EDUCATION COUNCIL
NEW ZEALAND | Matatū Aotearoa

Complaints Assessment Committee (CAC) v Whelch:

New Zealand Teachers Disciplinary Tribunal 2018/4

Relief teacher censured with conditions after serious misconduct and failing to ensure students were provided with a safe learning environment.

Ms Annmarie Whelch was relief teaching in a school classroom, when she observed Student A hitting another student with a softcover exercise book. She took the book off Student A and hit Student A with the book on the side of his face. She then sat back at her desk without saying anything.

Student A later called Ms Whelch over to his desk and when she leant down, he hit Ms Whelch on her face. After this, Ms Whelch said, "I understand why you did this to me and I realise I shouldn't have done it to you." She apologised to Student A in front of the class.

Ms Whelch did not report the incident. However, Student A disclosed it a week later, and Ms Whelch accepted the incident occurred. This led to her employment at the school being terminated and the matter being reported to the Police and Child, Youth and Family. Following a Police investigation, Ms Whelch received a formal warning for assault on a child.

The Education Council's Complaints Assessment Committee (CAC) referred Ms Whelch with serious misconduct to the New Zealand Teachers Disciplinary Tribunal (Tribunal).

The Tribunal found that the teacher's behaviour amounted to serious misconduct on the basis that it was physical abuse. The Tribunal considered that her conduct could also be characterised as ill treatment of the student.

The Tribunal noted that "a teacher has no unique right to use force…teachers must be careful not to abuse the position of authority that they have in a classroom."

While the Tribunal commented that the use of physical force on a student may often cause more emotional harm than physical injury, there was insufficient evidence in this case to show that the student was psychologically abused. The student was distressed and angry and the Tribunal noted the risk that Ms Whelch hitting this student could undermine his school experience and have far reaching impacts on his learning. The Tribunal held that Ms Whelch's behaviour brings discredit to the profession.

In determining penalty, the Tribunal considered that there were mitigating circumstances in this case. These factors included Ms Whelch having no previous disciplinary history, acknowledging her

wrongdoing, her willingness to attend an appropriate remedial course and that she has continued relief teaching with no further incidents.

The Tribunal censured Ms Whelch and placed conditions on her practising certificate and ordered her to pay 40 per cent costs.

BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

NZTDT 2018-4

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	**ANNMARIE CATHERINE WHELCH** **Respondent**

TRIBUNAL DECISION

DATED: 23 July 2018

HEARING: Held at Wellington on 22 May 2018

TRIBUNAL: Theo Baker (Chair)

Sheila Grainger and David Spraggs (members)

REPRESENTATION: Ms Mok for the CAC

The respondent represented herself

Ms Harkess for the school

1. The Complaints Assessment Committee (**CAC**) has referred to the Tribunal a charge of serious misconduct and/or conduct otherwise entitling the Tribunal to exercise its powers under s 404 of the Education Act 1989 (**the Act**). The charge is that on or about 12 or 13 June 2017 the respondent hit Student B with an exercise book once on the side of Student B's face.

Summary of findings

2. We found the charge proved and the conduct amounted to serious misconduct. The penalty imposed is found in paragraph 34. We also made orders for non-publication of the matters outlined in paragraph 69. The reasons for these orders are found in paragraphs 65 to 68.

Evidence

3. This matter was heard on the papers. Before the hearing the parties conferred and filed an Agreed Summary of Facts which is set out in full:

    1. *As at about 12 or 13 June 2017, **ANNMARIE CATHERINE WHELCH** had been employed as a relief teacher at [School A] (the School) for approximately two weeks.*
    2. *On or about 12 or 13 June 2017, while teaching a Year 7 class, Ms Whelch got up from her desk to talk to Student S.*
    3. *On approaching Student S, Ms Whelch observed another student, Student B, pick up Student S's exercise book and hit Student S with it across the face with it.*
    4. *Ms Whelch then took the exercise book from Student B, and hit Student B with it on the side of Student B's face.*
    5. *After hitting Student B with the book, Ms Whelch did not say anything and then sat back at her desk.*
    6. *Later, Student B asked to speak to Ms Whelch at his desk. Ms Whelch approached Student B's desk and leaned down. When Ms Whelch leaned down, Student B hit Ms Whelch on the side of her face.*
    7. *After this, Ms Whelch states she said to Student B, "I understand why you did this to me and I realise I shouldn't have done it to you."*
    8. *Ms Whelch then apologised to Student B in front of the class.*
    9. *Ms Whelch did not report the incident to anyone. Student B disclosed the incident to the school on 20 June 2017 and his statement was taken. Ms Whelch was informed of the allegation on 21 June 2017 and accepted that the incident had occurred as outlined above.*
    10. *On 21 June 2017, Ms Whelch's employment at the school was terminated, and the incident was reported to New Zealand Police and Child, Youth and Family.*

