



EDUCATION COUNCIL

NEW ZEALAND | Matatū Aotearoa

Complaints Assessment Committee (CAC) v Davies
NZ Disciplinary Tribunal Decision 2016/28

This is a complex case and requires reading in full.

BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

NZTDT 2016/28

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 **LESLEY ALEXANDRA DAVIES**

Respondent

TRIBUNAL DECISION

6 SEPTEMBER 2017

HEARING: Held at Wellington 25 January 2017

TRIBUNAL: Theo Baker (Chair)
Maraea Hunia and Tangi Utikere (members)

REPRESENTATION: Mr Woods for the CAC
Ms King for the respondent

1. The Complaints Assessment Committee (CAC) has referred to the Tribunal a charge of serious misconduct arising from the respondent's behaviour towards students. The names of the students have been suppressed in this decision. It was alleged that the respondent, during class time did:
 - 1.1 *throw a white board pen at a student, namely Student A;*
 - 1.2 *push the head of a student, namely Student B, onto a desk;*
 - 1.3 *push the head of a student, namely Student C, onto a desk;*
 - 1.4 *push the head of a student, namely Student A, onto a desk;*
 - 1.5 *swear at students; and*
 - 1.6 *fail to promote the physical wellbeing of the students in her class.*
2. The CAC alleged that the incidents either separately or cumulatively amount to serious misconduct pursuant to section 378 of the Education Act 1989 and Rule 9(1)(a) and/or (o) of the New Zealand Teachers Council (Making Reports and Complaints) Rules 2004 and/or conduct otherwise entitling the Disciplinary Tribunal to exercise its powers pursuant to section 404 of the Education Act 1989.
3. The evidence was produced by an Agreed Statement of Facts. The respondent attended the hearing and was sworn in. We heard submissions from both parties.

Evidence

4. Counsel conferred and helpfully provided an agreed statement of facts which covered all relevant matters. This is produced in full:
 1. *The respondent, Lesley Davies, is a registered teacher who has been employed by Wairarapa College in the Commerce Department for 10 years. She teaches accounting, economics and junior maths.*
 2. *As there had been a reduction in the number of students taking Commerce subjects, at the relevant time Ms Davies was also taking a transition class in Year 12 and a Year 9 mathematics class. She had been teaching Maths for 4 years at this time.*

Circumstances

3. Sometime during the first term in 2015, Ms Davies was teaching a year 9 mathematics class.
4. Towards the end of the class, two students were banging each other's heads against their desks. The respondent approached the students. She put her hand on a student's head to stop him banging the other student's head on the desk. She put pressure on the student's head and he pushed back against her hand. She then realised what she had done and removed her hand.
5. The way that she touched the student's head damaged her relationship with the boy and other students in the class who witnessed the incident, although she did subsequently undertake restorative processes as she referred to in her explanation set out below.
6. In May 2015 the respondent swore at her year 13 economics class. She said "shut the fuck up" or "I'm fucking sick of you disrupting the class" or words to that effect. She apologized to the class immediately after this incident occurred. This took place on the day she found out her uncle had died.

Respondent's explanation

7. The respondent states that she acted in the spur of the moment in order to stop a behaviour which she thought at the time to be dangerous. When the respondent realised what she had done, she removed her hand. On reflection of the matter, the respondent accepted that she should have handled the situation differently.
8. The respondent expressed that she was disappointed in her own behavior. She pointed to stress she was under at the time due to her extremely difficult work relationship with her Head of Department, which the teacher felt the school was well aware of but had done little about. The teacher had undertaken counselling to help with the ongoing difficult relationship.

Respondent's position

9. The respondent accepts that her conduct as described amounts to misconduct. She accepts that her actions breached the obligations in the Code of Ethics in terms of providing a safe environment for learners.
10. In explanation she said:

I have successfully restored the relationship with the boys at the centre of the actual incident that is claimed to be 'serious misconduct'. I worked hard to restore the relationships and these two boys accept me as their teacher and are doing well in class.

...

I have also restored the relationship with the class I swore at. The students who complained accept me as their teacher and are also willing to ask and accept help and guidance from me.

I have been disappointed with my own behaviour and these incidents have highlighted for me just how much stress I had been under.

11. *The respondent also said she had reflected on the incident where she touched a child's head and realised she could have handled it differently.*

12. *She accepts the appropriate penalty is censure, coupled with conditions requiring her to undertake professional development relating to classroom management.*

13. *The respondent also agrees to pay a 40 percent contribution of the costs of the CAC.*

Findings

5. The charge refers to three incidents of pushing students' heads to a desk, but the facts refer to her placing her hand on the head of a student but not pushing it to the desk. The summary of facts does not mention the name of the student whose head she pushed, and there is no evidence that she pushed a student's head on to the desk. This fact has therefore been considered under particular 1.6.

