NZTDT 2015/17

BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

UNDER	the Education Act 1989
IN THE MATTER	of disciplinary proceedings commenced by a Complaints Assessment Committee of the Education Council of Aotearoa New Zealand
BETWEEN	**COMPLAINTS ASSESSMENT COMMITTEE** Complainant
A N D	**PAUL ANTHONY BREMER** Respondent

DECISION OF TRIBUNAL

Tribunal:	Kenneth Johnston (Chair), Graeme Gilbert and David Hain
Hearing:	15 and 16 December 2015
Decision:	5 April 2016
Counsel:	Gaeline Phipps for Complainant David Martin for Respondent

CONTENTS

Introduction

[1] The Education Council of New Zealand's Complaints Assessment Committee charges the Respondent with serious misconduct.

[2] The Notice of Charge is dated 18 June 2015. As amended by consent at the commencement of the hearing, it particularises the charge in these terms:

> *"**Particulars of Charge***
>
> *"3. The Complaints Assessment Committee, pursuant to Section 139AT(4) charges that **PAUL ANTHONY BREMER**, teacher of Havelock North, behaved in an unprofessional manner amounting to serious misconduct and/or conduct entitling the Tribunal to exercise its powers, in that in his role as the principal member of the Board of Trustees and in his role as the principal of Havelock North Primary School, he:*
>
> *3.1 failed to take reasonable steps to ensure that the Board was aware of and/or to took advice on and/or*

acted on the requirement to submit a mandatory report to the New Zealand Teachers Council and/or

3.2 Failed to inform the New Zealand Police on or about 10 June 2014 and/or 17 June 2014, in relation to the conduct of Charles Michael Harter, employed by the School as a teacher, in that:

(a) On or about 10 June 2014, he was informed of an allegation that Mr Harter had touched the bottom of a female student (victim 3) at the School;

(b) On or about 13 June 2014, he was informed by two female students (victim 4 and 5) that Mr Harter had hugged them and had squished their bottoms at the School; and

(c) On or about 24 June 2014, Mr Harter resigned.

3.3 Failed to minimise the risk of harm to students of the School or the wider community, or to otherwise protect the safety of the students of the School or the wider community, in that he:

(a) He did not do all that was reasonable to ensure that a mandatory report was made to the New Zealand Teachers Council and/or a notification made to the New Zealand Police, as particularised in paragraph 3.2 above; and

(b) Despite knowing that Mr Harter provided private lessons, namely music and/or drama to students outside of the School, did not take any or any appropriate steps to ensure that students or members of the wider community did not attend those lessons and/or had protections in place if they did attend;

(c) Did not ensure that reasonable steps were taken to prevent Mr Harter's contact with students or former students, in circumstances where students

or former students were the victims of indecent assaults by Mr Harter after 17 June 2014;

3.4 Failed to take reasonable steps to ensure that an honest and/or not misleading public statement was provided explaining the reason for Mr Harter's departure from the School.

4. The conduct alleged in paragraphs 3, 3.1 to 3.4, either separately or cumulatively amounts to serious misconduct pursuant to section 139AB of the Education Act 1989 and Rule 9(1)(o) of the New Zealand Teachers Council (Making Reports and Complaints) Rules 2004 and/or conduct warranting referral to the Disciplinary Tribunal."

[3] The Chairman convened a pre-hearing telephone conference on 20 July 2015, following which the matter was set down for hearing and directions issued in relation to the filing and service of evidence and submissions.

[4] The hearing occupied two full days on 15 and 16 December 2015. There was insufficient time at the conclusion of the hearing to hear counsel's submissions. Accordingly, the Tribunal invited a sequential exchange of written submissions. Ms Phipps and Mr Martin duly filed and exchanged comprehensive written submissions early in the New Year. The Tribunal expresses its gratitude to counsel for the obvious care and attention taken in the preparation of these submissions, which have been of great assistance in dealing with the matter.

Pre-Hearing Applications

[5] Prior to the pre-hearing telephone conference the respondent had filed and served an application for an order pursuant to r 32(1)(c) of the New Zealand Teachers Council (Conduct) Rules 2004 permanently suppressing his name. In support of that application, he filed and served affidavits sworn by himself and his wife, Mrs Lynette Bremer. Shortly before the hearing the Tribunal received an affidavit sworn by Mr Nicholas James, the current Chair of the board of Havelock North School, supporting the respondent's application, and

seeking also an order permanently suppressing the school's name. At the pre-hearing telephone conference the Chairman made an interim order suppressing the respondent's name and all other details of the case prior to the hearing, on the basis that the application for permanent name suppression would be dealt with by the Tribunal at the hearing. We return to this later in this decision.

[7] Prior to the hearing the parties filed an agreed statement of facts recording those aspects of the factual background in relation to which there was agreement, together with an agreed bundle of documents extending to 39 documents and 236 pages.

[8] Also prior to the hearing the respondent filed an application for an order excluding the evidence of an expert witness the complainant was proposing to call, Mr Larry Forbes, essentially on the basis that his evidence was either inadmissible or of no probative value because it went to the very issue which the Tribunal was expected to determine. The complainant contended that this objection was misconceived, and that Mr Forbes' qualifications and experience were such that his views as to the respondent's actions were admissible and of probative value. At the commencement of the hearing the Tribunal ruled that it would receive Mr Forbes' evidence, and would make an assessment of the weight which should be placed on it in due course.

Background and Charge

[9] At all material times the respondent, Mr Paul Bremer, was the principal of Havelock North School. The school was governed by a board. The respondent was a member of the board ex officio. Between November 2011 and June 2014, the school – or, rather, the board – engaged Charles Harter as a part-time music (and later drama) teacher. He taught a small number of classes on a weekly basis. Apparently, he had other part-time positions, and also offered private music lessons (though the evidence was that the respondent was unaware of this).

[10] We now know that during that time Harter committed a series of offences involving school-aged children. In the District Court at Napier on 23 October 2014 Harter pleaded guilty to and was

convicted of nine representative charges of indecent assault on girls under the age of 12. He was later sentenced to a term of imprisonment. In the case of the majority of these victims, Harter came into contact with them as a result of his position at the school.

[11] No suggestion is made that the respondent was in any way associated with Harter's offending, or that he had actual knowledge of it at the time.

[12] What the complainant says is that the respondent was put on notice in various ways that Harter presented a threat to children, that he had a duty to take steps to safeguard the safety and welfare of the children in the school and the wider school community, that he failed to do so and that this failure constituted serious misconduct.

[13] These events all occurred prior to recent amendments to the Education Act 1989. In this decision we will refer to the provisions of the Act as they were at the time. The statutory definition of serious misconduct was, at the time, contained in s139AB of the Education Act 1989, which provided that *"… **serious misconduct** means conduct by a teacher*:

> *(a) that:*
>
> > *(i) adversely affects, or 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; and*
>
> *(b) is of a character or severity that meets the New Zealand Teachers Council's criteria for reporting serious misconduct.*

[14] The Council's criteria for reporting serious misconduct was and still is (though the Council itself has since been renamed) set out in r 9(1) of the New Zealand Teachers Council (Making Reports and Complaints) Rules 2004 which materially provides:

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

[15] We refer only to paragraph (o) because that is the only paragraph of r 9(1) which features in the Notice of Charge.

[16] Essentially, then, the allegation in this case is that the respondent's inaction – his failure to respond appropriately to the information he had to hand relating to Harter – constituted conduct on his part that either adversely affected or was likely adversely to affect the well-being or learning of one or more students; or reflected adversely on the respondent's fitness to be a teacher; or both; and that it constituted an act or omission that brought or was likely to bring discredit to the profession.

[17] It is unnecessary to dwell on the type of conduct that is caught by the phrase *"… adversely affects; or likely to adversely affect, the well-being or learning of … students…"*. Plainly, any actual or potential link between a teacher's conduct and abuse of the sort involved in this case is caught.

[18] In the past the Tribunal has said that any conduct which calls into question whether a teacher is a fit person (whether it calls into question his or her competence or character) is conduct which *"… reflects adversely on the [teacher's] fitness …"*.

[19] As to the test of when a teacher's conduct brings or is likely to bring discredit to the profession, we adopt Mr Martin's submission on the point, on which we do not think we could improve:

> *"12 Determining when an individual's misconduct casts a shadow on the entire profession is not always easy.*
>
> *(1) The standard is an objective standard: Collie v Nursing Council of New Zealand* [2001] NZAR 74.

(2) *The question is whether reasonable members of the public, informed of* ***all*** *the circumstances, could reasonably conclude that the reputation and good standing of the profession had been lowered by the individual's misconduct: Collie. See also CAC v Teacher NZTDT 2014/18 and CAC v Duffy NZTDT 2015/2.*

(3) *It is a matter of severity: CAC v Whitwell NZTDT 2011/7, at para 122.*

(4) *The misconduct must be so far below acceptable standards that the public would believe that teachers should not stand for them:*

Complaints Committee for the Canterbury District Law Society v W [2009] 1 NZLR 514.*"*

[20] Against that background, we now turn to the evidence.

Evidence

Agreed Statement of Facts

[21] The parties' agreed statement of facts (without the cross-references to the documents, and edited as necessary) was in these terms:

"1. At all material times the respondent was a fully registered teacher employed as the principal of Havelock North Primary School, a Year 1 to 6 school with a role of around 516 ākonga.

2. The respondent employed a Mr Charles Harter to work as a part-time music and drama teacher. In October 2014 Mr Harter was sentenced to imprisonment on nine representative charges of indecent assault on girls aged under 12 years old. The offending occurred between 1 February 2014 and 25 July 2014. The victims were all pupils or former pupils of Havelock North Primary School.

3. At the relevant time, the school had in place a child protection policy (NAG5). This was to:

"… ensure the safety and the welfare of the child was paramount."

4. *There was also a complaints policy in place at the relevant time that required that:*

   "If the concern is not resolved it should be referred as a complaint in writing to a full Board meeting."

