

BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

NZTDT 2020/22

IN THE MATTER of the Education Act 1989

AND

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

BETWEEN **COMPLAINTS ASSESSMENT COMMITTEE**

AND **TEACHER V**
Respondent

TRIBUNAL DECISION DATED 23 NOVEMBER 2020

HEARING: Held at Wellington on 22 September 2020

TRIBUNAL: Theo Baker (Chair)
Nichola Coe and Aimee Hammond (members)

REPRESENTATION: Ms Scott for the CAC
Ms Renton for the respondent

1. In a Notice of Charge dated 22 June 2020, the Complaints Assessment Committee (**CAC**) alleged during the first and second terms of 2019, Teacher V (**the respondent**) breached professional boundaries with a 16-year-old female student (**Student A**) when he:
 - a) Used inappropriate language on a number of occasions such as, “I love you. I love everything about you,” “after Tuesday you are going to be all mine,” and “I miss you, make sure you come back;” and/or
 - b) Made or attempted to make inappropriate physical contact on a number of occasions.
2. The parties conferred and filed an Agreed Summary of Facts (**ASF**).
3. In the charge it was alleged that separately or cumulatively the conduct amounted to serious misconduct under section 378 of the Education Act 1989 (**the Act**) and rules 9(1) and/or (b) and/or (e) and/or (k) of the Teaching Council Rules (**the Rules**) or alternatively amounted to conduct otherwise entitling the Tribunal to exercise its powers under section 404 of the Act. The CAC revised its position and accepted that there was no suggestion of a sexual or romantic subtext to the respondent’s actions; and the CAC was prepared to classify the conduct as misconduct rather than serious misconduct.
4. A hearing was convened for us to consider the question of disciplinary threshold,¹ penalty, costs and non-publication orders. Although the respondent did not seek non-publication of his own name, we had applications for non-publication of the name of the school and the student and identifying details. These are discussed below.

Summary of decision

5. We found that the factual allegations of the charge were established.
6. Each of the statements the respondent made to Student A was not appropriate. However, it is significant that these few comments and the physical contact occurred over a period of time and in the presence of others. There was no element of intimacy or secrecy. This is different from other cases where a teacher forms a friendship with a student and then makes personal comments in private or via text. The Tribunal accepted that there was no aspect of sexual grooming or breaching of teacher/student

¹ Whether the conduct amounted to misconduct or serious misconduct

boundaries in the usual sense. Rather, the respondent's actions were a clumsy attempt to engage with the student. They were gauche, inappropriate, and it was predictable that the student would feel very uncomfortable.

7. For the reasons outlined in paragraphs 47 to 60, we did not find the conduct was of a character or severity to meet the criteria in rule 9 and therefore the second part of the definition of serious misconduct is not met. The respondent was so intent on ensuring students under his tuition achieved excellent academic results that he lost sight of the needs of Student A and her overall wellbeing. This was a significant lack of judgment which we found amounts to misconduct.
8. We directed under section 404(1)(c) and/or (j):
 - a) Subject to paragraph b), for a period of one year from the date of the issue of any practising certificate, the respondent must appoint a mentor and show a copy of this decision to any future employer;
 - b) Paragraph a) applies only if the respondent is taking up a position for more than 6 weeks and that position is at a school other than School A.
9. We ordered a contribution towards costs of 50% under sections 404(1)(h) and (i).
10. There is an order for non-publication of the name of Student A and any identifying details, which includes the names of the respondent and School A and School B.

Evidence at the hearing

11. At the hearing we considered following evidence:
 - a. An agreed summary of facts;
 - b. Documents contained in the Agreed Bundle of Documents, which included affidavits from the respondent and the Principal of the school;
 - c. Oral evidence from the respondent, who was available for questioning.