Particular 1.1 – [threw] a white board pen at a student, namely student A

6. There is no evidence of throwing a white board pen before the Tribunal. Therefore this particular is not proven.

Particular 1.2 – [pushed] the head of a student, namely Student B, onto a desk;

Particular 1.3 – [pushed] the head of a student, namely Student C, onto a desk;

Particular 1.4 – [pushed] the head of a student, namely Student A, onto a desk;

7. There is no evidence of pushing any student's head onto (as opposed to "towards") a desk. These particulars are therefore not proven.

Particular 1.5 – [swore] at students

8. The evidence in support of this particular is at paragraph 6 of the Agreed Summary of Facts. Although some swear words are more commonplace and therefore less offensive than they once were, this language is not acceptable in a learning environment.

Particular 1.6 – [failed] to promote the physical wellbeing of the students in her class.

9. The respondent has accepted that she put her hand on a student's head to stop him banging the other student's head on the desk. She put pressure on the student's head and he pushed back against her hand. She then realised what she had done and removed her hand. We accept this is evidence of failing to promote the physical wellbeing of this student. This particular is therefore proven.

Serious misconduct

10. Serious misconduct is defined in s 378 of the Education Act 1989:

serious misconduct means conduct by a teacher—

(a) that—

(i) adversely affects, or is likely to adversely affect, the well-being or learning of 1 or more students; or

(ii) reflects adversely on the teacher's fitness to be a teacher; or

(iii) may bring the teaching profession into disrepute; and

(b) that is of a character or severity that meets the Education Council's criteria for reporting serious misconduct.

11. The charge alleges that the particulars either separately or cumulatively amount to serious misconduct pursuant to section 378 of the Education Act 1989 and rule 9(1)(a) and/or (o) of the New Zealand Teachers Council (Making Reports and Complaints) Rules 2004 and/or conduct otherwise entitling the Disciplinary Tribunal to exercise its powers pursuant to section 404 of the Education Act 1989. The criteria in rule 9 are:
 - (a) *the physical abuse of a child or young person (which includes physical abuse carried out under the direction, or with the connivance, of the teacher);*
 - (o) *any act or omission that brings, or is likely to bring, discredit to the profession.*
12. The respondent does not accept that her conduct amounts to serious misconduct. The CAC also accepts that it is not serious misconduct. Ms King submits that prior to amendments to the Act which took effect on July 2015, it is likely this matter would have been dealt with by the CAC. Section 401 replaces s 139 AT and sets out the powers of the CAC. In particular, subsection 4 provides:

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

misconduct.

13. The point of Ms King's submission is that prior to amendment the CAC was obliged to refer a matter only where it was:

satisfied on reasonable grounds that—

- (a) the teacher has engaged in serious misconduct; and*
- (b) the matter should be referred to the Disciplinary Tribunal*

14. Ms King therefore says that prior to the amendment it is likely that the CAC either would not have been satisfied that the teacher had engaged in serious misconduct or that the matter should be referred to the Disciplinary Tribunal, or both. She referred the Tribunal to an earlier decision of *CAC v Rowlingson*¹ where the changes were discussed. In particular, at paragraph 17 it was said:

Then, having arrived at a judgement about the parameters of the factual situation with which they are dealing, basing their assessment exclusively on that, CACs are obliged to make a judgement about whether the teacher's conduct, "... may possibly constitute serious misconduct". And the second point which the Tribunal would emphasise is that the words "...may possibly..." are not synonymous with "...may conceivably...". In other words the possibility that a teacher's conduct may constitute serious misconduct must be a realistic possibility. The CAC must be satisfied that if the facts as they have assessed them to be can be proved then there is a realistic possibility that the Tribunal will regard the teacher's conduct as constituting serious misconduct.

15. Therefore, if the CAC does not think there is such a realistic possibility, then the CAC is not obliged to lay the charge. On the one hand telling us that there is a realistic possibility that we will regard the teacher's conduct as serious misconduct but at the same time telling us it is not serious misconduct.
16. In her submission, Ms King says that the respondent approached the students and put her hand on a student's head to stop him banging the other student's head on the desk. Ms King submits that this is not physical abuse (r9(1)(a)). She does not refer to r 9(1)(o).
17. It was not clear to the Tribunal whether the respondent argues that her preventive action

¹ NZTDT 2015/54,

was akin to “defence of another”, or in order to correct behaviour. Section 139A is relevant here:

139A No corporal punishment in early childhood services or registered schools

(1) No person who—

- (a) is employed by a board (within the meaning of section 2(1)) at or in respect of a school or institution administered by the board; or

...

shall use force, by way of correction or punishment, towards any student or child enrolled at or attending the school, institution, or service.