5. *The child protection policy required that where a complaint of child abuse is made against a staff member, the procedure set out in the Teachers' Collective Employment Contract regarding complaints against teachers will be followed.*

6. *It was at the relevant time the practice of the respondent, on receiving a student complaint, to speak with them to find out the nature of the complaint, who was involved and what had happened, and then to do a small investigation of his own to ascertain:*

   "… how grave their situation actually is."

7. *It was also the practice of the respondent, when a student came to him with a complaint, he would contact the parents to make sure they were aware of it.*

8. *The respondent had never had to contact the Police during his years as principal but it was his understanding of proper practice that if a child was not in a safe physical or emotional environment, whether at home or any other situation, he would call the Police.*

9. *Mr Harter commenced work on 11 November 2011. He taught guitar.*

10. *At some time during 2012, Mr Harter also began teaching drama. At all times, he taught in a group environment, never in any small private room and always moved around the school, using various rooms so people could walk in and access their things while he was there.*

11. *In 2012, a complaint was made by the present Chairperson of the Board of Trustees about Mr Harter using lollies during his lessons. This occurred at a time when the respondent was away on sabbatical. The respondent was became aware of*

this complaint on his return and aware that the Deputy principal had told the respondent to stop providing lollies to the students. It was understood by the respondent that this practice had ceased.

12. *At all material times, Mr Harter also taught drama and guitar privately from his home. The respondent was aware that he taught drama of some kind but he did not know anything about it. He did not know anything about the private guitar lessons.* [redacted] *In addition, some of the teachers at the school were getting lessons from Mr Harter at his home.*

13. *Some time prior to April 2013, Mr Harter threw a chair during drama, resulting in a parent making a complaint to the Assistant Principal. There were 15 children in the class at the time. A parent notified the school by email dated 15 April 2013 which was forwarded to the respondent. In response, the respondent spoke to Mr Harter, who admitted throwing the chair but not directly at the child, saying he did so just to get their attention. Mr Harter apologised.*

14. *This information was not brought to the attention of the Board. There was no response to the family following that complaint at the time. On 12 September 2014 the Chair of the board responded.*

15. *Some time after the first chair throwing incident and before 1 April 2014, Mr Harter threw a chair on a further occasion whilst teaching children at the school. Mr Bremer was made aware of this and spoke to Mr Harter. In explanation, Mr Harter said it was as a result of frustration at the crowded stage he had to work on. There was no investigation by the respondent. No report was made to the Police or to the then Teachers Council. The respondent noted that this was one complainant out of 10 students who were present.*

16. *The Board was not given a "heads-up" regarding this behaviour at any time.*

17. *Some time in 2014 the respondent discovered that Mr Harter had again started giving lollies to students and spoke to him about it. The respondent understood that Mr Harter had introduced this practice as an incentive to get students to class on time.*

18. *On Wednesday 4 June, nine year old Victim 3* [redacted] *was indecently assaulted.*

19. *On Tuesday 10 June 2014, the mother spoke to the respondent and registered her concern, reporting that:*

> *"[Victim 3] said that* [redacted] *When getting back to her feet Mr Harter tickled her bum for two seconds which made her feel uncomfortable.*
>
> *After the event she ran back to class where she told another class member. She said she thought it may have been an accident but was unsure. She also stated that at the time of the incident that the outside door was shut however the corridor door was open."*

20. *The respondent alerted the Acting Board Chair, Mr Jol Bates who is a lawyer. It was decided the Board of Trustees should go into Committee on 16 June.*

21. *On 13 June 2014, two students, Victims 4 and 5, asked to see the Principal. The girls reported that they had written to Mr Harter setting out their feelings and left it in the room for him. The respondent asked them to remove the letter. This first meeting occurred at 11.30am. The respondent subsequently interviewed the girls with the Deputy Principal*

(who was female) at 2 pm. He then learned the girls had thrown the letter away.

22. *They reported that Mr Harter yelled at them, swore at them to shut up, piss off, and said the word "shit", and touched them when hugging them, patting them on the bottom. It was also complained that he squished one student on the bottom. The first student had told her mother, the other one had not. The respondent did not inform the parents of the girls about the disclosure made or put in any safeguards to ensure that the girls were supported over the weekend.*

23. *On 16 June 2014, the mother of the victim 3 attended school to let the respondent know she was aware of the allegation but they were "not making too big a thing of the situation". She was informed by the respondent that the board was going through the necessary procedure and dealing with it in a sensitive manner. It was recorded that it was hoped the situation could be resolved in an amicable way.*

24. *On 16 June, a Board of Trustees meeting was held to discuss the disclosures and verbal complaint made by victim 3. The Board of Trustees resolved to investigate the complaint as per the minutes.*

25. *On 17 June 2014, the respondent spoke to … (victim 4) and she confirmed her statement. She confirmed that Mr Harter had squished her bottom on Wednesday, said that he used only the words "shut up".*

26. *On 18 June 2014, the respondent checked with victim 5 that her statement was correct. She confirmed that she had been patted on the bottom and recorded that they had written to Mr Harter. Mr Harter was subsequently convicted of indecent assault on victims 3, 4 and 5.*

27. *On 18 June 2014 the respondent wrote to Mr Harter, recording that they had had a meeting the previous day (17 June 2014), confirming that the purpose of the meeting was "simply to alert you to the fact that there was a complaint" and*

that the Board had determined that an investigation was required which may lead to disciplinary action in due course.

28. *On the 19th June Mr Bates met with Mr Harter, with Mr Bremer in attendance as note taker. Ms O'Donnell, the partner of Mr Harter, was present as Mr Harter's support person.*

29. *Mr Harter provided a statement which was noted as being received by the respondent on 19 June 2014.*

30. *In the response, Mr Harter said:*

> *"I pretended to be angry, tickled her under the armpits and said 'you give me my pick back'. I expected her to laugh and give it back to me but she dropped to the floor still clutching the pick and adopted a defensive curled-up, hard to tickle position - she was giggling and laughing. I foolishly tried to lift her back to her feet – she was still laughing, wriggling and resisting which made it very difficult. I tried to lift her from the small of her back but she wriggled away. At this stage I was getting annoyed and grabbed the top of her leg and managed to get her to her feet after a struggle with her still squealing, resisting and laughing. It was past a joke but she may have felt I was trying to tickle her again – I was not [the child] herself said it could have been an accident, and I confirm this … I have been a teacher for over 40 years I have taught here for over a year, and all that time nothing like this has ever happened before … What I did was unprofessional – I am devastated and sick in the heart that what I thought was a harmless play fight that got a little out of hand could be construed as more than that."*

31. *The handwritten notes refer to a question from Mr Bates to Mr Harter asking whether this had ever happened before, with Mr Harter replying "No it hasn't". The notes record the statement:*

"… been no complaints. I was tired and stressed."

32. *The notes record Mr Harter acknowledging that he touched the child at the top of the leg and buttock.*

33. *From 21 June 2014, the respondent was concerned about the health of Mr Harter and, in discussions with Mr Bates, agreed that he would keep in regular contact with him.*

34. *On 24 June 2014, at noon prior to a mediation occurring that afternoon. The Board of Trustees met.*

35. *At around about that time, the school notified its insurer of a potential claim.*

37. *On the afternoon of 24 June 2014, the mediation was held attended by Mr Bremer. A settlement was reached with Mr Harter. Following that, an announcement was made by the school to parents advising that for health reasons Mr Harter was leaving the school.*

38. *Between 1 February 2014 and 25 July 2014, Victim 2 [redacted] Mr Harter [redacted] frequently hugged from behind with her breasts squeezed and had her crotch grabbed.*

39. *On 31 July 2014, the parent of Victim 2 met with the respondent, advised him of the disclosure by her daughter and her daughter's friend, [redacted], and learned there had been other parental complaints about tickling and a further complaint about throwing chairs.*

40. *On 4 August 2014, the parents of Victims 1 and 2 met with the respondent again and advised that they were making complaints to the Police. The Police became involved as a result of the parental action on or about 5 August 2014.*

41. *On or about 8 August 2014, the Police wrote to various students to ascertain if they had been the victim of any crime, and notified the Board of Trustees that they were investigating the allegation. On that same day Mr Harter was arrested.*

42. *On 9 August 2014 the Board of Trustees held a meeting to discuss advice that charges were being brought. It was at this stage that they resolved to refer the matter to the New Zealand Teachers Council. The resolution read:*

> *"It was resolved a letter to be written to the New Zealand Teachers Council informing them of the two complaints received while Charles was employed at Havelock North Primary School and the subsequent Police investigation.*

43. *A letter was written to the New Zealand Teachers Council. That letter referred to three complaints and the letter was countersigned by the chairperson of the Board of Trustees.*

44. *On 13 August the Board met again to address communication with parents now that name suppression had been lifted and that a letter had been received from the New Zealand Teachers Council requesting that a mandatory report was provided.*

45. *On 13 August the Board met and resolved to make a mandatory report.*

46. *A mandatory report was subsequently submitted on 13 August 2014.*

47. *On 15 August 2014 the Board met to discuss communication with parents following the lifting of the suppression order.*

48. *On 16 August there was a Board meeting to discuss a complaint made by Ms [redacted], a parent of one of the victims who was offended against after Mr Harter had left the school, as recorded in the minutes of that date."*

[22] In addition to the agreed statement of facts, the Tribunal heard from seven witnesses. The complainant called Mr [redacted] (hereinafter "Mr 4"), the father of Victim 4, one of the two students who made disclosures to the respondent concerning Harter on 13 June 2014, Mrs [redacted] (hereinafter "Mrs 2"), the mother of Victim 2, Mr Forbes to whom reference has already been made

and Mr Andrew Greig who is the Education Council's Manager Teacher Practice and who, like Mr Forbes, was called to give expert evidence. The respondent called Mr Jolyon Bates who was a member of the school's board at the relevant time, gave evidence himself, and also called Mrs Bremer. We will address the evidence of these witnesses in the order in which they were called.