Agreed facts

12. Included in the Bundle was an Agreed Summary of Facts (**ASF**), signed by the respondent.
13. It was accepted that the respondent gained a Bachelor of Education with Honours in the United Kingdom in 1972. His first teaching role in New Zealand was in 1974 and he taught for approximately 18 months. The respondent then left teaching and worked in

non-teaching roles until 1986 when he was appointed Head of Department for Art at School B (an all boys' college), where he taught until the end of 2018. He then accepted a one-year contract to teach at School A (an all girls' college).

14. Student A was one of two Year 12 students enrolled in a Year 13 painting class that the respondent taught. Because of a lack of space, Student A and the other Year 12 student sat at a picnic table in the breakout area outside the prefab classroom. This space was public and clearly visible from the junior art teaching space and the teachers' office space. The picnic tables were small and were only capable of comfortably seating two people on each side. The complainant and the other Year 12 student would sit in the middle of both of the bench seats facing one another. We were provided with a photograph showing the area.
15. When providing instruction to Student A, the respondent would seat himself next to her. Due to the small size of the picnic table, the respondent's whole leg would press against her leg. When the complainant moved her leg away from the respondent's leg, he would readjust himself to be more comfortable, and in doing so, would move closer to the complainant. He never sat next to the other Year 12 student.
16. On a Friday during Term 1, before Student A left for a sports tournament, the respondent approached her during class and said words to the effect of "[Name of complainant], I love you. I love everything about you." He touched her shoulder a couple of times to reinforce what he was saying to her.
17. There were also occasions when the respondent touched Student A's hand when providing a drawn example of what he was trying to explain in the complainant's workbook.
18. The complainant was very uncomfortable with this physical contact for cultural and personal reasons.
19. During Term 2, the respondent had another extra-curricular commitment that required her attention. The respondent said to her, "After Tuesday² you are going to be all mine."
20. At the end of July 2019, Student A returned some equipment to the art department. She had not been attending class because unbeknownst to the respondent, she had

² When an extra-curricular event she was involved in would be finished.

withdrawn from his class, choosing to continue to study Art at the same NCEA level, but in a junior class. On the day in question, Student A was with about three friends. The respondent ran after the group and started a conversation with the complainant, asking where she had been. At some point during the exchange he said words to the effect of "I miss you, I miss you, make sure you come back to class." At this point the complainant advised the respondent that she was no longer enrolled in his painting class.

21. In July Student A sent an anonymous letter to the school, complaining about these matters, which the school then investigated and made a mandatory report to the Teaching Council. The agreed outcomes of the school's process included the respondent:
- a) providing a full written apology and expression of regret was to be provided to the complainant and copied to the Principal;
 - b) undertaking learning in the area of professional boundaries;
 - c) attending a minimum of four counselling sessions to discuss these incidents and to provide a statement of attendance as evidenced at the end of the sessions;
 - d) not having any further contact with Student A;
 - e) not engaging in any inappropriate touching of students (or touching that may be interpreted as inappropriate).
 - f) Making no inappropriate comments towards students (or comments that may be interpreted as inappropriate).

Respondent evidence

22. The respondent filed an affirmation and was available for questioning from the Tribunal. He acknowledged that his actions were inappropriate and breached professional boundaries. He also accepted that he made the student feel deeply uncomfortable.
23. As a result of his briefing, the respondent was aware that Student A would not always speak up and needed encouragement but was very capable. The respondent told us

that the Year 12 Art programme is more self-directed than Year 11 and Student A struggled with this transition.