18. The respondent was motivated by wanting to stop the boys' behaviour. She therefore used force for the purposes of correction. As we said in *CAC v Haycock*:²

[13]...it is difficult to see how an act of force for the purposes of coercion or punishment, which is unlawful behaviour on a teacher's part can be otherwise than regarded as abusive.

...

[15]... It needs to be emphasised that in order for any technical assault to constitute an offence under s 139A it must involve 'force' and be administered for the purposes of coercion or punishment.

[16] Moreover, once the application of force reaches the point of constituting a breach of s 139A and attracts disciplinary attention, it seems to the Tribunal that it is better to deal with the gradations as a matter of penalty.

19. The application of force (of any degree) to a student's head is a serious matter. We understand that the student's head did not make contact with the desk. It is fortunate that the student resisted and the respondent ceased.
20. Having considered these matters further, we asked the parties for further submissions. We advised the parties of our provisional findings, as set out above and sought further submissions on the following three matters:
- a. How the Tribunal should approach a charge alleging serious misconduct where the CAC concedes that it is not serious misconduct.
 - b. Why the facts do not amount to serious misconduct.

² *CAC v Haycock* (NZTDT2016-2), 22 July 2016

- c. Whether a finding of misconduct in these circumstances is relevant to the Tribunal's consideration of name suppression.

21. We are grateful to the parties for elaborating on their submissions. In the meantime, the Tribunal has also considered another case involving a physical interaction between teacher and student where the CAC conceded misconduct was an appropriate finding.³
22. For the CAC, Mr Woods referred to our observation in *Rowlingson*,⁴ that the change "removes a significant discretionary judgement from the Council's CACs". He submitted that the lowered threshold in s 401(4) means that cases of this kind are more likely to arise, and that the legislative change must have been in part at least to ensure that the Tribunal had oversight over a wider range of cases where "serious misconduct" was a realistic outcome. Mr Woods observed that the departmental report to the select committee rejected submissions to change the "may possibly" wording, noting the "policy intent" was to ensure "instances of possible serious misconduct are to be dealt with expeditiously and at the appropriate level."⁵
23. Mr Woods reminded us that consistent with the CAC practice, the charge alleges "serious misconduct and/or conduct otherwise entitling the Disciplinary Tribunal to exercise its powers."
24. Mr Woods urged us to attach no significance to the respondent's submission that on the former provisions, the CAC may have dealt with the matter itself. It is speculative, and is out of step with the current legislative provisions. The reality is that the CAC is now obliged to refer all matters where serious misconduct is a realistic possibility, even where the CAC does not think that outcome should be reached. Therefore the incongruity hinted at in our minute of 24 May, which is also found at paragraph 15 above, does not arise. A referral on the basis that a serious misconduct is a realistic possibility is not mutually exclusive with a submission that a finding of "misconduct" simpliciter should be made. The Tribunal could disagree with the CAC's position based on the agreed statement of facts.
25. The basis for the CAC's submission that misconduct is appropriate in the present case is that:

³ *CAC v Teacher B* (NZTDT2017-7), 27 July 2017

⁴ *CAC v Rowlingson*, above, n 1

⁵ Ministry of Education and New Zealand Qualifications Authority *Education Amendment Bill* (No. 2): *Report to the Education and Science Committee* (1 July 2014) at [541]