Mr 4

[23] Mr 4 confirmed that his daughter was Victim 4. He told us that shortly after his daughter and Victim 5 had made disclosures concerning Harter to the respondent, he and his wife, Mrs 4, had decided that they would take the matter up with the respondent. He said that Mrs 4 had then had meetings with the respondent (and Mr Bates). Although, as the Tribunal understands things, Mr 4 was not involved in these meetings, he told us, no doubt relying on what Mrs 4 had told him, that much of the discussion concerned whether or not their daughter's name (or their family name) needed to be mentioned in the context of any investigation. Mr and Mrs 4 both met with the respondent to discuss this very issue. Mr 4 said that in the end it appeared to them that there would be no need for their name to be revealed, and that suited them. But he added that he and Mrs 4 did not have a fixed view on this, and would have agreed to their name being mentioned had it been suggested that this was necessary.

Mrs 2

[24] Mrs 2 is both a member of another school board and a registered teacher. She is the mother of Victim 2. [redacted]

[25] She explained that, late in term 2 of 2014, the parents of children at the school who were taught by Harter received two notices concerning him. She said that the first informed them that Harter

was having some time off school *"for family reasons"* and the second informed them that *"due to health reasons Mr Harter was no longer employed by the school but that the school wished him well in the future"*. She said that those notices conveyed no indication to her that she should have any concerns about Harter in relation to her daughters.

[26] Mrs 2 said that after Harter had left the school arrangements [redacted] her older daughter disclosed to her Harter's behaviour towards her. She said that this came about after the mother of Victim 1 had told her that her daughter had disclosed Harter having made her feel uncomfortable. As a result of this, and [redacted] – Victim 2 – disclosed that Harter had sexually assaulted her, [redacted]

[27] With this information, Mrs 2 arranged to meet the respondent on 31 July 2014. She advised him of her older daughter's disclosures to her. The respondent conveyed to her that there had already been complaints of a similar nature. She said that he did not however seem to be concerned.

[28] Mrs 2 and Mrs 1, Victim 1's mother, met with the respondent on 2 August 2014. At this meeting the respondent confirmed to the two women that there had been earlier reports of inappropriate behaviour on Harter's part. Mrs 2 said that the respondent told her and Mrs 1 that he understood what was and was not appropriate, and that this was an area in which he was very strong with his male staff members. The two women told the respondent that they were proposing to take the matter to the Police. Mrs 2 said that for her part she was disappointed that the respondent had not already done so.

[29] She went on to tell us that on the day that Harter was arrested she learned of the mediation, the negotiated exit and that the respondent had been involved in that process. She said that at no time had she or the school community been told about this. She said that she felt

that she had been lied to about the circumstances of Harter's departure from the school, and expressed her anger about this.

[30] Mrs 2 offered evidence relating to the obligations of schools, boards and principals to report serious misconduct. Although the Tribunal appreciates that Mrs 2 was sincere in offering this evidence, she was not called as an expert and did not qualify herself as such. We do not think it would be appropriate for us to have regard to her evidence in relation to this.

[31] She then went on to say that on 15 August 2014 she delivered a written complaint to the board of trustees about the way that the school, the board and the respondent had dealt with Harter's departure. The then Chair, Mrs Rachael Cornwall, responded on behalf of the board by letter dated 3 September 2014. Mrs 2 produced copies of both her complaint and the Chair's reply.

[32] Mrs 2 told us that at the time that the Chair handed her reply to her, she asked if the school was proposing to report the respondent to the Council in relation to his dealings with Harter. She said that Mrs Cornwall replied that there was no reason for the school to do so.

[33] She observed that whilst, in her reply, the Chair said that the school had reported Harter to the Council once it became aware of the seriousness of his misconduct, that had only happened after she – Mrs 2 – had reported Harter to the Police and the Police investigation had commenced.

[34] Mrs 2 informed us that she had known – from her daughters – of the chair-throwing incidents, but had not followed up on them, believing that the school would deal with them appropriately.

[35] She then offered some views about the respondent's obligations in relation to these incidents, but, again, we do not think it would be appropriate for us to have regard to this evidence.

[36] Mrs 2 gave evidence of the impact of Harter's offending on [redacted] her family. She quoted the victim impact statement she had provided at the time of Harter's sentencing. We do not think it is necessary for us to describe this evidence in detail. It is sufficient for us to record that no one could imagine that Harter's

behaviour was anything other than devastating for Mrs 2's older daughter and all of the other victims. It goes without saying that his behaviour is incomprehensibly despicable. We hope that Mrs 2 and the other parents involved will forgive us for saying that the one bright spot in this whole matter is the courage and moral strength that she and many of the other parents exhibited, and that that gives us cause for optimism that the victims, well parented as they no doubt are, will eventually be able to put these matters behind them.

Mr Forbes

[37] Mr Forbes is an educational consultant. He has extensive and impressive qualifications and experience in the education field. He is well qualified to talk about many of the issues raised by this case. What he is not is a member of this Tribunal.

[38] As already recorded, Mr Martin objected to our hearing Mr Forbes' evidence. Essentially, his objection was that Mr Forbes was being called to tell us what he believed our conclusions should be on the ultimate issues in the case. In the past, at least in court proceedings, that would render the evidence of an expert inadmissible. There are two reasons why that is not so in this case. First, the law of evidence has now been codified in the Evidence Act 2006. Section 25 of that Act provides in effect that expert evidence, even if it goes to the ultimate issue, can be admitted if the court believes that it may be of assistance. Second, by reason of r37 of the New Zealand Teachers Council (Conduct) Rules, this Tribunal is entitled to receive evidence even if it would not be admissible in a court. However, what no court or tribunal is entitled to do is abdicate responsibility for deciding the matter before it by deferring to the views of a witness.

[39] During the course of the hearing, having received helpful legal argument on this point, we ruled that we would receive Mr Forbes' evidence. Determining that we were prepared to receive Mr Forbes' evidence says nothing of course about the weight which we are prepared to place on it. On this score, our view is that there is much in Mr Martin's submission. Throughout his evidence, Mr Forbes offered his views as to the law and effectively as to whether the respondent's actions at various points constituted serious

misconduct. It is of course for the Tribunal to determine the law which applies to this case – starting with the legislation, and taking such guidance as is available from the decisions of the courts. And it is our responsibility to determine whether or not the complainant has made out its allegation of serious misconduct. Against that background, we approach Mr Forbes' evidence with circumspection.

[40] Furthermore, it appeared to us as Mr Forbes' evidence unfolded that he had approached the case with the benefit of hindsight, and exhibited little appreciation of the fact that the respondent was confronting these events in real time as they emerged. There is a danger in applying hindsight to an analysis of what might be expected of someone in the respondent's position, and that danger is all the more acute in a case such as this where the ultimate outcome was nothing short of horrendous for the children involved.

[41] However, those things said, we regard Mr Forbes' evidence as being of some value to the extent that he described how he, as a highly experienced principal, would have dealt with this matter had he been in the respondent's position. That evidence he was perfectly entitled to give and, as we say, we regard it as being of some assistance.

[42] In summary Mr Forbes' evidence was as follows:

- The first incident involving Harter giving sweets to children should have resulted in an informal disciplinary process and an instruction to Harter to cease the practice followed by a period of monitoring for compliance. Mr Forbes added that in his view the respondent should have reported the incident to the board, without necessarily identifying Harter;

- The first incident involving Harter throwing a chair should have resulted in a formal disciplinary investigation. Mr Forbes added that he would have expected that to result in a warning and a period of monitoring to ensure compliance. He said that it should also have resulted in a full report to the board;

- The second incident involving Harter throwing a chair should have resulted in a further formal disciplinary investigation and a full report to the board;

- The second incident involving Harter giving sweets to children (against the backdrop of the first such incident, and the two incidents involving throwing chairs) should have resulted in a further formal disciplinary investigation and a full report to the board;

- The complaint concerning Victim 3 on 10 June 2014 should have resulted in a further formal disciplinary investigation. In relation to this Mr Forbes offered the view that the "information" showed that Harter was a serial abuser and a risk to children. That is an example of the type of conclusion which Mr Forbes drew in his evidence which suggested that it was coloured by hindsight. Immediately following this complaint the respondent could draw no such conclusion. All he had was a complaint that clearly called for investigation;

- The disclosures made by Victims 4 and 5 on 13 June 2014 should have been included the investigation;

- Mr Forbes said that if the respondent was unsure of how to proceed on any one of these occasions there were sources of advice readily available to him, particularly the NZSTA. He then described in detail what advice the respondent should have sought;

- The thrust of Mr Forbes evidence was that this series of events should have been enough to signal to the respondent at a relatively early stage that there was a risk to children and that he should have acted much earlier and much more decisively to deal with that risk;

- He then gave evidence as to the point at which he believed reports should have been made to the Council pursuant to Part 10A of the Education Act and to the authorities (the Police and/or CY&F). Essentially, his evidence was that the respondent should have reported to the authorities when he received the disclosures from Victims 4 and 5 on 13 June 2014;

- Finally, Mr Forbes observed that that, right up until the closing stages of this matter, the respondent was the only person with a full knowledge of Harter's background at the school and that in various ways he kept the board, the parents of the victims who had complained and the school community generally in ignorance. There is certainly something in this point.

[43] Mr Greig, who, as we have already said, is the Education Council's Manager Teacher Practice, gave evidence, the focus of which was the circumstances in which the Council expects matters concerning teachers to be reported to it. He told us that the Council's expectation is that a report will be made *"… immediately if there is reason to believe serious misconduct [has] occurred."* He said that the council's website provides guidance along those lines, and that in his role he takes every opportunity to re-enforce this expectation to schools, boards and principals throughout the country.

[44] Mr Greig acknowledged that the statutory obligation is on the employer to make such reports – which, in this case, was the board – but he added that schools' professional leaders are generally the ones who manage the process, either making reports themselves or ensuring that reports are made.