11. *In response to the CAC, Ms Whelch accepted the incident occurred, stating Student B, "Suddenly picked up [Student S]'s exercise book and hit [Student S] very hard across the head with it. I was taken aback and unfortunately reacted by repeating the action to [Student B], although not as hard". In explanation, Ms Whelch stated it was a "complete knee-jerk reaction from me. I don't know why I did it."*
12. *Following a Police investigation into the incident, Ms Whelch received a formal Police warning for assault on a child.*

4. We also received a personal statement from the respondent. In this she said:

> *On the day [Student B] struck [another student] with the soft covered exercise book I had been at the hospital with my daughter who was in severe pain till the early hours of the morning. Tiredness I feel just tipped me over the edge. It is still not an excuse as I should have known better than to strike [Student B]. I did not plan to strike him. I was shocked at my reaction. Later when [Student B] asked me to help him at his desk I walked over, leaned in and he struck me, this was planned as all the boys at the table began to laugh. I apologised to him in front of the class.*

5. Based on the ASF, we are satisfied that the factual allegations contained in the charge are proved. In particular, we find that the respondent hit Student B on the side of the face with an exercise book.

Serious misconduct

6. Having found the factual allegations proved, we must now decide whether any of these findings amounts to serious misconduct (or conduct otherwise entitling the Tribunal to exercise its powers).

7. Section 378 of the Act provides:

> ***serious misconduct*** *means conduct by a teacher—*
>
> *(a) that—*
>
> *(i) adversely affects, or is likely to adversely affect, the well-being or learning of 1 or more students; or*
>
> *(ii) reflects adversely on the teacher's fitness to be a teacher; or*
>
> *(iii) may bring the teaching profession into disrepute; and*
>
> *(b) that is of a character or severity that meets the Education Council's criteria for reporting serious misconduct*.

8. The criteria for reporting serious misconduct are found in r 9 of the in the Education

Council Rules 2016 (**the Rules**). The CAC relies on the rr (a), (c), (f), (n) and (o), as set out below:

Criteria for reporting serious misconduct

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

(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):

…

(c) the psychological abuse of a child or young person, which may include (but is not limited to) physical abuse of another person, or damage to property, inflicted in front of a child or young person, threats of physical or sexual abuse, and harassment:

…

(f) the neglect or ill-treatment of any child or young person in the teacher's care:

…

(n) any other act or omission that could be the subject of a prosecution for an offence punishable by imprisonment for a term of 3 months or more:

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

9. For the CAC, Ms Mok submitted that each of the limbs in s 378(1)(a) is met, as well as each of the r 9 criteria set out above. In her helpful submissions, she referred to the following decisions: *NZTDT-1*,[1] CAC v Haycock,[2] CAC v Maeva,[3] and *CAC v Allen*;[4] s 139A of the Act; the Vulnerable Children Act 2014; and the Code of Professional Responsibility.

10. The respondent did not oppose or respond to any of the CAC's submissions, but engaged in the investigation and Tribunal proceedings and accepted responsibility for her actions.

11. Dealing first with the r 9 criteria, the CAC submitted that the respondent's conduct was physical abuse (r 9(1)(a)). Ms Mok also referred to s 139A of the Act which prohibits the use of "… *force, by way of correction or punishment, towards any*

[1] NZTDT 2017-1, 6 March 2017
[2] *CAC v Haycock* NZTDT 2016-2, 22 July 2016
[3] *CAC v Maeva* NZTDT 2016-37, 24 May 2017
[4] *CAC v Allen* NZTDT 2015-15, 26 May 2017

student or child enrolled at or attending the school, institution, or service. We agree that the respondent used force for either correction or punishment and her conduct contravened139A. Ms Mok referred to the statement in NZTDT2014-49:[5]

> *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.*

12. On the same day as we heard this case, we considered another case involving s 139A.[6] Like the respondent, that teacher had received a police warning for assault on a child.[7] Although a finding of assault has not been made by a court, we accept that the respondent's actions seem to meet the definition of assault.