- a) The respondent has breached s 139A of the Education Act.
 - b) The pressure applied was short-lived. No harm came to the student.
 - c) External stressors were acting on the respondent, and these are mitigating features.
 - d) In each case the respondent immediately recognised her actions were inappropriate.
 - e) The respondent has undergone restorative processes.
26. Mr Wood referred to similarities with this case and *CAC v Teacher*⁶ where the use of force for corrective purposes triggered at least a finding of “misconduct”, finding that two of the limbs of serious misconduct were made out, but that it was a spontaneous and brief reaction to a student’s sudden intransigence and was not abusive and was not of the character or severity that met the criteria for reporting serious misconduct.
27. The CAC acknowledged our observation that any degree of force being applied to a student’s head is a serious matter, and that it carries a risk of serious harm, but the CAC has been influenced by the brevity and spontaneity of the action, coupled with the lack of harm to the student.
28. Mr Wood accepted that despite the CAC’s concession that the conduct does not amount to serious misconduct, the Tribunal is the ultimate decision-maker, and the CAC cannot supplant that role. The CAC must refer the matter if there is a realistic possibility that the Tribunal might find serious misconduct.
29. For the respondent, Ms King queried how the legislative amendments achieve the Select Committee’s state objectives to “strengthen and streamline the disciplinary regime for teachers, especially in relation to the investigation of reports to, and complaints about, possible serious misconduct”. She submitted that the CAC is maintained as a body that has to consider all matters that are referred to it despite the fact that some matters are indubitably serious misconduct and will inevitably be referred to the Tribunal.
30. In Ms King’s submission, if the CAC makes a finding of “misconduct” rather than “serious misconduct” there is no requirement for it to refer the matter to the Tribunal. To refer a matter that is not serious misconduct does require the CAC either to advocate for a finding of serious misconduct or to provide an explanation for the referral. If the CAC maintains that a finding of serious misconduct is a realistic possibility it should advocate for that; otherwise it should deal with the matter itself and not refer it, unless there are circumstances which favour referral, in which case those circumstances and reasoning

⁶ *CAC v Teacher* (NZTDT 2016-50)

for the referral should be clearly set out.

31. Ms King submitted that the facts do not amount to serious misconduct for the following reasons:
 - a) The application of force was not for correctional purposes but to prevent harm being done.
 - b) It was not physical abuse.
 - c) It does not meet any of the three definitions in paragraph a) of the definition of serious misconduct.
32. Ms King elaborated on her submissions about correction, saying that to correct is to scold, rebuke or punish; to make something true, accurate or right; to counteract something desirable. Later in her submissions, she stated that correct can mean "counteract" or "rectify", "put right an error or fault", "point out a mistake", "adjust something". She tell us that it comes from the Latin *corrigere* from *cor* "together" and *regere* "guide". It is not clear in either of these paragraphs if she is quoting from a dictionary or thesaurus.
33. Ms King referred to *Rowlingson*, where we said that tapping a student who is misbehaving in a loud disruptive and potentially dangerous way on the shoulder to gain the student's attention would not be abusive. Ms King took the matter further by submitting that it would nonetheless still be a correctional action. Referring to the passage from *CAC v Haycock*⁷ (quoted above at paragraph 18), Ms King submitted that in some circumstances, coercion will not be punishment, but prevention. She referred to instances where restraint is required to avoid imminent danger, such as pulling a student's hand away from the flame of a Bunsen burner or grabbing a student's hand to prevent him or her hitting another student.
34. Ms King cited the Ministry of Education *Guidance for New Zealand Schools on Behaviour Management to Minimise Physical Restraint*. She submitted that the respondent did not use physical restraint, but that if she did so, then it falls within the permissible categories where it is used to prevent harm.
35. Ms King further submits that before forming a view about the possibility of risk of serious harm, the respondent should be asked for her opinion. She says that the respondent's use of force was minimal and it was not for the purpose of punishment. There was no

⁷ *CAC v Haycock* above, n 2

element of anger or aggression in her action.

36. Ms King submitted that given the Education Council⁸ has referred to an “inappropriate use of force”, there is a corollary that there can be an appropriate use of force. The Council referred to a situation where it may be entirely appropriate for a teacher to use “physical force to prevent, restrict or subdue the movement of a student’s body or part of their body” and where the safety of someone is not at serious or imminent risk. Examples included were, “Physically moving students from one another to break up a minor altercation where they are not responding to verbal instructions to desist from fighting, but where the safety of the students or others is not deemed to be at “serious or imminent risk” (e.g. where they are pulling each other’s hair or are pushing at each other in a non-harmful way)”. Ms King said that in the present case there was a greater risk as the student the respondent touched was banging another student’s head on the desk.
37. In summary, Ms King submitted that “correction” in terms of s 139A cannot mean to remedy or rectify in this type of situation. She observed that in *Haycock*, the Tribunal referred to “coercion and punishment”, rather than “correction and punishment”