24. By the end of Term 1 the respondent was concerned by the lack of work being produced by Student A. He spoke to the HOD and also offered extra class times during lunch and interval (with other students and the HOD). This offer was not taken up.
25. The respondent had not thought a great deal about the differences between female and male students. He was motivated to take the job as it was an opportunity to focus on sculpture. He accepted that his wife had suggested that he be mindful of his boundaries with girls and that he had discussed this with his colleagues. The HOD had told him to be mindful of space and not to be in the room with one girl alone.
26. The respondent explained that he had come from a culture with a high emphasis on the measure of academic achievement through grades. In that environment he would have contacted the parents earlier about a student's lack of productivity, but the policy at this school discouraged that. He wanted to finish his career on a high and so was motivated to help his students obtain good marks. He believed that if a student underachieved while in his care, he too failed.
27. The respondent also said that he had much to learn about cultural differences between different groups in New Zealand. He had taught Samoan boys, but not girls.
28. When he said he loved Student A, he meant that he loved her work. She was looking down and he saw such unhappiness. He reached out his hand at full length to touch her shoulder.
29. Under cross-examination and further questions from the Tribunal, the respondent accepted that he had not ever told a male student that he loved him, and that young women from any culture would find his conduct uncomfortable. He said when he told Student A that he missed her, he was a bit grumpy. He felt he had given her a lot of attention and he had not seen her for a week or 10 days. When he saw her, he bristled a little bit. In response to a question about other approaches he had used to get Student A to engage, he told us about some conversations he had had with her about her father's tattoos, her house in Samoa and her house in [suburb]. The respondent did a painting for her to show what she could do.
30. On the topic of his physical contact with Student A, the respondent explained that

when teaching, he often draws to explain and assist the student to formulate ideas. Helping someone without ideas involves sitting beside them and drawing while talking to show how the ideas can generate images or show different techniques they could consider using. He has no specific memory of touching Student A's hand, but accepts that it happened and it may have occurred if he was clumsy in how he moved as he drew beside her. It is not his practice to touch or guide students by the hand, and any touch would have been brief and accidental. It was awkward sitting at the picnic table, and ordinarily, he would not have sat so close but the space was restricted. Looking back, he can see now the student would have found his sitting beside her an invasion of her personal space. He realises it would have been better for him to stand at the end of the table. Because the other student would come to lunchtime sessions, he would draw with her then, and there was a lot more room. He did not need to sit next to her during the scheduled class time.

31. The respondent did not accept that the reason Student A was not engaging with him was because she felt uncomfortable; he thought it was because she was struggling with the new emphasis on directing her own enquiry. It did not occur to him that his persistent approach could have affected her engagement.
32. When the student continued not to engage in her work, the respondent did not go back to the HOD. He said that at the time he felt he knew enough based on his experience, but now recognises that he was wrong and that he needed help with her. He did contact Student A's parents, just before he was aware of the complaint. He accepted that could have happened sooner.
33. The respondent expressed his deep regret for the hurt he had caused Student A and her family. He felt ashamed to have unintentionally distressed her and said that his actions were interpreted in this way. He has not experienced anything like this in the past, and this is a shock to him.
34. In answer to questions about his professional learning following these events, the respondent said it was difficult to find a course, but the Principal sent him some videos on professional boundaries which he found very helpful. He said that he had learned that a teacher is a subject specialist, not a counsellor; as a teacher, you don't get involved. It was said so strongly that it resonated with him. He did not recall anything about the power dynamics in the teacher/student relationship, but said that he had reflected on that.

Findings

35. The CAC must prove the charge on the balance of probabilities. The respondent has not denied the allegations. Based on the respondent's admissions, we are satisfied that he said to the respondent:
- a) "I love you. I love everything about you,"
 - b) "After Tuesday you are going to be all mine"; and
 - c) "I miss you, make sure you come back".
36. The charge also requires us to find that these comments were inappropriate. It is difficult to imagine any context where making the first statement would be appropriate. Had the respondent made the second and third comments to a group of students, his intentions would have been unlikely to be misconstrued but saying any of these things to one teenage girl was clearly inappropriate.
37. There are three examples of the respondent touching Student A:
- i. Touching her hand while demonstrating drawing;
 - ii. Touching her shoulder; and
 - iii. His leg touching hers when seated by her.
38. Most adults respect each other's personal space. Apart from greetings, hand to hand contact is not common between adults outside of close relationships. We recognise that in the process of demonstrating art with a student, there may be inadvertent touching of a hand. Teachers should recognise that this may feel uncomfortable to a student. We will not go so far as to classify this touch as "inappropriate", but when considered alongside the other touching it is not surprising that it made Student A feel very uncomfortable.
39. Placing a hand a student's shoulder may not always be inappropriate, but the respondent has admitted that he did this at the same time as saying, "I love you; I love everything about you." Therefore in this circumstance, it was clearly inappropriate.
40. In many parts of adult society it is not usual for a man to rest his leg against that of a woman unless they are part of a family or in a close personal relationship. We are surprised that the respondent would not be more aware of his physical presence around any female. We also find that allowing his leg to touch the student's leg was