13. As we noted in that decision, because of the broad definition of assault, not every assault will amount to "physical abuse". There may also be occasions when the use of force for correction does not meet that criterion. In *CAC v Haycock*, the Tribunal commented that where an assault has occurred the level of force used will generally determine the appropriate penalty:[8]

> *[I]t 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 regarded than abusive… 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 correction or punishment... once the application of force reaches the point of constituting a breach of s 139A and attracts disciplinary attention, it seems to the Tribunal it is better to deal with the gradations as a matter of penalty.*

14. However, this position was modified in NZTDT 2016-50,[9] where we said:

> *[26]* Haycock *appears to suggest that any use of force contrary to s 139A of the Education Act will automatically comprise serious misconduct, with the assessment to be made by the tribunal solely focusing on where on the*

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[5] NZTDT2014-49, 20 May 2014 at 6.
[6] *CAC v Tregurtha* 2017-39, 21 June 2018
[7] "Assault" is defined in the Crimes Act 1961 as, "the act of intentionally applying or attempting to apply force to the person of another, directly or indirectly, or threatening by any act or gesture to apply such force to the person of another, if the person making the threat has, or causes the other to believe on reasonable grounds that he or she has, present ability to effect his or her purpose".
[8] NZTDT2016-2 at [13]-[16].
[9] NZTDT 2016-50, 6 October 2016

> *seriousness spectrum the matter concerned sits. That impression, to our minds, is wrong. This is because, to be serious misconduct, the behaviour concerned must satisfy the character and severity threshold established in the Rules. This is an assessment that must be undertaken on a case by case basis to determine if the charge is provide – thus it is not merely a question of dealing with gradations at the penalty stage.*

15. In *Haycock* this Tribunal did not hesitate in finding that smacking a child's bottom in an act of playful pretend anger was physical abuse. This was on the basis that it was covered by s 139A. The Tribunal rejected the respondent's argument that physical abuse must involve some degree of aggression or violence, saying:

> *Without foreclosing this argument for the future, in the context of this case, we think 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 otherwise than be regarded as abusive."*

16. Section 139A makes it clear that a teacher has no unique right to use force. We assume most teachers would not hit another adult if unhappy with their behaviour. A teacher's position does not legitimise actions that amount to crimes if committed in the community. Therefore teachers must be careful not to abuse the position of authority that they have in a classroom.

17. We considered the question of "abuse" in *CAC v Emile* NZTDT 2016/51,[10] where we suggested that a single push would undoubtedly amount to physical abuse where there is significant force used, or the teacher is either intending (or reckless as to the likelihood of) harm, for example pushing with two hands into a wall, or off a platform. As we noted in *CAC v Davies* NZTDT 2016/28,[11] the application of force (of any degree) to a student's head is a serious matter. We are satisfied that the respondent's conduct amounts to physical abuse.

18. Use of physical force on a student may often cause more emotional harm than physical. In *Haycock* a child was embarrassed and upset when the teacher smacked his bottom in an act of playful pretend anger. In the present case we do not know exactly how he felt, the student's emotional response is evidenced by his later act of retaliation of hitting the respondent. We note from the respondent's account it appears that the students might have planned this and they all laughed. They seem to have taken matters into their own hands. We are not satisfied that in this particular

[10] *CAC v Emile* NZTDT 2016-51, 14 December 2016
[11] *CAC v Davies* NZTDT 2016-28, 6 September 2017

case the conduct is "*of a character or severity that meets the Education Council's criteria for reporting serious misconduct"* on the basis of psychological abuse.

19. There may be situations where there is no physical or psychological abuse but the teacher's conduct amounts to neglect or ill-treatment under r 9(1)(f). In the present case, we find that the respondent's conduct can easily be framed as ill-treatment.

20. The respondent received a Police warning for assault on a child under s 194 of the Crimes Act 1961. Section 194 has a maximum penalty of 2 years' imprisonment. Accordingly, the actions of the respondent trigger r 9(1)(n) on the basis that it could be the subject of a prosecution for an offence punishable by imprisonment for a term of 3 months or more.