[45] Mr Greig then said that:

> *"The expectation of the Council was and is that if a principal is aware of an incident involving possible serious misconduct, he or she should make a mandatory report immediately. Or, at the very least, the principal should advise the Board of Trustees to make a mandatory report immediately."*

[46] What the legislation (formerly s 139 AM; now s 394) actually says is that a teacher's employer must report to the Council if the employer has reason to believe that the teacher has engaged in serious misconduct, which is not quite as Mr Greig put it.

[47] Mr Greig then referred us to a memorandum of understanding between the Council and the New Zealand Schools Trustees Association which says, amongst other things:

> *"Generally, an employer will have reason to believe a teacher has engaged in serious misconduct if the employer is notified and an initial assessment indicates there may be a case to answer in relation to rule 9 criteria."*

[48] He told us that the memorandum of understanding goes on to say that the term *"immediately"* means *"the same day or as soon as practicably possible".*

[49] Mr Greig gave evidence that as the Council's Manager Teacher Practice his view is that both of the incidents involving Harter throwing chairs should have been investigated and reported, as should the subsequent complaint and reports of sexual abuse.

[50] With one qualification, we are inclined to accept Mr Grieg's evidence as being an orthodox interpretation of the requirements of the legislation. The qualification is that the legislation requires employers to have reasonable grounds for suspecting serious misconduct. Except in the clearest of cases, it seems to us that a preliminary investigation must be required before an employer can regard itself as having reasonable grounds. When this point was put to him, Mr Greig accepted that that was so.

Mr Bates

[51] As already recorded, Mr Bates was a member of the school's board at the material time. He told us that he was and is a solicitor in practice in Hawkes Bay and that he is an experienced employment lawyer. In mid-2014 he had two children at the school.

[52] Mr Bates said that on 11 June 2014 the Chair, Ms Cornwall, was away, and, although he was not in an acting position, the Respondent contacted him regarding the complaint by Victim 3's mother.

[53] We quote directly from Mr Bates' brief of evidence at this point:

> *"5. I made myself available to talk to Paul about an incident concerning a child at the school.*
>
> *6. I asked Paul for a copy of Mr Harter's employment agreement. I remember reviewing part 10 of the Collective*

Employment Agreement with him. Paul explained to me the incident and what he had done. I was aware of the Board's NAG (National Administration Guidelines] obligations as well.

7. Given my experience in employment cases and in particular my knowledge of the particular difficulties that can arise under the Education Act with its particular requirements, I was very concerned about the process that had to be followed and the powers and obligations involved.

8. I became immediately aware that under clause 10.1 there was a mandatory obligation to address complaints against employees in the manner set out in clause 101. The Board of Trustees was Mr Harter's employer but clause 10.1 provided for a role for the school's principal, Mr Bremer to play.

9. I was acutely aware that decision-making in this context could be subjected to challenge if the process was not followed correctly, and I have been involved in cases where the various responsibilities – who is supposed to do what – are lost sight of. I did not want either Paul or the Board to make the same type of mistake."

[54] We pause at this point to observe that upon the complaint against Harter being raised at the board level it would seem from Mr Bates' evidence that the immediate and almost exclusive focus became the employment issues, that is to say the obligations of the board as Harter's employer and the constraints imposed by those obligations on what could and could not be done. Little attention seems to have been devoted to the obligations arising under the Education Act and the responsibilities which the school, the board and the principal might owe to the children at the school. In our view, this initial response set the tone for what followed.

[55] Mr Bates went on to describe his involvement from this point.

[56] He told us that the respondent briefed him as to his discussion with Mrs 3. He said that following his discussion he took away a copy of the collective employment agreement. He said that he could distinctly recall considering the Education Act when he returned to his office because he was already aware of the contents of *"Part 10"*

(in fact, the relevant part was Part 10A) concerning reporting obligations. Mr Bates said that his review of the legislation confirmed to him that it was the employer of a teacher who had the reporting obligations and he said:

> *"As far as I was concerned this was a matter that rested completely on the Board because this had not been delegated to Paul (and never was subsequently, either)".*

[57] Mr Bates summarised the position he had reached at this stage:

> *"Given the events as described to me, I certainly did not feel that the Board had a basis to report the incident to the Teachers Council at that point in time."*

[58] Expanding on that, he said, in effect, if not in precisely these words, that, having regard to the fact that the obligation on an employer to report arose only when the employer had reasonable grounds for believing that a teacher had seriously misconducted himself or herself, his belief was that it was necessary to embark upon an investigation and for the board to reach that conclusion before it could conclude that it was obliged to report.

[59] Mr Bates explained that a board meeting was scheduled for 16 June 2014, and he obviously concluded that the board could address the matter then.

[60] In the meantime of course, on 13 June 2014, the respondent had met with Victims 4 and 5.

[61] Mr Bates told us that he was informed about this, and the respondent's initial meeting with Mrs 4, prior to the 16 June 2014 meeting.

[62] He explained that the board's response to the situation when it came up for discussion on 16 June 2014 was to resolve to appoint a committee to embark upon an investigation. Mr Bates was appointed to convene the committee. The other members of the board appointed to the committee were Ms Kath Eaton and Mr Bill Roberts. The respondent was not a member.

[63] Mr Bates told us that as at 16 June 2014 the board's collective view remained that it was not in a position to determine whether or not there were reasonable grounds for believing that Harter had seriously misconducted himself and therefore that there was no basis for reporting anything to the Council.

[64] The next day, 17 June 2014, presumably at the committee's behest, Mr Bates had a meeting with the respondent and Harter. From Mr Bates' evidence it would seem that this was a short meeting, the principal purpose of which, so far as he was concerned, was to secure an agreement with Harter that he take leave.

[65] The Tribunal makes no criticism of this. It appears to us that from the school's perspective this was an appropriate course of action, no doubt perceived to ensure that there was no ongoing threat to children and at the same time facilitate the investigation.

[66] Mr Bates explained that he drafted a letter for the respondent to write to Harter on 18 June 2014. That letter set out the nature of the complaint which had been made, thereby delineating the scope of the investigation and requesting a meeting with Harter at which his response would be expected. In other words, the committee's investigation got off to a predictable start.

[67] As Mr Bates said, the school, the board, the committee and the respondent were dealing with a very difficult situation, in which they were obliged to act fairly.

[68] He explained that the committee met on 19 June 2014 with the respondent present to keep notes and that the board convened later the same day to discuss the outcome. He said that at that meeting there was *"… a robust discussion…"* concerning the board's legal obligations, including its reporting obligations, and child safety. The respondent was excluded from much of this meeting.

[69] Mr Bates then returned to the question of the board's reporting obligations:

> *"31. As far as we were concerned this was not Paul's call because he was not the employer. At that point in time the issue about whether we needed to report to*

the Teacher's Council was a live consideration and we all agreed that we did not have reason to believe that Mr Harter had had "engaged in serious misconduct" . The Board (through the committee) had not yet interviewed him, and we were also aware that the parents of the girls did not want to become involved in the investigation.

32. I had specifically discussed the situation with Paul about the need to obtain on the record statements from the subsequent children involved, and what had been reported to us in that regard had not been conveyed to Charles Harter due to the reluctance of parents becoming involved.

33. We debated this predicament at length because as Mr Roberts said, we could not "unknown" these concerns.

34. The Committee did not think that we had reached the threshold required for the mandatory reporting at that point in time but it was still a matter that was on the table and might be triggered the further we went into the investigation.

35. We certainly had not ruled out recommending to the Board a mandatory report but at the point in time did not consider that point had been reached. We could only report to the Teacher's Council if the threshold had been met."

[70] He said that by this time he had become aware of the protocols which existed between various public and private entities within the education sector concerning the reporting of child abuse. He said he was also aware that s15 of the Children, Young Persons, and their Families Act 1989 provided that *"any person who believes that a child or young person has been, or is likely to be, harmed … abused etc may report the matter to a social worker or a constable."*

[71] Mr Bates continued:

> *"38. Again on the evidence which we had at that point, we did not believe that we should report the matter to a social worker. We had not ruled that option out but the process was very preliminary at this point and involved parents who did not wish their children to be formally involved and the committee as a whole had not interviewed anyone. I have interviewed Mr Harter who had denied any sexual misconduct. His partner was passionately in support of him as well."*

[72] He told us that at this juncture he and the other members of the committee had concluded that they needed to pursue their investigation further before making any judgments in relation to the employment issues involved or whether the circumstances could be or should be reported to the Council or the authorities.

[73] Mr Bates said that the next event which occurred so far as he was concerned was that he was contacted by the respondent on 21 June 2014 with a concern about Harter's mental health. Apparently, the respondent asked whether it was appropriate for him to visit Harter and Mr Bates told him that it was. He said that the respondent had expressed concern about Harter possibly being suicidal. He said that in light of these developments he had further discussions with the other members of the committee, presumably to keep them informed and to discuss how to proceed.

[74] He said that at about this point he made contact with a local mediator, Mr Lance Peterson, to see whether Mr Peterson could convene a mediation involving the school and Harter at short notice.

[75] Mr Bates told us that around this time Harter contacted him directly and expressed a wish to return to work. He said that he had persuaded Harter that it was in his best interests to remain on leave until a mediation could be arranged.

[76] Mediation was arranged at short notice and took place on 24 June 2014. Of course the Tribunal is ignorant of what transpired at the mediation. All we know is that the contract of employment between the board and Harter was terminated, and that the board

communicated with all concerned in the terms set out in the terms described by Mrs 2.

[77] Mr Bates confirmed that the board made a mandatory report to the council by letter dated 11 August 2014 *"… on legal advice from Russell Fairbrother QC, after the board learned of other complaints about our former employee, Mr Harter."*

[78] He concluded his evidence in these terms:

> *"… Mr Bremer observed his responsibilities as principal. Although he was a member of the Board, he was not a member of the appointed committee. Given his involvement in collecting evidence, we did not want to be compromised in our investigation by having him on the committee. I believe he was appropriately excluded from the decision-making role vis-ā-vis "employer".*

Respondent

[79] The respondent began by providing details of his professional background. In essence he has been a teacher for somewhere in the order of 35 years, and has had five principalships, the principalship of Havelock North School being his fifth and longest. He was appointed to that position at the beginning of 2004 and left in mid-2015.