inappropriate.

41. Both parts of the charge are therefore established.

Misconduct/serious misconduct

42. It is an agreed fact that the respondent had no sexual motive. Having heard from him, we accept that is true. This is not a case of a teacher grooming a student. However, all teachers must understand that one of the reasons actions such as those of the respondent are not acceptable is because they can be a precursor to a more serious breach of professional boundaries. Irrespective of the respondent's intent, his behaviour made a student feel very distressed. That is a foreseeable consequence of his actions and he should have realised that.
43. By his own admission, the respondent's drive for high academic assessment results for his students clouded his judgment. We gained the impression that he placed his own need to achieve his goals in teaching ahead of the student experience.
44. Serious misconduct is defined in section 378 as follows:
- serious misconduct*** means conduct by a teacher –
- (a) *that –*
- (i) *adversely affects, or is likely to adversely affect, the well-being or learning of one or more students;*
 - (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 Education Council's criteria for reporting serious misconduct.*
45. The criteria for reporting serious misconduct are found in rule 9 of the Rules. The CAC argued that the respondent's conduct was a breach of the Code of Professional Responsibility and is of a character and severity that meets rules 9(1)(b), (e) and (k), but added that the CAC is prepared to categorise the conduct as misconduct because it was motivated by a genuine desire to assist and support a student, and did not meet the level of seriousness as the conduct in cases cited.
46. Rule 9 reads:

9 Criteria for reporting serious misconduct

(1) *A teacher's employer must immediately report to the Teaching Council in accordance with section 394 of the Act if the employer has reason to believe that the teacher has committed a serious breach of the Code of Professional Responsibility, including (but not limited to) 1 or more of the following:*

...

(b) *emotional abuse that causes harm or is likely to cause harm to a child or young person:*

...

(e) *breaching 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 the child or young person*

(ii) *engaging in, directing, or encouraging behaviour or communication of a sexual nature with, or towards, the child or young person:*

...

(k) *any act or omission that brings, or is likely to bring, the teaching profession into disrepute.*

47. Dealing with the first the part of the test, we find that the respondent's conduct adversely affected the wellbeing and learning of Student A and therefore the first definition in paragraph (a) of section 378 is met. His actions represent a significant lack of judgment and in that sense, reflect adversely on his fitness to be a teacher. We also find that the established conduct may bring the teaching profession into disrepute under paragraph (a)(iii).

48. As we have said in some recent decisions, the fact that a student or learner has been distressed by a teacher's conduct does not mean that the conduct is properly classified as emotional abuse. In *CAC v Teacher NZTDT 2019-69*³ some students had been

³ *CAC v Teacher NZTDT 2019-69*, 8 September 2020 (not yet published and subject to interim non-publication orders)

upset when tickled by a teacher. We said:

The fact that students were upset by this physical act does not mean that the conduct amounts to emotional abuse. There is merit in Ms Andrews' submission that emotional abuse is designed to humiliate, degrade, undermine and control, which is absent in this case. In our view, the reason for the inclusion of rule (1)(b) is to cover situations that do not involve physical force. In many cases the conduct will be verbal, or it may involve a student being singled out in some way.