Discussion

38. There is no doubt that a finding of misconduct is open to the Tribunal, and such findings have been made even in the face of the CAC’s submission that we should find serious misconduct,⁹ but we do observe that legislative changes place the CAC and the Tribunal in an unusual position when the parties agree that the behaviour does not warrant such a finding, and yet the CAC is obliged to refer it to the Tribunal.
39. Dealing first with the submissions on behalf of the respondent, we accept that in setting out the circumstances in which physical restraint might be used as a last resort, there may be a use of force that is not inappropriate.
40. Although in *Haycock*, the term “coercion or punishment” was used, we have turned our mind to the wording of s 139A, that is “correction or punishment”. We have therefore not addressed the respondent’s discussion of coercion.
41. Accepting that if the CAC makes a finding of “misconduct” rather than “serious misconduct” there is no requirement for it to refer the matter to the Tribunal, s 401(4) is

⁸ Education Council Submission on the Supplementary Order paper 250 regarding Seclusion and Restraint – Education (Updated) Amendment Bill, Education Council 2017

⁹ For example, *CAC v Emile* (NZTDT 2016/51); *CAC v Hackett* (NZTDT 2016-19)

very clear that the CAC *must refer to the Disciplinary Tribunal any matter that the Committee considers may possibly constitute serious misconduct*. In the present case, the CAC thinks this case “may possibly constitute serious misconduct”, but also concedes misconduct may be sufficient. We agree that when referring a matter and the CAC is not advocating for a finding of serious misconduct, an explanation for the referral and the position regarding a finding of misconduct is helpful.

42. We do not find that the respondent used restraint. We do find that the respondent used force. We do not find that the respondent’s actions were truly preventative. Replication of a student’s behaviour is not a preventative action. Prevention might have involved putting herself between the students, or using some form of restraint, such as if she had held the arm of the student to prevent him pushing the other student’s head, but we do not find that the respondent’s conduct involved the use of restraint.
43. It is not clear whether the application of force was for correction or punishment. Unlike the hypothetical example in *Rowlingson*, the respondent did not tap the student on the shoulder to get his attention in order to correct the behaviour. She pushed his head. It appears to have been a reaction to the boys’ inappropriate conduct.
44. Ms King submits that there was no physical abuse. The CAC has framed the charge under r 9(1)(a) (physical abuse) and/or (o) (any act or omission that brings, or is likely to bring, discredit to the profession). The respondent does not accept that her conduct amounts to physical abuse, and has still made no submission on the matter of discredit to the profession.
45. In our minute dated 24 May we said that in our view, the application of force (of any degree) to a student’s head is a serious matter. We were concerned that had the student not resisted, there was a risk of serious harm. In response to this observation, Ms King submitted that the respondent should be asked for her opinion before a view is formed about this.
46. We do not need to find that there was a risk of serious harm. We reiterate that the application of force (of any degree) to a student’s head is a serious matter. In our view, the conduct was likely to affect the wellbeing of that student and those around him. We find that the respondent’s decision to apply pressure to a student’s head in circumstances where he was pushing another student’s head to a desk is conduct which reflects adversely on her fitness to be a teacher and may bring the teaching

profession into disrepute. It therefore meets all three limbs of the definition of paragraph (a) of the definition of serious misconduct.

47. Turning to the criteria under r 9 of the Education Council Rules 2016, the Notice of Charge referred to paragraphs (a) and (o).

(a) *the physical abuse of a child or young person (which includes physical abuse carried out under the direction, or with the connivance, of the teacher):*

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

48. In many cases the application of force to a student's head might amount to physical abuse, but given the brevity of the contact, we will refrain from making that finding. However, we do find that pushing a student's head in these circumstances is an act that is likely to bring discredit to the profession. Therefore the test for serious misconduct is met.
49. We agree that particular 1.5 on its own might not reach the threshold of serious misconduct, but we find that cumulatively with particular 1.6 the respondent's conduct in its totality amounts to serious misconduct.

Penalty

50. The parties agree that an appropriate penalty is censure, coupled with conditions requiring her to undertake professional development relating to classroom management.
51. We accept that the respondent immediately recognized the inappropriateness of her conduct and took remedial steps with the boys. It was during the next term that she then seems to have lost her temper with a class and spoken inappropriately.
52. We also accept that the respondent has been co-operative and has endeavoured to have this matter dealt with expeditiously.
53. In *CAC v Teacher NZTDT 2014/49* we said:
- [We] repeat as we have said in a number of cases in the past that the use of physical force – even at a lower level such as evident in this case – is unacceptable in New Zealand schools, and that any teacher who uses physical force contrary to section 139A puts his or her status as a teacher in peril.*
54. The cases in where cancellation has not been imposed, the following factors have been relevant:

- The teacher's reflection and remedial steps taken since the event¹⁰
- Whether the teacher has continued to work
- The degree of force used

55. In the present case we agree with the proposed penalty. We believe that the respondent will benefit from some assistance with classroom management. We hope that she will also reflect on her stress management and trigger points. We therefore impose the following:

- a) Censure under s 404(1)(b)
- b) Conditions under s 404(1)(c) on her practising certificate that she undertake to the satisfaction of the Manager Teacher Practice a course of professional development in classroom management, including personal stress management.