21. Finally, we agree that the respondent's conduct is an act that brings discredit to the profession. We have no doubt that reasonable members of the public, informed of the facts and circumstances, could reasonably conclude that the reputation and standing of the profession is lowered by the respondent's behaviour.[12]

22. Turning to s 378(1)(a), we are satisfied that in hitting Student B on the side of the face with an exercise book, the respondent's act adversely affected or was likely to adversely affect his well-being or learning. Although there is no evidence of physical harm, there is evidence of distress or anger. It is difficult to know the extent of psychological harm caused. There is also the risk that such conduct undermines the student's school experience and could have far-reaching impacts on his learning.

23. For the same reasons that we found the respondent's conduct brings discredit to the profession, we find that the respondent's conduct may bring the teaching profession into disrepute and that her behaviour reflects adversely on her fitness to teach. Therefore all three limbs under s 378(1)(a) are met.

24. In conclusion, we find that the conduct amounts to serious misconduct.

Penalty

25. Section 404 of the Act sets out our powers following a hearing of serious misconduct:

> ***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:*

[12] The objective standard set out in *Collie v Nursing Council of New Zealand.* [2001] NZAR 74 at [28]

(a) any of the things that the Complaints Assessment Committee could have done under section 401(2):

(b) censure the teacher:

(c) impose conditions on the teacher's practising certificate or authority for a specified period:

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

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

(f) impose a fine on the teacher not exceeding $3,000:

(g) order that the teacher's registration or authority or practising certificate be cancelled:

(h) require any party to the hearing to pay costs to any other party:

(i) require any party to pay a sum to the Education Council in respect of the costs of conducting the hearing:

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

26. For the CAC, Ms Mok submitted that the safety of children and young people can be ensured by imposing a penalty short of cancellation with safeguards in place. Ms Mok set out the following mitigating factors. The respondent:

(a) acknowledged her wrongdoing from the outset of the CAC's investigation and has accepted that her conduct amounts to serious misconduct;

(b) had been up early in the morning because her daughter was at an accident and emergency clinic;

(c) has offered to apologise to the student and his family;

(d) has stated that she is very willing to attend a course on class management skills or anger management;

(e) has no previous disciplinary history;

(f) has continued relieving at another school with no further incidents

27. The CAC proposed the following penalty:

(a) Censure;

(b) The respondent to have a mentor (who has seen a copy of the Tribunal's decision) who is required to provide quarterly reports to the Senior Manager Professional Responsibility for a period of 12 months or such lesser time as is agreed with the Senior Manager Professional Responsibility.

(c) Completion an appropriate classroom management skills or anger

management course as is agreed with the Senior Manager Professional Responsibility.

(d) The respondent is to show a copy of the Tribunal's decisions to her current employer and any future employer for the next two years.

28. The respondent provided a statement setting out her personal history and outlining her teaching career. She described the difficulties in her role at School A, including some students with challenging behaviours and she told us:

> *Having to go to a Police Station was just a horrifying ordeal. I had never broken the law and was petrified at my interview. I felt humiliated and very ashamed of my actions. The constable recorded my interview and only a warning was put on my file.*
>
> *I then had to appear in front of 4 people and a lawyer at the next hearing. I took a friend as support. Again I was so ashamed of my actions, I felt anxious and sick while I waited for the outcome only to discover there would be another hearing after a telephone conference.*
>
> *It has been a long process certainly not one I would ever want to go through again. In hindsight I wish I had never gone to School A but I can't change time, I can only learn from my mistake and move forward. Full time teaching is not an option for me I am contented with day to day relieving. This incident has certainly heightened my awareness. I am more than happy to attend an anger management or class management session and would also like to apologise to the parents.*

29. We understand that the respondent is referring to her appearance in front of the CAC followed by a teleconference once a charge had been laid with the Tribunal.

30. In *CAC v McMillan*[13] we summarised the role of disciplinary proceedings as:

> *… to maintain standards so that the public is protected from poor practice and from people unfit to teach. This is done by holding teachers to account, imposing rehabilitative penalties where appropriate, and removing them from the teaching environment when required. This process informs the public and the profession of the standards which teachers are expected to meet, and the consequences of failure to do so when the departure from expected standards is such that a finding of misconduct or serious misconduct is made. Not only do the public and profession know what is expected of teachers, but*

[13] NZTDT 2016/52, 23 January 2017, paragraph 23.

the status of the profession is preserved.