49. Although Student A was understandably embarrassed and upset by the respondent's conduct, and he ought to have been aware of her likely discomfort, we find that the lack of sexual motive or other abusive intent reduces the character and severity of his actions so that the criterion in rule 9(1)(b) is not met.
50. Because of that lack of motive and no reciprocity from Student A, it is not clear that there was a breach of professional boundaries as articulated in rule 9(1)(e). The conduct does not in the category of an inappropriate relationship, the example provided in rule 9(1)(e)(i). As for conduct of a sexual nature, contemplated in rule 9(1)(e)(ii), we are not satisfied the respondent's statements are best classified as sexual. Nor, in the circumstances of this case, was the touching. A breach of professional boundaries is not limited to those two examples. We find that although the respondent's conduct might be classified as a breach of professional boundaries, it is not in this case of a sufficient severity or character to meet rule 9(1)(e).
51. The question of disrepute to the profession is more finely-balanced. We have already found that the respondent's conduct might bring the profession into disrepute under the definition of serious misconduct in section 378(a)(iii). The criterion in rule 9(1)(k) is that the conduct is likely to bring the profession into disrepute. In *Collie v Nursing Council of New Zealand*,⁴ the High Court was considering the meaning of discredit to the nursing profession under the Nurses Act 1977:⁵

[28] To discredit is to bring harm to the repute or reputation of the profession. The standard must be an objective standard with the question to be asked by the Council being whether reasonable members of the public, informed and with knowledge of all the factual circumstances, could reasonably conclude that the reputation and good-standing of the nursing profession was lowered by the behaviour of the nurse concerned.

⁴ *Collie v Nursing Council of New Zealand* [2001] NZAR 74 (HC) at [28]

⁵ Now repealed and superseded by the Health Practitioners Competence Assurance Act 2003

52. A reading of the allegations in the Notice of Charge is quite alarming. If we were not provided with any other information, we think most reasonable members of the public would consider the reputation and good-standing of the profession is lowered by this behaviour.
53. As noted above, each of the statements the respondent made to Student A was not appropriate. However, it is significant that they occurred over a period of time and in the presence of others. There was no element of intimacy or secrecy. This is different from other cases where a teacher forms a friendship with a student and then makes personal comments in private or via text. The Tribunal accepts that there was no aspect of sexual grooming or breaching of teacher/student boundaries in the usual sense. Rather, the respondent's actions were a clumsy attempt to engage with the student. They were gauche, inappropriate, and it was predictable that the student felt very uncomfortable.
54. As we have said, any teacher should be much more aware of students' physical space and secondary students in particular are likely to feel uncomfortable with any form of physical touch from their teachers. This is irrespective of culture or ethnicity. We view the respondent's act of allowing his leg to touch the student's the most surprising and concerning but we accept that this contact was also innocent.
55. We accept Ms Renton's submission that the respondent made no attempt to extend the relationship beyond that of teacher/student, all of his actions were in an open teaching or school space often observed by other teachers. When considered over the period of half a year of a busy classroom and school environment the incidents of concern are (each) brief and not sustained.
56. We have decided that with knowledge of the facts and circumstances, reasonable members of the public would not think that the reputation of teachers is likely to be lowered by the respondent's conduct.
57. We agree with the CAC's submission that the respondent's conduct was in breach of the Teaching Council's Code of Professional Responsibility, in particular Clause 2.1 which requires teachers to promote the wellbeing of learners by protecting them from harm. In doing so, teachers are expected to create learning environments that are safe and inclusive and that promote the dignity and emotional wellbeing of learners; foster trust, respect and cooperation with learners. And under Clause 2.2 teachers must

engage in ethical and professional relationships with learners that respect professional boundaries. In doing so, teachers are required to recognise that they are in a unique position of trust, care, authority and influence over learners, and that if the relationship is not equal; there is always an inherent power imbalance.