[80] He told us that in his entire career he had never been confronted with a situation such as the one involving Harter. He said that whilst he had a good understanding of the school's contractual obligations as an employer and its policies he did not have a good understanding of the provisions of the Education Act relating to reporting and, we infer, other relevant legislation.

[81] The respondent explained to us the circumstances in which the school employed Harter. He then proceeded to deal with the various events which are relevant to this proceeding.

[82] With respect to the incident in 2012 when it emerged that Harter was giving sweets to children, the respondent told us that he was on sabbatical at the time and the matter was dealt with by his deputy in

his absence. He said he understood that the deputy had spoken to Harter and instructed him to put a stop to the practice. He said that he was satisfied that the matter had been dealt with appropriately and that there was nothing more that he needed to do.

[83] The respondent then talked about the complaints concerning Harter throwing chairs. He said that in relation to both of these incidents parents had made complaints, the first in early 2013 and the second in early 2014. In so far as the first incident was concerned he said that he spoke to Harter who admitted having thrown a chair and said that he had done it to get a student's attention. The respondent said that he had reprimanded Harter and that at the time he was satisfied that there would be no recurrence. When he received the second complaint in early 2014 the respondent said that he spoke to Harter again and that Harter again admitted having thrown a chair explaining on this occasion that he had let frustration get the better of him and apologised. The respondent said that he again reprimanded him. He said that he was concerned that this had happened a second time, but that he was prepared to deal with the matter informally because he again believed that there would be no recurrence.

[84] He said that when during the first half of 2014 it emerged that Harter was again offering sweets to students, he spoke to him and once again believed that Harter had ceased the practice immediately.

[85] The respondent evidently treated all four of these incidents as being relatively minor, and ones which he in his capacity as the principal felt able to deal with informally without initiating formal disciplinary proceedings or advising the board.

[86] When cross-examined about his approach he was prepared to accept that he had perhaps treated these matters – or at least the incidents involving throwing chairs – too casually and that, with the benefit of hindsight, he should have taken them more seriously.

[87] The respondent then turned to the reports concerning alleged sexual abuse. Dealing first with the complaint by Mrs 3 on 10 June 2014, the respondent said that he *"… recognised that this was an issue that needed to be investigated and that if what the student said was*

true, it would amount to inappropriate behaviour by a teacher. I did note that while the student was clear that she had been tickled, she was not at all certain about whether Mr Harter had deliberately touched her bottom." He then confirmed that the next day he had reported the complaint to Mr Bates to whom he referred as "the acting Chair".

[88] He continued, referring to his discussion with Mr Bates:

> *"… we decided that the complaint would be discussed in committee with the Board on the Monday, which was a scheduled meeting. We felt this was timely enough to consider the issue and we did not feel the complaint to be at a level where we needed to take further steps in relation to student safety."*

[89] We pause at this stage to observe that it is obvious from the respondent's evidence in relation to this that right from the start he perceived it to be his responsibility to alert the board to the matter and having done so took the lead from Mr Bates who also perceived the complaint to be a matter which the board, as Harter's employer, was obliged to deal with, as opposed to a matter which could be left to the respondent.

[90] The respondent then turned to the disclosures made to him on 13 June 2014 by Victims 4 and 5. He described the way in which these disclosures were made, his initial interview with the students and the subsequent more detailed interviews which he conducted with his deputy, Ms Shona Burrough. At the conclusion of this section of his evidence, he said that when he told the students that he would need to speak to their parents, neither of them wanted him to do so and that he said he would leave it over the forthcoming weekend to enable the students to talk to their parents first, the implication being that he would then do so.

[91] He then summarised his views at this point, saying that he *"… was of course concerned. I was also aware that I needed to keep an open mind."*

[92] The respondent then made the point that Harter was not currently teaching the two students in question and had not done so for at

least eight weeks, and he said that, *"…therefore, while I appreciated the situation needed to be investigated I did not feel that they were in any immediate danger. It was now late Friday afternoon and I did intend to follow up with the parents on the Monday."*

[93] He added that he did not regard it as appropriate to involve the Police at this point.

[94] The respondent then went on to describe his meeting with Mrs 4 on 16 June 2014.

[95] He said that Mrs 4 had explained that she had had a discussion with the mother of Victim 5 and had talked to her own daughter.

[96] The respondent said that he went through what he had discussed with the two students on the Friday and that Mrs 4 confirmed that her daughter had told her the same things. The respondent said that he had told Mrs 4 that he would be following the matter up. He also said that Mrs 4 *"… did not seem particularly concerned. She did not want to make a big thing about it and I got the clear impression that she wanted to leave it be. I got the sense that, based on what her daughter had told her, she did not think anything serious had actually gone on, and that perhaps there had been a degree of dramatisation."*

[97] He then turned to the board meeting on 16 June 2014. He began by saying that he had already informed Mr Bates of the disclosures made to him by Victims 4 and 5, and his meeting with Mrs 4. He then said that the board had gone into committee, and he had explained where things had got to and his view that these matters *"… needed to be addressed by the board. I handed out the notes from the interviews with the three students."*

[98] The respondent said that Mr Bates effectively took charge of the meeting and took the lead. He said that *"…there was discussion in the Board about what was and was not appropriate in the terms of teacher behaviour towards students and various other matters."*

[99] He described the board as having concluded that there was, at that stage, only one complaint, that is to say the complaint concerning

Victim 3, but that they realised that the disclosures made by Victims 4 and 5 could also become complaints.

[100] The respondent said that there was a discussion about the contractual arrangements between the school and Harter and the board's complaints policy, and general acceptance that it was necessary to be guided by these things.

[101] He then said, as Mr Bates had already told us, that the board's decision was to establish a committee to investigate the matter and that he – the respondent – was excluded from membership of that committee. The clear implication of this evidence was that the board had taken responsibility for dealing with the complaint concerning Victim 3 and the disclosures made by Victims 4 and 5, and that he was to do as he was told.

[102] The respondent said that the board instructed him to speak to the parents of Victims 4 and 5 in order to ascertain whether they wanted to take matters any further and to arrange a meeting between Mr Bates and Harter the next morning.

[103] He also said that:

> *"57. There was a very clear consensus amongst the Board members they needed to give Mr Harter a chance to put his side of things before any decisions were made about what actions to take, if there were to be any.*
>
> *58. We did decide to ask him to stand down while he was being investigated. However, no-one on the Board felt that we needed to do any more at that stage."*

[104] The respondent went on to say that at this stage the board still had a high degree of faith in Harter and he gave examples of some views which were expressed.

[105] He also commented that he had not sought external advice from the school's lawyers, the School Trustees Association or anyone else. Although he did not expressly say so, it seems that at least by this stage the respondent's approach to the matter involved recognising

that the board, through its committee, and Mr Bates, had effectively taken control.

[106] The respondent described the meeting that Mr Bates and he had with Harter on 17 June 2014 at which it was agreed that Harter would take leave whilst an investigation proceeded.

[107] He then turned to his meeting on 17 June 2014 with Mrs 4 and Victim 4.

[108] The respondent also described his meeting with Victim 5 and her parents on 18 June 2014.

[109] In relation to both of these meetings, he made the observation, though the Tribunal is not sure of its importance, that Victims 4 and 5 expressed a fondness for Harter.

[110] The respondent said that Victim 5's parents were very clear in saying to him that they did not want to take the matter any further.

[111] He then described his meeting on 18 June 2014 with Mr and Mrs 4. The effect of his evidence was that Mr and Mrs 4, after discussing the matter thoroughly with him, between themselves and Victim 4 herself, made a conscious decision that they did not want to take the matter any further. It will be recalled that Mr 4's evidence was that whilst neither he nor Mrs 4 were especially anxious for their daughter's name to emerge in this process, and expressed that preference, they would have been prepared for this to happen had it been necessary for the purposes of the investigation. The Tribunal places no particular weight on this differently nuanced evidence which is perfectly understandable. No doubt these discussions were tense for everyone concerned, and it is not surprising that slightly different perceptions emerged.

[112] The respondent concluded his evidence concerning the interviews which followed the 16 June 2014 board meeting, by emphasising that he was dealing with intelligent, professional people who were thinking through all the various issues involved. He said that the reactions of the parents and the students throughout gave him no reason to suspect that serial sexual abuse was involved.

[113] He then referred to his letter of 18 June 2014 to Harter which was effectively the commencement of the formal investigation process. He said that Mr Bates had drafted that for him, as indeed Mr Bates had confirmed when he gave evidence.

[114] The respondent then described the meeting which Mr Bates and he had with Harter on 19 June 2014. We do not need to go into detail in relation to this. The essential points are that the respondent played the role of note-keeper at the meeting which appears to have involved a dialogue primarily between Mr Bates and Harter, and that Harter denied any wrongdoing.

[115] He then described the meeting of the committee later on 19 June 2014. He attended only parts of that meeting and was asked to leave at the point where they discussed the substantive complaint and disclosures, and how the committee proposed to address them. Here is the respondent's description of what appears to have been the critical aspect of the meeting:

> *"89. I was asked to leave the meeting so they could talk amongst themselves and I did that. I think I was gone for 20 or 30 minutes.*
>
> *90. When I rejoined them, the sub-committee had decided that they would go to mediation, and I think that [Mr Bates] had already made some phone calls to start organizing a possible date.*
>
> *91. [Mr Bates] had to explain what that meant to me. I have to admit I was not much clearer at the end of his explanation."*

[116] The respondent then spoke of his dealings with Mr Bates and directly with Harter over the weekend of 21 and 22 June 2014.