31. In considering penalty, we were mindful of our comments in *CAC v Mackey,*[14] where we noted the change in s 377 of the Act from "contribute" to "ensure" that students are provided with a safe learning environment, representing a heightening of the protective obligations resting on the Education Council.

32. In NZTDT 2016/60, the Tribunal summarised the relevance of the Vulnerable Children Act 2014 Act [the VC Act] to these proceedings as follows:[15]

> *The VC Act's purpose is to reduce the risk posed by those whose profession requires them to associate with children and young persons, and who have convictions for offending of a type that presumptively undermines their suitability to have such contact. Teachers logically form part of the VC Act's catchment. As we said in NZTDT 2016/50, we accept that the VC Act's focus on safety mirrors a key factor the Tribunal must consider whenever it decides if a teacher who has engaged in behaviour prohibited by the Rules – whether it took place inside or outside the work environment, and whether or not it attracted a criminal conviction – is fit to remain a member of the profession. We accept the VC Act reinforces the importance of our obligation to closely scrutinise the ongoing fitness to teach of any practitioner who faces a disciplinary charge for behaviour of a type that may pose an ongoing risk to students.*

33. When discharging the responsibilities owed to the public and profession, the Tribunal is required to arrive at an outcome that is fair, reasonable and proportionate in the circumstances.[16]

34. We are persuaded that in the present case a penalty short of cancellation can meet the need to ensure the purpose of s 377 is met. We accept the mitigating factors outlined by the CAC, and we impose the following penalty:

    a) The respondent is censured under s 404(1)(b)
    b) Under s 404(1)(c) the following conditions are placed on the respondent's practicing certificate:
        i) that she have a mentor (who has seen a copy of the Tribunal's decision) who is required to provide quarterly reports to the Senior Manager

[14] *CAC v Mackey,* NZTDT 2016/60, 24 February 2017.
[15] At [40]
[16] *Roberts v Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354, at [51].

Professional Responsibility for a period of 12 months or such lesser time as is agreed with the Senior Manager Professional Responsibility.

ii) Completion an appropriate classroom management skills or anger management course as is agreed with the Senior Manager Professional Responsibility.

iii) The respondent is to show a copy of the Tribunal's decisions to her current employer and any future employer for the next two years.

Costs

35. The CAC sought costs of 40%. We order the respondent to pay 40% of the costs of conducting the hearing, under section 404(1)(h) and (i), that is 40% of the Tribunal's costs and 40% of the CAC's actual and reasonable costs. 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:

i. The Secretary is to provide the Chairperson and the parties a schedule of the Tribunal's costs

ii. CAC to file and serve on the respondent a schedule of its costs

b) 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 or CAC.

c) The Chairperson will then determine the total costs to be paid.

Non-publication

36. The respondent and the school have both applied for name suppression.

37. The respondent's grounds are that the publication of her name will make it difficult for her to obtain relief teaching and this will exacerbate her financial pressures.

38. The CAC opposed name suppression, noting that no evidence has been provided to show that the respondent is experiencing financial difficulties. Ms Mok referred to our further comments in *CAC v Mackey*:[17]

> *It is inevitable that a degree of hardship and embarrassment will be suffered by a teacher who is found guilty of serious misconduct.*

39. Ms Mok submitted that the respondent's circumstances are not such that the default

[17] Above, n 14

position in favour of publication has been displaced.

40. Ms Mok also noted that if we impose the conditions sought, that any school must be shown a copy of this decision, then the impact of publication of her name on her relieving prospects is irrelevant.

School's application for non-publication of name of school

41. The school applied for name suppression on the following grounds:

(1) In order to protect identification of the victim;

(2) In order to protect all present students and staff from harassment;

(3) In order to protect the school from any undue hardship, including: protection from unwanted media attention, resurfacing of previous unrelated incidents at the school, bringing the school's reputation into disrepute and a reduction in student enrolment numbers;

(4) Publication would impede the Board's and the school's efforts made to date to restore damage to its reputation;

(5) The presumption of open justice is served by naming Ms Whelch; and

(6) It would not otherwise be in the interests of justice identifying the school.