58. However, in all of the circumstances of this case, we do not consider these breaches are serious ones. Therefore, the threshold for serious misconduct is not reached.
59. In summary, it was appropriate to refer the matter to the Tribunal, but having heard from the respondent, we find the definition of serious misconduct is not reached. That is not to say that his actions were acceptable, but we agree with the CAC position that the conduct is better classified as misconduct. Having heard from the respondent we are satisfied that the respondent's conduct can be distinguished from cases such as:
- *CAC v Huggard* NZTDT 2016/33⁶ where a teacher engaged in prolific, personal texting at all hours with a Year 9 female student;
 - *CAC v Buchan* NZTDT 2017/23⁷ where a teacher invited a student to sit in front of him on the ground at a festival, and then rested his hands on her hips tapping during the performance. He then hugged her and another student;
 - *CAC v Teacher* NZTDT 2016/69⁸ where a teacher tickled two groups of girls on separate occasions on the same day.
60. The respondent's touching was not intentional and he engaged in no personal disclosures or private communication.

Penalty

61. Section 404 of the Act provides:

404 Powers of Disciplinary Tribunal

- (1) *Following a hearing of a charge of serious misconduct, or a hearing into any matter referred to it by the Complaints Assessment Committee, the Disciplinary Tribunal may do 1 or more of the following:*
- (a) *any of the things that the Complaints Assessment Committee could have done under section 401(2):*

⁶ *CAC v Huggard* NZTDT 2016/33, 14 November 2016

⁷ *CAC v Buchan* NZTDT 2017/23, 8 February 2017

⁸ Above, note 3

- (b) *censure the teacher:*
- (c) *impose conditions on the teacher's practising certificate or authority for a specified period:*
- (d) *suspend the teacher's practising certificate or authority for a specified period, or until specified conditions are met:*
- (e) *annotate the register or the list of authorised persons in a specified manner:*
- (f) *impose a fine on the teacher not exceeding \$3,000:*
- (g) *order that the teacher's registration or authority or practising certificate be cancelled:*
- (h) *require any party to the hearing to pay costs to any other party:*
- (i) *require any party to pay a sum to the Teaching Council in respect of the costs of conducting the hearing:*
- (j) *direct the Teaching Council to impose conditions on any subsequent practising certificate issued to the teacher.*

62. The parties reminded us that the primary motivation regarding the imposition of orders in professional disciplinary proceedings is to ensure that three overlapping purposes are met:

- i. protecting the public through the provision of a safe learning environment;
- ii. maintaining professional standards; and
- iii. maintaining public confidence in the profession.⁹

63. In imposing a penalty, the Tribunal must arrive at an outcome that is fair, reasonable and proportionate in the circumstances.¹⁰ The Tribunal will also seek to ensure that any penalty is comparable to those imposed on teachers in similar circumstances.¹¹

64. Whether it is necessary to cancel a teacher's registration in order to discharge the Tribunal's disciplinary obligations will often turn on the teacher's rehabilitative prospects and the degree of insight he or she has demonstrated in to the causes of the

⁹ *CAC v McMillan* NZTDT 2016/52 as cited in *CAC v White* NZTDT 2017/29, at [24]

¹⁰ *Roberts v Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC at [51]; *CAC v Korau* NZTDT 2017/17 at [22]

¹¹ *CAC v White* NZTDT 2017/29 at [27]

behaviour.¹²

65. The CAC submitted that in the event that the respondent decides to return to teaching, the appropriate outcome is the imposition of the following conditions, pursuant to s 404(1)(c):
- for a period of two years from the date that the respondent renews his practicing certificate that he is to provide a copy of the decision to any prospective employer in education; and
 - for a period of 12 months from the date that the respondent renews his practicing certificate that he is to have a mentor, approved by the Teaching Council, to provide quarterly reports for 12 months.
66. Ms Renton observed that when the concerns were raised with him the respondent was respectful of the student and the way she wanted the situation dealt with. He was able to continue to teach at the school for the remainder of the year without incident. Following the end of the respondent's fixed term contract at School A, he started a further contract with the same school. However, he was unfortunately diagnosed with a life-threatening illness and spent much of this year in treatment.
67. The respondent's reflections and the references he has provided from his colleagues show his record of a high standard of professional behaviour and integrity. She submitted that given the actions the respondent has taken, no penalty is required, but that if we do impose a penalty, having conditions in place for short term relieving work would have a disproportionately negative effect on the respondent and are unnecessary given the fact that in short term relieving work there is no expectation that teachers will be taking responsibility for students ongoing success and so the conditions in which these events took place would not be present. Therefore, Ms Renton proposed that the conditions be limited to circumstances where the respondent takes on long term relieving or permanent employment. This is continuous employment of 6 weeks or more with one school.