Costs

56. The parties have agreed that the respondent should contribute 40% of costs. The CAC submitted a table showing its total costs were \$9,293.40, of which 40% is \$3,717.38.

57. By seeking further submissions, we have put the parties to further expense, but we do not propose to include any further costs in any order for the respondent.

58. We therefore direct that the respondent pays \$3,717.38 towards the CAC costs, under s 404(1)(h) of the Act. We also direct the respondent to pay 40% of the costs of the Tribunal prior to the memorandum of 24 May 2017. The Tribunal delegates to the Chairperson authority to determine the quantum of those costs and issues the following directions:

- a) Within 10 working days of the date of this decision, the Secretary is to provide the Chairperson and the parties a schedule of the Tribunal's costs. Within a further 10 working days the respondent is to file with the Tribunal and serve on the CAC any submissions she wishes to make in relation to the costs of the Tribunal.
- b) The Chairperson will then determine the total costs to be paid.

¹⁰ CAC v Mackey NZTDT 2016-60, CAC v Papuni NZTDT NZTDT 2016-30

Name suppression

59. The respondent seeks name suppression on the grounds that publication of her name would cause detriment to her mother. She also seeks suppression on the basis that the students should not be named.
60. In an affidavit the respondent set out the state of her mother's health. The following paragraph is suppressed from the decision.
61. [The respondent told us that her mother is 83 years old, and has suffered several strokes, leading to vascular dementia. She remains an avid newspaper reader and listener to National Radio. She has not coped well with dementia-based losses and has suffered from panic and anxiety attacks. Further shocks and stress may aggravate her condition and induce another stroke. The respondent has not told her mother about her situation as she does not wish to add to a situation of anxiety and distress].
62. For the respondent, Ms King submitted:
 - The potential ramifications of publication on the health of the respondent's mother go beyond normal embarrassment and humiliation.
 - Because she has not told her mother about the conduct, the respondent has not been able to obtain medical evidence about her mother's condition and the potential effect on her mother.
 - There is a logical effect between the respondent's behaviour and the potential effect on her mother.
 - *ABC v Complaints Assessment Committee* is authority for the proposition that more acute forms of embarrassment could make suppression a proper outcome. Therefore, potentially deleterious effects on a family member's physical and mental well-being are grounds for suppression.
 - The Tribunal granted suppression in NZTDT 2015/31P and stated that the door must be left open to the possibility that personal, professional and familial embarrassment or anguish could be grounds for suppression.
 - The respondent has accepted responsibility for her actions and they were out of character.
 - There is no onus on the applicant and that the question is simply whether the circumstances justify an exception to the fundamental principle.¹¹

¹¹ *ASB Bank Ltd v AB* [2010] 3 NZLR 427(HC) at [14]

- The correct approach is to strike a balance between the open justice considerations and the interests of the party who seeks suppression.¹²

63. Ms King also quoted the following from *Y v Attorney General*:¹³

The suppression of the respondent's name will not have a bearing on the public's ability to understanding of the nature of the proceeding and to what it is that the Court must decide, the stronger is the presumption favouring disclosure.

64. Ms King further submitted that suppression will not have a bearing on the public's ability to understand what the Tribunal has decided and why. She said there is no impediment to the ability of the public to access and scrutinise information about this disciplinary proceeding and the workings of the disciplinary process if the respondent's name is suppressed.
65. Finally, Ms King told us that the respondent is not currently teaching, that she has admitted to misconduct and accepted there would be a censure. The offending is not at the high end of the scale. The circumstances are such that the principle of open justice can be displaced and a suppression order granted.
66. For the CAC, Mr Woods submits that:
- The ordinary public interest factors apply even though the conduct is at the lower end of the scale. There remains a public protection and deterrence purpose.
 - The decision itself will alleviate any risks of disproportionate gossip or rumour about the level of conduct.
 - There is only a small likelihood of the case being reported in the media which the respondent's mother is exposed to.
 - There is no information about the mother's health from a medical professional, and in particular the likely severity of any impact from publication.
67. The CAC argues that there is insufficient detail or linkage between the purported detrimental effects and publication to displace the presumption of open justice.
68. Mr Woods reminds us that the publication of disciplinary proceedings will often have some impact on respondents and their families and that this alone is unlikely to be sufficient to displace the public interest in publication. He refers us to *CAC v Teacher*