42. The school's application was supported by an affidavit from the Principal, Ms C and comprehensive submissions. The Principal told us that the respondent received the usual briefing for a casual teacher. Ms C also set out the steps that were taken on finding out about the incident. These included contacting the Student B's father, notifying the Police and also Te Oranga Tamariki. The school reminds staff at morning briefings of the importance of taking breaks. There is a system in place where a teacher who is struggling with a situation may ensure a member of the Leadership Team is notified and can attend to assist, relieve or remove a student whose behaviour is challenging. Health and safety is an agenda item at the weekly Leadership Team meetings.

43. Ms C told outlined the harm that the school has suffered as a result of the very serious criminal activity of a former staff member. The publicity surrounding this person's conviction had a significant impact on the staff and students in a manner they had not foreseen and the school role suffered.

44. In her submissions on behalf of the school, Ms Harkess noted that s 405 of the Act provides that Disciplinary Tribunal hearings are to be in public, consistent with the principle of open justice and that s 405(6)(c) and r 32(1) of the Rules empower the

Tribunal to make an order prohibiting publication of the name of any person or the particulars of the affairs of any person, if it is proper to do so having regard to the interests of any person and to the public interest.

45. We understand Ms Harkess is referring to r 32 of the Teachers Council (Conduct) Rules 2004. In fact, because these rules do not apply, given the conduct occurred and the proceedings were commenced well after 1 July 2016 when the Education Council Rules 2016 commenced. Therefore s 405 of the Act applies. The principles remain the same. Section 405 (3) provides:

> *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*.

46. Ms Harkess summarised the review of principles set out in *CAC v Teacher S*:[18]

(1) There is no onus on the applicant, the question is simply whether the circumstances justify an exception to the fundamental principle;[19]

(2) The correct approach is to strike a balance between the open justice considerations and the interests of the party who seeks suppression;[20]

(3) The rationale for open justice was articulated by the Court of Appeal in *R v Liddell,*[21] where the Court observed at page 546 that:

> *…. 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 matter fairly and accurately as "surrogates of the public" ... The basic value of freedom to receive and impart information has been reemphasised by s 14 of the New Zealand Bills of Rights Act 1990.*

(4) The assessment requires a two-step approach. In *CAC v Finch,*[22] the first step being a question of threshold; does the tribunal, having regard to the public interest and the interests of any person, think it is "desirable" to make such an order. If it is, then the Tribunal may exercise its discretion in making the order sought. With regard to the first step, in *ABC v Complaints*

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[18] *CAC v Teacher S* NZTDT 2016/69
[19] *ASB Bank Ltd v AB* [2010] NZLR 427(HC) at [14]
[20] *Hart v Standards Committee (No 1) of the New Zealand Law Society* [2012] NZSC4 at [33]
[21] *R v Liddell* [1995] 1 NZLR 538, 546
[22] *CAC v Finch* NZTDT 2016/11

Assessment Committee[23] Chisholm J observed that the test used in disciplinary proceedings involves a threshold that is "significantly lower" than that used by the courts in the criminal jurisdiction.

47. Ms Harkess addressed the question of whether the Board (of the School) has standing to bring an application for permanent name suppression. This is not an issue that has been argued in any recent decisions. That may be because the parties have been conscious of s 29 of the Interpretation Act 1999 which Ms Harkess referred to. This provides that:

> *Person includes a corporation sole, a body corporate and an unincorporated body.*

48. Ms Harkess referred to cases where the courts have confirmed that a Board of Trustees is a person.[24] We accept that position.

49. Ms Harkess advised that the Board appreciates and accepts that the incident involving the respondent is serious and unacceptable; there is a need to denounce and deter such behaviour; and there is a desirability for open justice.

50. The school did not seek or support the respondent's name to be suppressed. It was explained that as the respondent was a casual relief teacher, who worked at the school for only 8 days; had been working with other schools; and is no longer employed or contracted by the school, there is little risk in being able to identify the school or the victim if her name was published.

51. Ms Harkess submitted that the school when employing the respondent on a temporary basis, took all reasonable steps to ensure her fitness to teach. Those steps are covered in Ms C's affidavit. She also referred to the steps taken on discovering the incident. It was submitted that the school behaved impeccably, and its reputation should not be brought into disrepute and/or tarnished because of this incident.