Discussion

68. Having heard from the respondent we felt that he has better insight and will be more careful in future. We accept that he was mortified at the suggestion that he might have had a sexual motive and genuinely explored that at counselling, as we

¹² *CAC v Adams* NZTDT 2018/11 at [25]

have said, we do not think that was the driver for his behaviour. However, we did not feel reassured that he really understood the power he has as a teacher and as a man. We did not understand the relevance of the respondent's reference to culture or ethnicity when he said that he had taught Samoan boys but not girls. Aside from the inappropriate comments and touching, the intensity of the respondent's efforts to get her to engage in her art project would not be suitable for any student, regardless of culture or ethnicity.

69. If the respondent were to accept another teaching position at the same school, with no change in HOD or Principal, then the imposition of the conditions sought might not be required, but should he teach again at any other school, we see merit in that school being aware of this conduct and ensuring that he has appropriate mentoring. Although we fully accept that the respondent has done what he can to try to understand his own behaviour and the impact on students, we had some reservations about his insight into the inherent power imbalance between teacher and student and issues of gender.
70. We therefore have decided that it is in the interests of both the respondent and prospective students that some conditions be imposed on any future practising certificate. We therefore direct under section 404(1)(c) and/or (j):
- a) Subject to paragraph b), for a period of one year from the date of the issue of any practising certificate, the respondent must appoint a mentor and show a copy of this decision to any future employer;
 - b) Paragraph a) applies only if the respondent is taking up a position for more than 6 weeks and that position is at a school other than School A.

Costs

71. The parties agreed that a contribution of 40% to the costs of this hearing is appropriate. We direct that the respondent pays 40% of the CAC costs under section 404(1)(h) and 40% of the Tribunal costs under section 404(1)(i).
72. We direct the CAC and the Tribunal secretary to file a schedule of costs by 30 November 2020. The respondent may then reply by 14 December 2020.
73. The Tribunal delegates to the Chair the authority to determine the final quantum of costs.

Non-publication

74. The parties agreed that it is appropriate that Student A's name is not published.
75. Although the respondent did not seek name suppression for himself, the parties also agreed there was a risk of identification of the Student A if his name is published. Ms Renton noted that if extensive redactions are required that it may be clearer and simpler to suppress his name.
76. Ms Scott submitted that even if the name of the school was suppressed, publication of the respondent's name will easily be associated with School B and it will not be difficult to lead to identification of School A, and therefore Student A.
77. Another option is to redact facts so that Student A is not identifiable. This would require no reference to which year she was in, her ethnicity, the use of picnic table outside the prefab classroom and other details.

Principles

78. Consistent with the principle of open justice, section 405(3) provides that hearings of this Tribunal are in public.¹³
79. Section 405(3) is subject to the following subsections (4) to (6) which provide:
- (4) *If the Disciplinary Tribunal is of the opinion that it is proper to do so, having regard to the interest of any person (including (without limitation) the privacy of the complainant (if any)) and to the public interest, it may hold a hearing or part of a hearing in private.*
- (5) *The Disciplinary Tribunal may, in any case, deliberate in private as to its decision or as to any question arising in the course of a hearing.*
- (6) *If the Disciplinary Tribunal is of the opinion that it is proper to do so, having regard to the interest of any person (including (without limitation) the privacy of the complainant (if any)) and to the public interest, it may make any 1 or more of the following orders:*
- (a) *an order prohibiting the publication of any report or account of any part of any proceedings before it, whether held in public or in private:*
- (b) *an order prohibiting the publication of the whole or any part of any books, papers, or documents produced at any hearing:*

¹³ Section 405 was inserted into the Act on 1 July 2015 by section 40 of the Education Amendment Act 2015.