[117] Then he turned to the board meeting on 24 June 2014. Clearly Mr Bates took the lead insofar as the investigation of Harter was concerned, and the respondent told us that:

> *"103. [Mr Bates] explained his view of the situation. He explained mediation as the way to go*

forward and to sort the situation out. There was discussion about the other two girls' statements, and how to deal with the issues presented by them. The answers all seemed to be that a mediation was the way to do that.

104. There was discussion about money and I was asked about how much Harter earned in a term. I answered that.

105. I was rather lost and I did not really follow much of the discussion."

[118] The respondent then turned to the mediation which Mr Bates had arranged for 24 June 2014. Apparently, the respondent was originally told that he wouldn't be needed but he was then told that he could come. He said that as Harter was one of his teachers he felt that he should be there and so he elected to attend. He said that his understanding was that Mr Bates had allowed him to come as an observer. He told us that he had been advised of the confidentiality obligations which apply to mediations, and that he could not describe how the mediation developed. But he said that what he could say *"… is that the decision-making was made by the Board sub-committee of which I was not a part."*

[119] Then the respondent said that, following the mediation, he *"… was instructed to announce that Mr Harter was leaving for health reasons, and that we wished him well. I complied with that instruction."*

[120] The respondent then went on to describe Harter's departure. Amongst other things, he said that he had tried to meet with Mrs 3 to report where things had got to, but that she did not respond to his attempts to contact her.

[121] He said that even at this stage he did not understand the school's reporting obligations, and did not realise that the school should have filed a report following Harter's resignation. He said that the Chair, Mrs Cornwall, and he had arranged to have *'… a full Board de-brief at our next Board meeting, which was scheduled for the end of July."*

But he told us that because Mr Bates was unexpectedly unable to attend that meeting, no de-briefing took place.

[122] The Respondent went on to address the complaint made by Mrs 2. It will be recalled that the respondent met with her on 31 July 2014. The respondent's description of this meeting was that Mrs 2 wished to ascertain the real reasons for Harter's resignation because her older daughter had expressed misgivings about Harter's behaviour towards her though she did not say why. The respondent's evidence was that from his perspective this was a difficult meeting because he was aware of his obligation to keep what had transpired at the mediation confidential and he could not really tell Mrs 2 anything. He explained that to her and that seems to have ended the meeting.

[123] He told us that he subsequently informed the board of the meeting.

[124] The respondent then described the meeting he had with Mrs 2 and Victim 1's mother on 2 August 2014. He said that the two women had told him that Harter had been giving their daughters private guitar lessons and that their daughters had both reported that Harter had acted inappropriately.

[125] He said that he had told the women that the school had carried out an investigation into the appropriateness of Harter's behaviour in the past. He said that he limited his comments because he felt he should not talk about things about which he was not sure and that he wanted to respect what he perceived to be as the wishes of the parents of Victims 4 and 5 that their daughters not to become involved.

[126] The respondent said that Mrs 2 had made it clear that she believed the matter should be reported to the Police and that he had encouraged her to do that. Finally, the respondent said that he had reported this meeting to the Chair.

[127] He then went on to describe the board meetings on 9 and 13 August 2014. He began by saying that by this stage the Chair had been informed by the Police that they were investigating Harter and the full board met to discuss this. There was discussion about whether or not the school was obliged to report some or all of the matters with which it had been dealing concerning Harter to the Council. The

respondent said that Mr Bates remained of the view that the board had no such obligation in relation to the complaint concerning Victim 3 and the disclosures by Victims 4 and 5, but that it had an obligation to report the new allegations concerning Victims 1 and 2. The respondent said that the board had voted and decided to make a report disclosing the allegations received relating to Harter prior to his resignation and the fact that, since his resignation, further complaints had been received. He said that the board resolved that Mrs Eaton would draft the letter which would be signed by the Chair and himself. That of course is the letter dated 3 September 2014.

[128] Insofar as the board meeting on 13 August 2014 is concerned, this was apparently arranged to discuss the Council's request for a formal report. The respondent said that he wanted to send a formal report. He said that by this stage he had downloaded the form from the Council's website and had completed it in draft. But, he said that he was aware of Mr Bates' view that it was the board who had to make any report. He said the board voted and he was instructed to send the report which he did.

[129] The balance of the respondent's evidence relates to his application for name suppression, and we do not need to address that at this stage.

Mrs Bremer

[130] Mrs Bremer's evidence also concerned the application for name suppression.

Liability

Submissions

[131] As already said, Ms Phipps for the complainant and Mr Martin for the respondent provided the Tribunal with comprehensive written submissions. These could not have contrasted more starkly. Mr Martin's point of reference was employment law, and he focused on the legal relationships within Havelock North School, the roles of the board and the respondent, and their respective obligations in dealing with the situation, and with Harter. Ms Phipps on the other hand approached the case from the perspective of the Education Act and

related subordinate legislation, and focused on the respondent's obligations as an educator.

[132] These contrasting approaches enabled them to arrive at opposite conclusions. Ms Phipps submitted that the respondent failed to discharge his obligation to take all reasonable steps to ensure the safety of children and that his failure to do so constituted serious misconduct in one or more of the ways described in the Notice of Charge. Mr Martin's submission was that the principal legal responsibilities for dealing with the situation rested with the school's board as Harter's employer, and any failings on the part of the board could not be visited on the respondent.

[133] The Tribunal does not propose to outline in detail the way in which these submissions were developed at this stage, because that will emerge when we discuss the approach we take to the case. However, it is important to address an underlying legal issue which emerges from them.

[134] It is by no means uncommon in the law to find that two or more legislative regimes can be applied to the same factual situation, and that the principles which emerge from them are not easily reconciled. This case is an example of such a situation. Approaching it from an employment law perspective, one might ask, who was Harter's employer and therefore had responsibility for dealing with the situation and for example making the judgments as to whether or not there was an obligation to report and, if so, to do so? And of course, the legislation is perfectly clear on this score – ss139AK of the Education Act for example provides that it is the obligation of the teacher's employer. Sticking with an employment law overlay, the next question might be, what steps must an employer (such as the school's board in this case) go through before making a judgment about whether to report possible serious misconduct? An employment law oriented approach is likely to suggest that the board must conduct a procedurally fair investigation (starting with an open mind; putting whatever allegations are involved to the teacher; listening to the teacher's response; weighing up all relevant considerations and ignoring irrelevant considerations) and reach a reasoned and reasonable conclusion that there is reason to believe that the teacher is guilty of serious misconduct.

[135] It is not for this Tribunal to have any view as to the appropriateness or otherwise of such an approach. It is one that has been developed by the courts of general jurisdiction and the specialist employment courts and tribunals over many decades. But, equally, it is fair to say that it has been developed with a view to its application in all employment law environments, and that, whilst it copes well with the majority, it does not tend to accommodate employment situations with particular requirements especially well.

[136] No doubt that is why in certain areas of employment which have such requirements (examples are the armed forces and the Police) special regimes apply.

[137] Although the education sector does not fall into the same category as the examples we have given, it is certainly the case that there are special considerations which apply. The prime example is what Ms Phipps in her submissions described as the obligation of educators to ensure the safety and welfare of students.

[138] Ms Phipps did not describe exactly where that suggested obligation arises from. But the Tribunal accepts that it exists. Section 139A of the Act sets out the purposes of Part 10A. These include the purpose of establishing a regime of professional leadership in the education sector which contributes to a safe environment for children. There is then the definition of serious misconduct in s139AB to which we have already referred. The primary focus of this provision is the safety and welfare of children, especially when coupled with, as it must be, r9(1) of the New Zealand Teachers Council (Making Reports and Complaints) Rules which sets out the Council's criteria for reporting serious misconduct, the vast majority of which concern the safety and welfare of children. The New Zealand Teachers Council's Code of Ethics too expressly puts the safety and welfare of children at the forefront of matters which educators must be cognisant of. In addition, in this case, there are the school's policies which are referred to in the agreed statement of facts.

[139] Plainly, then, there is the potential for a clash between an employment law-orientated approach and an education-orientated approach in certain situations. This type of potential conflict is not

something to which the law is blind, or has not grappled with. Examples of the courts addressing situations in which apparently conflicting legislation exists are to be found in *Trustees Executors Ltd v Official Assignee* [2015] NZCA 118 (apparent inconsistencies between the Insolvency Act 2006 (and subordinate legislation) and the Kiwisaver Act 2006 (and subordinate legislation)); *Jetstar Airways Ltd v Greenslade* [2015] NZCA 432 (Maritime Transport Act 1994; Land Transport Act 1998); and *Reay v Minister of Conservation* [2015] NZCA 641 (Conservation Act 1987; Fisheries Act 1996). The struggle in such situations is to ensure that all of the provisions of the legislation in question are given proper effect. At a very general level, the process of synthetisation tends to resolve conflicts on the basis that general obligations make way for, or are supplemented by, more particular obligations

[140] In the situation with which the Tribunal must deal in this case, we accept that there is room for the application of employment law and great care must be taken – as Mr Martin urged upon us in his submissions – to ensure that responsibilities which were clearly those of the board as Harter's employer are not visited on the respondent so that he becomes in effect responsible by proxy for any failings on the board's part. Equally, our view is that, outside the realms of employment law, the respondent had obligations as an educator and the school's principal, which, as already described, focus on the safety and welfare of children.

Burden and Standard of Proof

[141] The principles relating to the burden and standard of proof in professional disciplinary proceedings are now too well settled to require detailed exposition here.

[142] As the complainant, the CAC carries the burden of establishing the charge it has laid from beginning to end. It must do so to the civil standard, that is to say on the balance of probabilities. However, that is not a fixed standard, and the more serious the allegations made the more cogent the evidence necessary to establish them. Here, the allegations are of the most serious kind. What is said is that a principal has been so derelict in the discharge of his duty that

he has or might have endangered vulnerable young students to the point where his neglect must be regarded as misconduct.

Analysis of Charges

[143] The starting point is that there is only one charge –serious misconduct as defined in s139AB.

