes considerably beyond the normal distress, anxiety and humiliation which any teacher who is the subject of disciplinary proceedings is likely to suffer.
69. This material satisfies the Tribunal to the necessary degree that a non-publication order with respect to her is proper, and we exercise our discretion to make such an order. This is on the basis of protecting the respondent against the potential significant impacts on her mental state that publication might cause.
70. A further factor in our deliberations on this application is that we are not insensitive to the likelihood that the details of the respondent's somewhat bizarre behaviour in this case will particularly attract salacious interest from the media. The public interest is in justice being open, not in the satisfaction of the appetite of the media for salacious material. The respondent's registration has been cancelled so there is no need for publication of her name for the purpose of protection of other participants in the education sector. This decision will be published, with appropriate redactions, so the principle of open justice can be served in that the Tribunal's decision and its reasoning will be open for the information of, and scrutiny by, the public.
71. That brings us to the respondent's husband. He too has medical evidence which the Tribunal accepts does establish that there could be an adverse impact on his mental health of some significance if there is publication of his name in association with this matter, although it is not of the same order as that which may be suffered by his wife. He also expresses concerns about the impact on his employment and career. We do not accept that it is likely that his future employment will be jeopardised by publication of this

proceeding. We note the observations of the CAC that his surname is not identical with that of the respondent and that he works in a very different field. But we are also conscious that should his name be published there is a real possibility that the respondent will be identified even if her name is not published. For these reasons we conclude that it is proper to make a nonpublication order with respect to his name and we exercise our discretion to do so.

72. We also consider that the public interest in open justice in the publication of the name of a witness, or in this case the marital partner of a respondent teacher, is significantly less than it is in publication of the name of the teacher who is at the centre of disciplinary proceedings.
73. As to the respondent's parents, their distinctive surname is used by the respondent. There is clear evidence of their significant health issues and that any additional stress would have an adverse effect on their health. Given the surname, publication of their name could lead to identification of the respondent. Given that, and the medical evidence, we are satisfied that it is proper to make a nonpublication order with respect to their names and we exercise our discretion to do so.
74. The evidence with respect to possible impacts of publication on the health of the respondent's husband's parents is confined to his letter. But, given that we have decided that there should be no publication of his name, it is also appropriate that there be no publication of their name to avoid the possibility that he and the respondent might be thereby identified. We are satisfied it is proper to make a nonpublication order with respect to their names and we exercise our discretion to do so.
75. The school has requested a nonpublication order with respect to its name and also the names of the students. If the school or the students were to be identified the adverse effects on the respondent are capable of manifesting. As well, the students should be protected from distress and embarrassment. There will be a nonpublication order with respect to their names.
76. As to the school, the public interest in open publication applies with greatest force with respect to the name of the teacher concerned rather than to the school. But it is certainly not the case that there should be routine non-publication orders of the names of schools for the purpose of preserving the school from embarrassment. If the Legislature had considered that was

appropriate it would have provided for that possibility when changes were made to the Education Act providing that Tribunal hearings should be in public. However in the present case the Tribunal considers that publication of the name of the school, again given the somewhat bizarre nature of the respondent's conduct, would create a real possibility of identification of the respondent and also of the students concerned. On that basis, the Tribunal will order that there is to be no publication of the name of the school

77. The Tribunal considers it proper to order that the names of the students and the school and any details capable of identifying them shall not be published and exercises its discretion to do so.
78. The Tribunal orders that:
- (a) there is to be no publication of the name of the respondent or any details capable of identifying her;
 - (b) there is to be no publication of the names of the students involved, or of the name of the school, or of any details capable of identifying them
 - (c) there is to be no publication of the name of the respondent's husband or of any details capable of identifying him;
 - (d) there is to be no publication of the names of the respondent's parents or of any details capable of identifying them;
 - (e) there is to be no publication of the names of the respondent's husband's parents or of any details capable of identifying them
 - (f) This decision shall be redacted accordingly before publication.

Costs

79. It is appropriate that in a professional disciplinary system the costs of carrying out appropriate professional disciplinary procedures be borne at least to a significant extent by teachers who are found to have engaged in professional misconduct, to avoid an inappropriate burden being placed upon the balance of the teaching profession. The Tribunal normally requires teachers found to have engaged in serious misconduct to pay 50% of the costs of both the CAC, and of the Tribunal itself. In situations where the teacher has cooperated with the process and in particular has avoided the need for an in-person hearing by

agreeing a summary of facts, the Tribunal will usually reduce the costs to 40%, and sometimes to a lesser percentage in cases involving proven hardship or other particular circumstances.

80. No evidence has been provided of financial hardship or inability to pay. The respondent has cooperated with the process. However the Tribunal is concerned about the disparate way in which the evidence in support of the respondent's application for non-publication orders was provided to the Tribunal. It is also concerned about the last minute application for an adjournment, to provide further such evidence. The matter had been pending for a considerable time and we can see no reason why the evidence could not have been provided in a timely way, so that the matter could have proceeded on the scheduled hearing date. On that basis we consider an order that the respondent pay 50% of costs is appropriate here.
81. The Tribunal orders that the respondent pay 50% of the CAC's actual and reasonable costs. No costs schedule has yet been received from the CAC. In the event that the parties cannot agree the actual and reasonable costs, the Tribunal delegates to the Deputy Chair the task of fixing the amount of those costs.
82. The respondent is also ordered to pay 50% of the Tribunal's costs. The Tribunal's costs are \$1145. 50% of that amount is \$572.50 and the respondent is ordered to pay that sum.

Date: 10 June 2020


John Hannan
Deputy Chairperson

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

1. A person who is dissatisfied with all or any part of a decision of the Disciplinary Tribunal under sections 402(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.