- (c) *an order prohibiting the publication of the name, or any particulars of the affairs, of the person charged or any other person.*

80. Therefore if we are to make an order for non-publication, we must first have regard to:
- the interest of any person (in this case Student A);
 - the privacy of the complainant (Student A);
 - the public interest.
81. Open justice forms a fundamental tenet of our legal system and “exists regardless of any need to protect the public”,¹⁴ but the public interest in publication of a teacher’s name may include the need to protect the public. This is an important consideration where a profession is brought into close contact with the public. It should be known that based on a teacher’s previous conduct, that teacher may pose a risk of harm. The public is entitled to know about conduct that reflects adversely on a person’s fitness to teach.
82. Conversely, in certain instances, the public interest may include the suppression of information such as witness names (usually alleged victims of conduct) to ensure that they are prepared to come forward and give evidence in court proceedings.¹⁵
83. In *CAC v Jenkinson NZTDT 2018-14*¹⁶ we summarised the principles on non-publication in this Tribunal. We referred to *CAC v Teacher NZTDT 2016-27*, where we acknowledged what the Court of Appeal had said in *Y v Attorney-General [2016] NZCA 474*: While a balance must be struck between open justice considerations and the interests of a party who seeks suppression, “[A] professional person facing a disciplinary charge is likely to find it difficult to advance anything that displaces the presumption in favour of disclosure”.¹⁷
84. Where a person argues that harm would be caused by publication of a name, we must be satisfied that the consequence(s) relied upon would be “likely” to follow if no order was made. In the context of s 405(6), this simply means that there must be an “appreciable” or “real” risk.¹⁸

¹⁴ *CAC v MacMillan NZTDT 2016/52*, 23 January 2017

¹⁵ *Y v Attorney-General [2016] NZCA 474*

¹⁶ *CAC v Jenkinson NZTDT 2018-14*

¹⁷ *Y v Attorney-General [2016] NZCA 474*, at [32]

¹⁸ See *CAC v Jenkinson* above, note 11 at [34]; *CAC v Teacher NZTDT 2016/68*, at [46]; *R v W [1998] 1 NZLR 35 (CA)*.

Discussion

85. Our primary concern is for Student A. She was distressed enough by the respondent's conduct to make an anonymous complaint. We imagine it must have been a big step for her to do this and we would not want to discourage any student from reporting inappropriate conduct. In *CAC v Teacher NZTDT 2019/120*,¹⁹ it was the impact that publication might have on the teacher's family that was the deciding factor in granting non-publication. It was one of the teacher's daughters who had contacted the Police to report his assault of his wife. We did not want his family to be penalised by publication of his name, and or deterred from seeking help in the event of repetition by fear of publicity.
86. We agree that naming the respondent will very likely lead to Student A's identification. We have considered suppressing various details, including the subject taught and Student A's age and other identifying details, but we agree with counsel that the sense and reasoning of our decision could be lost without that context. We have therefore decided that in the interests of Student A, it is proper to direct non-publication of the names of:
- a) Student A
 - b) The respondent
 - c) The school where these events occurred (School A)
 - d) The respondent's former school (School B).



Theo Baker
Chair

¹⁹ *CAC v Teacher NZTDT 2019/120*, 6 July 2020

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

1. This decision may be appealed by teacher who is the subject of a decision by the Disciplinary Tribunal or by the Complaints Assessment Committee.
2. An appeal must be made within 28 days after receipt of written notice of the decision, or any longer period that the court allows.
3. Section 356(3) to (6) applies to every appeal under this section as if it were an appeal under section 356(1).