[144] There are then four interrelated allegations, which we summarise as being that the Respondent:

- Failed to ensure that the board complied with its reporting obligations (Notice of Charge, para 3.1);
- Failed to inform the Police or other authorities of Harter's behaviour (para 3.2);
- Failed to minimise the risk of harm to students (para 3.3); and
- Failed to ensure that the school reported openly and honestly to the school community as to the reasons for Harter's leave and the subsequent termination of his contract of employment (para 3.4).

[145] Finally, each of those allegations is particularised. A number of these particulars are to be found under more than one of the four allegations.

[146] The Tribunal makes no criticism of the form of the Notice of Charge. It focuses on the ways in which the complainant says that the respondent's behaviour constituted serious misconduct. And, that is as it should be. But, the approach is not especially conducive to a clear analysis of the case.

Discussion

[147] We prefer to begin our analysis by reference to the events which transpired and with which the respondent was faced.

[148] There are seven key events:

- The first occasion some time in 2012 on which a complaint was made – by the then Chair of the board – concerning Harter giving his students sweets;

- The first occasion during the first quarter of 2013 when a complaint was made – by a parent – concerning Harter throwing a chair;

- The second occasion during the first quarter of 2014 when the respondent became aware that Harter had again thrown a chair;

- The second occasion some time in the first half of 2014 when the respondent became aware that Harter was again giving his students sweets;

- The complaint concerning Victim 3 which was made on 10 June 2014;

- The disclosures by Victims 4 and 5 on 13 June 2014;

- The disclosures made in connection with Victims 1 and 2 on 31 July 2014.

[149] The first four of those events do not feature in the Notice of Charge, and, in any event, can be addressed very briefly.

[150] The first complaint concerning Harter giving sweets to children arose at a time when the respondent was on leave. The matter was dealt with by his deputy. It was dealt with informally. Effectively, Harter was told to cease the practice and it was left at that. When the respondent returned from leave he was made aware of the complaint and took no further steps. In the Tribunal's view, no serious criticism can be levelled at the respondent's actions in relation to this. His deputy had dealt informally with the matter and it appears to us that it was entirely appropriate for the respondent to leave things there. It was a minor matter.

[151] Turning to the first complaint regarding Harter throwing a chair, whilst this was undoubtedly a more serious incident, we do not agree with Mr Forbes that it was such a serious matter as necessarily to demand a formal disciplinary investigation. We can certainly see

that a principal in the respondent's position might have thought it appropriate to go down that route. But, having heard all the evidence, it appears to us that this incident was one which might equally have been managed less formally. In short, our view is that it was not outside the bounds of reasonableness for a principal to deal with it informally with a stern warning not to behave in such a way.

[152] We take a somewhat different view of the second occasion on which a complaint was received about Harter throwing a chair. It appears to us that against the background of the first such incident, a principal in the respondent's position might be expected to see in this that he or she had a teacher on the staff who was unable to keep his or her temper in check, and that there may be a risk to children. In our view, this was a matter which should have been dealt with by way of a formal disciplinary investigation (which would have meant involving the board). If it were found, as seems likely, that the teacher had endangered students, a warning - perhaps even a formal written warning – would have been justified. Thus, we take the view that the respondent's reaction to this event was not appropriate. From his evidence, we discern that the respondent might not disagree, at least with the benefit of hindsight.

[153] As to the second complaint concerning Harter giving sweets to children, whilst the respondent may well have taken a different approach to this complaint too, if for no other reason than that it demonstrated a disregard on Harter's part for the instruction given to him on the earlier such occasion, we are disinclined to think that this incident would have justified the respondent in initiating a formal disciplinary process.

[154] The fact that the Tribunal may not regard the respondent's approach to all of these incidents as appropriate by no means indicates that the respondent's behaviour constitutes serious misconduct. In any event, as we have already said, these events do not feature in the Notice of Charge.

[155] That brings us to what we regard as the serious issues in this case and, in particular, the first complaint of possible abuse on 10 June 2014.

[156] It might be as well at this point to recapitulate what happened in the period between 10 and 16 June 2014, which appears to the Tribunal to be the most critical period of time, and the period of time during which the events occurred which set the pattern for what followed.

[157] On Tuesday 10 June 2014 the respondent had a meeting with Mrs 3, the mother of Victim 3. The respondent's record of that meeting, which we have no reason to believe is not accurate, recorded that Mrs 3 explained that her daughter had told her that she had stayed behind in class, that Harter and she had been the only people in the classroom and that on some pretext Harter had tickled Victim 3 under the armpits and *"… tickled her bum for two seconds which made her feel uncomfortable".* Mrs 3 had been told by her daughter that she – Victim 3 – thought it might have been an accident but was unsure.

[158] The respondent's reaction on receipt of this complaint was to notify the board, and he did so on Wednesday 11 June 2014. The Chair was away and the respondent elected to notify the person who he perceived to be the acting Chair, Mr Bates. The board was due to meet on Monday 16 June 2014 (three working days later), and it would seem that both Mr Bates and the respondent believed that, given the relatively low key nature of the complaint, there was no need to take any steps until then, and that the board could decide how to deal with the situation. Then, on Friday 13 June 2014, the respondent met with Victims 4 and 5 and they expressed concerns of a similar nature. The respondent's immediate reaction was to ask Victims 4 and 5 to retrieve the letter they told him they had left for Harter (understandably, to ensure that the letter did not fall into the wrong hands) and then to meet with them again – individually – in the company of his (female) deputy in an attempt to clarify their disclosures. The respondent did not contact the parents of Victims 4 and 5 over the weekend because, he told us, they asked him not to, and he decided to give them the weekend to talk to their parents.

[159] Prior to the scheduled board meeting on Monday 16 June 2014, Mrs 4, the mother of Victim 4, met with the respondent to say that she was aware of the disclosures that her daughter and Victim 5 had made but that they (which the Tribunal takes as a reference to Mr and Mrs 4) were *"not making too big a thing of the situation".* The

respondent told Mrs 4 that matters had been elevated to, and would be dealt with by, the board.

[160] The board met later on Monday 16 June 2014 and discussed both the complaint concerning Victim 3 and the disclosures made by Victims 4 and 5. Prior to this the respondent had informed Mr Bates of the disclosures by Victims 4 and 5 and his meeting with Mrs 4. The board minutes record that the board perceived this, quite rightly in the Tribunal's view, as being a matter which required investigation and established a committee to be convened by Mr Bates and consisting of him and two other members. The respondent was expressly excluded from membership of that committee. Plainly the board, and Mr Bates, assumed responsibility for investigating these complaints and making a decision as to what should be done.

[161] It must be remembered that this was a school which operated on the basis that the board was the employer not only of the principal but of all teachers. Other schools operate differently. In many schools, the board is the employer of the principal but delegates to the principal the responsibility for employing all other staff. So, in the case of Havelock North School, the board was quite right from a legal point of view to proceed on the basis that – as Harter's employer – it was responsible for discharging its obligations at employment law and under the collective employment agreement, and making the judgment required as to whether, and if so when, and in what terms, it was obliged to report matters to the Council.

[162] We have the benefit of Mr Bates' evidence of course. He told us in the clearest possible terms that the board assumed these responsibilities and expressly told the respondent that it was not for him to take matters any further. The board determined, as it was perfectly entitled to do, that it would form a committee in order to progress matters, and expressly excluded the respondent from membership of that committee.

[163] In such circumstances, where it was the board which had the relevant legal obligations and where the board and Mr Bates were assuming full responsibility in directing how matters would proceed, it is very difficult to see how it can be suggested that the respondent breached his obligations or acted in a way which constitutes serious

misconduct by accepting that that was how these matters were to be dealt with.

[164] As Mr Martin submits, on any view, it was not open to the respondent to do otherwise.

[165] The real question which arises at this stage is whether, outside the realms of employment law and questions of whose responsibility it was to pursue the investigation and decide whether or not to report to the Council, it can be said that the respondent failed to discharge his more particular responsibility as an educator and the principal of the school to take all steps available to him to ensure the safety and welfare of children by, for example, reporting the matter to the Police (or possibly CY&F).

[166] In order to consider that issue, it is necessary to return to the narrative.

[167] The board having resolved to investigate this matter in the way that it did at its 16 June 2014 meeting, the following day, Tuesday 18 June 2014, the respondent wrote Harter a letter which had been drafted by Mr Bates. This was an orthodox letter initiating a formal disciplinary investigation. The next day, Wednesday 19 June 2014, Mr Bates and the respondent met with Harter. The purpose of this meeting, according to both Mr Bates and the respondent, was to secure Harter's agreement to take leave during the course of the investigation. This too is a conventional approach in the employment arena. Harter agreed to this course. The arrangement was that the board would continue with its investigation and that until it was complete Harter would take paid leave, the dual purposes of this being to facilitate the investigation and ensure that Harter was not in contact with children in the school environment.

[168] So, by this stage, not only had the board and Mr Bates assumed in every possible way complete responsibility for dealing with the complaint concerning Victim 3 and the subsequent disclosures by Victims 4 and 5, and effectively told the respondent that he had no substantive role to play in that process, Mr Bates and the respondent had between them secured a position where Harter was not at the school and to that extent no longer presented any risk to children.

[169] Mr Bates' approach from this point was plainly to begin thinking about how to bring this matter to a conclusion in a way that protected the school.

[170] That should not be interpreted as a criticism. Mr Bates, whilst a member of the board, is not an educator. He is a lawyer and apparently a specialist in the employment area. The approach he adopted is probably the approach that would have been adopted by many with his background.