¹² *Hart v Standards Committee (No 1) of the New Zealand Law Society* [2012] NZSC4 at [3]

¹³ [2016] NZCA 474 at [34]

*TDT2016/27 and ABC v Complaints Assessment Committee.*¹⁴ In the former this Tribunal said:

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

69. In *CAC v Teacher TDT2016/27* we were not sufficiently satisfied of the nature of the respondent's anxiety issues and likely impact, saying. "A bare assertion that a condition exists, or that it may render an applicant seeking suppression more vulnerable to harm will not suffice."
70. Mr Woods submits that the Tribunal is being asked to guess or assume, based on general knowledge rather than expert opinion.
71. The views of the parents of the students were obtained. Two sets of parents felt that there was nothing to be gained from publication; the respondent had learned her lesson and it was fairly low level. None of them thought that the boys would be upset by publication of the decision. One parent thought that there was a risk that people might associate the case with her son. This was based on general concerns about Masterton being a small town.
72. The third couple felt it would be wrong for the respondent to have name suppression. Co-workers and schools should be aware of this teacher's actions, that she has been dealt with. They also referred to the deterrence to others – that there are consequences to this kind of behaviour.
73. Finally, Mr Woods submitted that if a suppression order is made, the school should still be able to communicate with staff and parents about the case. He referred to the Court of Appeal's approach in *ASG v Hayne*,¹⁵ where the Court held it was not a "publication" in breach of a suppression order under the Criminal Procedure Act 2011 to provide information to person or persons who need to know, or have a genuine interest in knowing. Because schools are concerned about breach of an order, guidance would be of assistance.

¹⁴ [2012] NZHC 1901 at [49] – [58].

¹⁵ [2016] NZCA 203, [2016] 3 NZLR 289 at [43]

Discussion

Open justice

74. Consistent with the principle of open justice, section 405(3) provides that hearings of this Tribunal are in public. This is subject to the following subsections (4) to (6) which provide

- (4) *If the Disciplinary Tribunal is of the opinion that it is proper to do so, having regard to the interest of any person (including (without limitation) the privacy of the complainant (if any)) and to the public interest, it may hold a hearing or part of a hearing in private.*
- (5) *The Disciplinary Tribunal may, in any case, deliberate in private as to its decision or as to any question arising in the course of a hearing.*
- (6) *If the Disciplinary Tribunal is of the opinion that it is proper to do so, having regard to the interest of any person (including (without limitation) the privacy of the complainant (if any)) and to the public interest, it may make any 1 or more of the following orders:*
 - (a) *an order prohibiting the publication of any report or account of any part of any proceedings before it, whether held in public or in private:*
 - (b) *an order prohibiting the publication of the whole or any part of any books, papers, or documents produced at any hearing:*
 - (c) *an order prohibiting the publication of the name, or any particulars of the affairs, of the person charged or any other person.*

75. There has been much discussion of the principle of open justice in the Courts and legal commentary. The principle of open justice has been described as a fundamental principle of common law and is manifested in three ways:

[F]irst, proceedings are conducted in 'open court'; second, information and evidence presented in court is communicated publicly to those present in the court; and, third, nothing is to be done to discourage the making of fair and accurate reports of judicial proceedings conducted in open court, including by the media. This includes reporting the names of the parties as well as the evidence given during the course of proceedings.

76. Fisher J's explanation of the reason for open justice is often quoted:

In general the healthy winds of publicity should blow through the workings of the Courts. The public should know what is going on in their public institutions. It is

*important that justice should be seen to be done. That approach will be reinforced if the absence of publicity might cause suspicion to fall on other members of the community, if publicity might lead to the discovery of additional evidence or offences, or if the absence of publicity might present the defendant with an opportunity to re-offence.*¹⁶

77. And the presumption in favour of open justice is articulated by the Court of Appeal in *R v Liddell*.¹⁷

...the starting point must always be the importance in a democracy of freedom of speech, open judicial proceedings, and the right of the media to report the latter fairly and accurately as "surrogates of the public" ... The basic value of freedom to receive and impart information has been re-emphasised by s 14 of the New Zealand Bill of Rights Act 1990.

78. The principle of open justice therefore exists regardless of any need to protect the public. The tenor of s 405 is consistent with s 95(2)(d) of the Health Practitioners Disciplinary Act 2003, which was considered in *Dr A v Director of Proceedings*¹⁸ by Panckhurst J, who said:

The scheme of the section means, in my view, that the publication of names of persons involved in the hearing is the norm, unless the Tribunal decides it is desirable¹⁹ to do order otherwise. Put another way, the starting point is one of openness and transparency, which might equally be termed a presumption in favour of publication.