52. Ms Harkess submitted that it is proper to grant the school name suppression and supress any details leading to its identification because:

    (1) By not seeking the respondent's name to be suppressed, the principle of open justice can be met. Publication of her name will prevent unfounded rumours and assumptions being made and allow for any other complainants or victims to come forward;

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[23] *ABC v Complaints Assessment Committee* [2012] NZHC 1901 at [44]
[24] *R v X* Manukau DC CRI-2013-092-6049; Police v X CRI - 2013 - 004 - 5490 at [21] - [26]

(2) Publication of the school's name and identifying it in relation to this matter is likely to cause undue harm to victim and the school in the following ways:

(a) Harm to the wellbeing of the victim and his family, classmates and their families as a result of naming the school in association with the respondent is likely to lead to the victim being identified and could cause him undue stress.

(b) Harm to the wellbeing of all students as a result of harassment from their peers, unwanted media attention and social media comments. In her affidavit, Ms C's outlined the impact on the school from a high level of unwarranted media attention in relation to an incident involving a previous staff member. Student and staff well-being was negatively affected.

(c) Undue hardship. If the school's name were to be published it is likely to lead to further harm and damage to its reputation. The school's roll dropped significantly following the previous incident. Five years on the school's enrolment levels are only starting to stabilise. Allowing publication could lead to the resurfacing of this incident, and therefore a further negative impact on enrolment numbers, impeding and/or eroding the hard work the school and the Board have engaged in to repair their damaged reputation.

53. It was submitted that the Board has a responsibility to provide a safe physical and emotional environment for the students. The students of the school are at a particularly vulnerable age. It was submitted that as the incident happened in front of other students it is likely that the victim will be embarrassed and/or intimidated by the respondent's conduct.

54. Ms Harkess submitted that it is of paramount importance to the Board that the victim, his class members and the wider school community feel safe and supported throughout their time with the school.

55. The school has had communications with the victim's family and offered support to him and his family to ensure his wellbeing. He and the classmates have now moved to Year 9 in a range of different secondary schools. They will now be settling in after the social and emotional upheaval of the schooling transition and we do not wish to cause them any further upset.

56. The school is concerned that naming the school will bring unnecessary media

attention to the school and identify the victim causing him and the other class members undue stress, bullying and harassment.

57. As mentioned above, Ms C's Affidavit details an incident involving a former staff member which had a significant detrimental impact on students, staff and the local community. The school has since worked tirelessly to put that incident behind them and rebuild their reputation in a positive light. Publication of the school's name in relation to this incident has a real and appreciable risk to undermine the school and the Board's efforts to put that prior incident behind them and undo the hard work the school has done since the incident involving Ms Whelch too.

58. The school is concerned that this hard work could be undone if its name is able to be publicised. To date, there is no evidence that this incident has been published, nor associated to the School. It is respectfully submitted that no practical benefit will be served by publishing the school's name.

59. In response, Ms Mok advised that the CAC does not oppose name suppression for the school. She also provided submissions with reference to the following cases.

60. In *Complaints Assessment Committee v Teacher* NZTDT 2016/27,[25] a teacher was found guilty of serious misconduct for forging documents submitted as part of NCEA assessments and the school sought suppression on the basis that publication would risk reputational damage to the school. We said:

> *[69] … In ordering suppression, we have not placed any reliance on the ground advanced on the School's behalf. When a teacher commits serious misconduct in the course of his or her duties, it is inevitable that there will be a degree of fallout for the school concerned. However, in light of the central role that schools have in disciplinary proceedings, it is safe to assume that their potential to suffer detrimental reputational (and potentially financial) impact through open publication was factored in when Parliament introduced the presumption of open justice. We do not rule out the possibility that in rare cases suppression may be required to protect a learning institution's interests. In the majority of cases, however, the principle of open justice places the interests of the educational community at large ahead of those individuals of an individual school.*
>
> *[70] In any event, we are confident that had the respondent's name been published, the School (armed with the facts recorded in this decision) would*