[171] The members of this Tribunal are not altogether unfamiliar with employment law and the way in which the overwhelming majority of employment disputes are resolved, and it comes as no surprise to the Tribunal that Mr Bates' approach and advice to his fellow board and committee members was to move things towards a private mediation with a view to a confidential negotiation and ultimately to a settlement. That, of course, is exactly what happened. Mr Bates arranged a mediator, proposed mediation to Harter, and, on 24 June 2014, a mediation took place. As we have already said, the Tribunal is unable to look past the cloak of confidentiality which applies – and quite rightly applies – to all mediations. So we know nothing about what transpired. All we know is that a settlement was reached which involved the termination of the board's contract of employment with Harter and that the board (and we deliberately refer to the board in this context) communicated with the world by way of a letter signed by the respondent, which, though it may have had a germ of truth in it in explaining Harter's departure by reference to his health, was far from a complete disclosure of what had transpired. We have no doubt that one of the things negotiated at the mediation was the terms of that letter, and that, having settled the matter on those terms, the school, the board, the committee, Mr Bates and the respondent had no choice, from a contractual perspective at least, but to communicate the reasons for Harter's departure in those terms.

[172] That is not to say that the Tribunal is condoning the approach which was adopted. In our view it was quite wrong for the school to have allowed itself to enter into a settlement with Harter on terms which effectively precluded it from communicating openly and honestly with the school community, because this kept the parents of children at

the school, and everyone else, in the dark as to the real reason for Harter's departure.

[173] The board having entered into a settlement agreement with Harter, that did not absolve the board of its statutory obligations in relation to reporting to the Council. The evidence we have is somewhat opaque as to the board's views of that. However, that is not something in respect of which we have to make a determination. The settlement reached may have enabled everyone concerned to adopt the somewhat artificial stance that the board never reached the point of making a judgment as to whether or not Harter's behaviour constituted serious misconduct and therefore that it was not obliged to make a report to the Council under s139AM. But nor did it make a report under s139AK under which it was plainly obliged to do so following Harter's departure (or on receipt of the complaints made concerning Victims 1 and 2 after his departure as it should have done under s139AL).

[174] In the Tribunal's view, these were clear breaches by the board of its statutory obligations. The sections in question could not be clearer. It is no surprise to the Tribunal that when, at a later stage, the board took advice, apparently from Russell Fairbrother QC, as to its obligations, Mr Fairbrother told them that they were obliged to report, which they eventually did. The only surprising thing is that the board needed Mr Fairbrother or anyone else to tell them that.

[175] But, that did not happen until sometime later and not before the developments involving the complaint by the parents of Victims 1 and 2.

Conclusions on Liability

[176] Against that background, we return to the four allegations made in the Notice of Charge.

[177] As summarised earlier, the first allegation relates to the respondent's failure to ensure that the board complied with its reporting requirements. In our view the complainant has not made out this allegation. This was a legal obligation of the board, not the respondent. On the evidence, it is overwhelmingly clear that the board and Mr Bates understood it to be the board's responsibility

and assumed that responsibility. Although we have some evidence of the interplay between the board, the committee, Mr Bates and the respondent, and it is probably fair to say that the respondent could have done more, we are not prepared to conclude that the respondent breached his obligations to the extent of serious misconduct effectively by not exercising sufficient influence over the board. We are doubtful that even if the respondent had done more, it would have made any difference.

[178] The second allegation brings into sharp juxtaposition the employment related obligations of the board on the one hand and the independent responsibilities which the respondent owed in relation to the safety and welfare of the school's children. In our view, the complainant has made out this allegation because it seems to us that whatever obligations the board may have had of an employment nature in dealing with Harter and in relation to its reporting obligations, there came a point when the respondent had sufficient information to indicate on any objective view that Harter might present a serious threat to students. Precisely when that point was reached may not be of the first importance. We are inclined to think that it may have been reached as early as 10 June 2014 when Mrs 3 made her complaint. But, at very least, it was reached when Victims 4 and 5 made their disclosures to him three days later. In our view, irrespective of how the board was or was not discharging its obligations, at that point, the respondent had a duty as an educator and the principal of the school to report Harter to the authorities (the Police and possibly CY&F), taking advantage if this was necessary of the immunity conferred by s15 of the Children, Young Persons and their Families Act 1989. We conclude that the respondent's failure to do so constituted serious misconduct. Plainly it either adversely affected or was likely adversely to affect the wellbeing or learning of students. In our judgment, it also reflected adversely on the respondent's fitness to be a teacher. And, we are in no doubt that his failure to do so was an omission which brought, or is likely to bring, discredit to the profession. Accordingly, in our judgment, the respondent's failure to take that step on 10 June 2014 when the complaint was made by Mrs 3 concerning Victim 3, or on 14 June 2014 when Victims 4 and 5 made their disclosures to him, constituted serious misconduct on his part.

[179] For the same reasons we take the view that the allegation in paragraph 3.3 if the Notice of Charge is made out, but to the extent only that this allegation is made on the basis of the respondent's failure to report Harter to the authorities.

[180] We are not satisfied that the fourth allegation in paragraph 3.4 of the Notice of Charge is made out, again because the legal and practical responsibility for the terms in which the school communicated with the wider school community was squarely with the board as opposed to the respondent.

Penalty

[181] The issue of penalty can be dealt with very shortly.

[182] From the outset the complainant has taken the position that this is a test case. It has accepted as is clearly appropriate that the respondent knew nothing of Harter's offending and that if he is guilty of serious misconduct that results from neglect on his part rather than any active wrongdoing – in lawyer's language, non-feasance as opposed to misfeasance.

[183] That being so, the complainant has made it clear that it does not seek deregistration.

[184] In the Tribunal's view it is highly relevant to take into account the fact that the respondent is a teacher with 35 years' experience, a number of principalships and a hitherto unblemished record. We have concluded that he failed to discharge his responsibility by failing to report Harter to the authorities at a point when he had sufficient information in front of him to recognise, and should have recognised, that Harter presented a risk to children and, whatever approach the school's board was taking in dealing with the employment situation, it was incumbent upon him to inform the authorities and in doing so initiate an enquiry which would both reveal whether or not Harter was guilty of sexual abuse of children in the past and make sure that, if he was, there was no ongoing abuse. And we have concluded that the respondent's failure to discharge that duty amounts to serious misconduct.

[185] In the Tribunal's view, that conclusion, in and of itself, is a serious punishment, and we do not regard it as being necessary to go any further than to censure the respondent.

Costs

[186] Costs are reserved. Before either party makes an application for costs, counsel may wish to reflect on the fact that the complainant has made it clear that it regards this as a test case and that whilst the Tribunal has concluded that the complainant has made out its case of serious misconduct it has not made out all elements of that charge.

[187] If there is to be an application for costs then that should be made by a full application, affidavit evidence and supporting memorandum within 10 working days of the date of this decision. Any response should be filed and served within a further 10 working days.

Publication

[188] As already stated, the respondent filed an application for the suppression of his name, the name of the school and other details which would lead to his identification prior to the hearing.

[189] The respondent's evidence focused on this. He said that these events were traumatic for the school and the school community, and in particularly for the victims and their families. He told us that the school had worked hard to provide support for everyone involved, and that, by the time he left the school, the healing process had commenced. He said that any further publicity about this matter would not help this process. He said that there had been a great deal of media attention when all of this happened and that had made matters more traumatic for everyone involved. He told us that in his view further publicity would *"… only hurt people all over again."* Then he said that naming the key people involved (he referred in particular to Mr Bates, himself and his wife) would have the same effect as naming the school.

[190] Mrs Bremer spoke poignantly about the effect that this whole matter had had on her husband, herself and their family, and how stressful it had been. She gave us examples of the stress which it is

unnecessary to set out in this decision and she said that the whole matter had had adverse health consequences for her and that her health was only just settling down.

[191] As already mentioned, the current Chair of the school's board, Mr Nicholas Jones, provided an affidavit supporting the respondent's application for name suppression. He told us that the board's primary concern is that further publicity would have a detrimental effect on the victims and the school's current students, as well as on the school itself and its staff. He too said that further publicity would be a set-back for the progress that the school has made since these events.

[192] At the conclusion of the hearing the Tribunal heard submissions from Mr Martin in support of the application for name suppression.

[193] Having retired to consider the application, the Tribunal returned and informed the parties that it was not prepared to make a permanent order for the suppression of the name of the school or the respondent or any other aspect of the case except the names of the Victims and their families.

[194] Essentially, the Tribunal reached that conclusion on the basis that it was not satisfied that the default position provided for in r 32(1)(c) of the New Zealand Teachers Council (Conduct) Rules, that the Tribunal's decisions are published in full except where the Tribunal concludes that in the public interest or the interests of any person any particular information should be suppressed, should be departed from.

[195] There is no doubt that these events have been traumatic for all concerned, most importantly for the victims and their families, but also for the school, the board, the staff and students, the respondent, Mrs Bremer and their family. And it is natural that the current board and the respondent should wish to avoid any further publicity. But the reality in this case is that there has already been a considerable amount of publicity about this matter and the only new feature which will emerge from the Tribunal's decision is its conclusion that the respondent did not discharge his responsibilities as a principal of the school by failing to report Harter to the

authorities. That is not something in respect of which we are satisfied a suppression order would be appropriate.

[196] Of course that conclusion does not affect the application of the provisions of the legislation which expressly provide for the suppression of the names of the victims and any identifying information and in order to support that we propose to make a specific order suppressing the names of the victims, their families and any information which might lead to their identification.

Conclusion

[197] The Tribunal's formal orders are therefore as follows:

1. Pursuant to s404(1)(b) of the Education Act 1989 the Tribunal censures the respondent;

2. Costs are reserved on the basis described in this decision;

3. Pursuant to rule 32(1) of the New Zealand Teachers Council (Conduct) Rules 2004, the Tribunal orders the suppression of the names of the victims and their families and any information which might lead to the identification of their names.

_____

Kenneth Johnston
Chairman

NOTICE

1. A person who is dissatisfied with all or any part of a decision of the Disciplinary Tribunal under sections 139AU (2) or 139AW of the Education Act 1989 may appeal to a District Court.

2. An appeal must be made within 28 days of receipt of written notice of the decision, or within such further time as the District Court allows.

3. Subsections (3) – (7) of section 126 apply to every appeal as if it were an appeal under subsection (1) of section 126.