79. In *Director of Proceedings v I*,²⁰ Frater J found that any differences between the Courts and medical disciplinary processes (under the Medical Practitioners Act 1995) were ones of emphasis and degree. The most significant difference was the threshold to be reached before the balance was tipped in favour of name suppression. Unlike the courts, where "exceptional" circumstances are commonly required, the criterion for cases before the Medical Practitioners Disciplinary Tribunal (and its successor, the Health Practitioners Disciplinary Tribunal), is whether suppression is desirable.

¹⁶ *M v Police* (1991) 8 CRNZ 14, p15

¹⁷ [1995] 1 NZLR 538 at 546

¹⁸ (High Court, Christchurch, CIV 2005-409-002244, 21 February 2006, Panckhurst J).

¹⁹ The term, "desirable", as opposed to "proper" is used in the Health Practitioners Competence Assurance Act 2003

²⁰ [2004] NZAR 635,

80. In this jurisdiction, the threshold of whether it is “proper”, is the same as under the Lawyers and Conveyancers Act 2006. That Tribunal has suggested that “proper” is arguably between “exceptional” and “desirable”, but in any event the threshold is somewhat lower than that imposed in the courts.²¹
81. So our starting point is the presumption of publication, based on the principles of open justice.
82. Having considered the parties’ submissions and authorities cited, we accept:
- a. If we are satisfied that it is desirable, we may make an order for non-publication of the respondent’s name.²²
 - b. The circumstances need not be exceptional.²³
 - c. It is a balancing exercise, not a matter of whether the applicant has discharged a threshold test.²⁴
 - d. A family’s acute embarrassment may be grounds for name suppression.²⁵
83. We do not consider it is relevant that the Disciplinary Tribunal’s decisions are not often disseminated via the respondent’s mother’s usual media preferences. A decision may be published in and distributed via any channel. If we decline non-publication, it is on the assumption that the decision may reach her.
84. Ms King quoted a statement in support of her submission that the suppression of the respondent’s name will not have a bearing on the public’s ability to understand what the Tribunal has decided and why. The quote from *Y v Attorney-General* set out above at paragraph 63 should be read in context. In that particular case, the Court was considering an appeal of a judgment declining suppression for the names and identifying details of witnesses. The Court observed that given the almost limitless variety of cases, the balancing exercise must necessarily be case dependent. It said that sometimes the legitimate public interest in knowing the names of those involved in the case or in knowing the detail will be high. The Court referred to its earlier decision of *Hart v*

²¹ *Canterbury Westland Standards Committee No.2 v Eichelbaum* [2014] NZLCDT 23

²² Section 405

²³ *CAC v Finch NZTDT 2016-11*; *ASB Bank Ltd v AB* [2010] NZHC 1266; [2010] 3 NZLR 427

²⁴ *Y v Attorney-General*

²⁵ *ABC B v R B v R* [2011] NZCA 331

Standards Committee²⁶ where it had said in an appeal brought by a lawyer:

[18]... The public interest and 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 and has been recently confirmed in Rowley.

85. The Court then added to this:²⁷

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.

86. On the subject of "onus", the Court considered that term was best avoided in considering name suppression. The Court said:²⁸

Rather, the applicant needs to point to factual material justifying the court departing from the presumption. That may require, but does not necessitate the applicant adducing evidence.

87. Section 405 also specifies that the Tribunal must have regard to the "public interest" as well as the interest of any person. In the present case, we are being asked to consider the interests of the respondent's mother on the basis of her health, and the risk of identification of one or more students.

88. We appreciate the CAC obtaining the views of the students' parents, but we are not able to distinguish which views were those of the parents of the student whose head was touched.

89. Based on the information before us, and that set out in this decision, we are not satisfied that publication of the respondent's name would lead to identification of one or more students.

90. Therefore, we must balance the interests of the respondent's mother against the public interest, in the context of the principle of open justice.

91. We accept the CAC's submission that we have no medical evidence to support the

²⁶ *Hart v Standards Committee (No 1) of the New Zealand Law Society* [2011] NZCZ 676

²⁷ *Y v Attorney General* At paragraph 32.

²⁸ At paragraph 37

assertion that publication will have an adverse impact on the respondent's mother's health. There is therefore an insufficient basis to rebut the presumption in favour of publication of name. Her application therefore fails.



Theo Baker
Chair

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

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