[25] *Complaints Assessment Committee v Teacher* NZTDT 2016/27

> *have been able to satisfy its constituents that, as it puts it, it has "very robust" NCEA processes. After all, the School itself exposed the respondent's behaviour, which was isolated and took place sometime ago. These factors should assure students and parents that credits were not "given away".*

61. In *Complaints Assessment Committee v Mackey*[26], the school submitted that naming it, and the teacher (who had pinned a student against the wall), might cause hardship to both the school and "the Maori immersion education movement as a whole". Referring to NZTDT 2016/27, we noted that "[e]vidence, rather than a bare assertion of hardship, is required should a school seek to" advance a submission of reputational damage in support of an application for name suppression. We also observed that our decision made it clear that the school had "proactively confronted and addressed the respondent's misconduct. Therefore, the school ought to be in [a] position to constructively address any criticisms levelled at it".

62. In *Complaints Assessment Committee v Sowerby*[27] the teacher invited students to stay at her home and engaged in unprofessional Facebook communications with them. The school submitted that there was a risk of emotional harm to the former students and their whānau in the event of publication. In declining the school's application, we said:

> *We are not persuaded that three years on from these events any students (who are now at secondary school) would be adversely affected by publication of the names of the school or the respondent to the extent that non-publication of those names should be ordered.*
>
> *In our view, transparency is important…*
>
> *No adverse comment was made about the school or teachers. The school and wider community will be able to read, discuss and learn from the findings of the case should they see fit.*

63. Ms Mok submitted that these cases show that the threshold for schools to obtain name suppression, in particular due to the risk of reputational damage from publication, is a high one, and such applications will rarely be granted. Further, as emphasised in *Complaints Assessment Committee v Mackey*,[28] evidence is needed rather than "bare assertion".

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[26] Above, n 14
[27] *Complaints Assessment Committee v Sowerby* NZTDT 2016-23S
[28] Above, n 14

64. The CAC noted that the student (and those students witnessed the incident) have since moved on to different secondary schools. On this basis, it would appear that suppression of the school's name would not be necessary to protect the student from being identified.

Orders for non-publication

65. The CAC sought orders for non-publication of the children's names. We are satisfied that the children's privacy interests outweigh any public interest in publication of their names. It is proper to suppress their names. We therefore make orders for non-publication of their names under s 405(6)(c) of the Act.

66. We do not believe that suppression of the school's name is needed in order to protect the students. We accept the CAC's submission that the fact that the children are no longer at this intermediate school is a relevant factor. We are not convinced that publication of the school's name in connection with this matter would cause particular anxiety to the victim or any of his classmates.

67. However, the factors that distinguish this matter from *Sowerby*[29] and other cases where we have declined to order name suppression is the adverse publicity this school has already suffered as a result of the appalling behaviour of a former staff member. Although this present incident is of a very different nature, we accept that it is likely that the previous matter will surface and there will be a link made.

68. Ordinarily we would expect the following observations to allay any concerns about the school's reputation: the respondent was a day reliever and not even a regular one; the school had taken reasonable steps to ensure the reliever would be suitable; this incident that was quickly and appropriately addressed. However, in this instance, because of the likely link and refuelling of the previous publicity, we are satisfied that the interests of current students and staff of the school outweigh a more general public interest of naming the school or identifying details.

69. It is proper to order non-publication of the following names:

    a) Student B
    b) Student S
    c) the school
    d) the area where the school is located
    e) the Principal
    f) the former staff member referred to in the Principal's affidavit.

[29] Above, n 27

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).

BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

NZTDT 2018-4

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	**ANNMARIE CATHERINE WHELCH** **Respondent**

ADDENDUM TO TRIBUNAL DECISION

DATED: 20 September 2018

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1. In the Tribunal's original decision dated 23 July 2018 the question of name suppression for the respondent was not explicitly determined. Although implicit in the decision, we did not record our decision that this application was declined. We now do so.

2. The reasons are that the grounds advanced by the respondent were not sufficient to satisfy us that it was proper to order non-publication. We accept that publication of this decision might adversely affect the respondent's employment prospects, but that is because the information in this case is relevant to a prospective employer. We agree with the CAC that if we impose the conditions sought, (that any school must be shown a copy of this decision), then the impact of publication of her name on her relieving prospects is irrelevant. The school must be shown the decision.

3. We confirm that the respondent's application for name suppression is declined.

Theo Baker

Chair