EDUCATION COUNCIL
NEW ZEALAND | Matatū Aotearoa

Complaints Assessment Committee (CAC) v Jenkinson
NZ Disciplinary Tribunal Decision 2018/14

Teachers are expected to display a high standard of professional behaviour and integrity; and be honest and candid when faced with conduct allegations.

Mr Jenkinson was employed as a deputy principal at the time of the complaint and when he tried to deceive his employer during an investigation into the complaint.

A complaint was received that students had discovered pornographic material on Mr Jenkinson's personal mobile phone when using it as a calculator during class. Mr Jenkinson denied this allegation saying his phone had a virus. The Teaching Council's Complaints Assessment Committee (CAC) subsequently investigated the allegation but considered that there was insufficient evidence to conclude there was pornographic material on the phone. No further action was taken.

The School also undertook an investigation into the allegation. Mr Jenkinson provided the principal with a signed letter on Vodafone letterhead, which claimed an examination of his phone by a "Mr Parker" had found a virus was responsible for the material on the phone.

The School took steps to validate the letter with Vodafone, while Mr Jenkinson continued to assert the letter was legitimate. The School were advised Mr Parker was not employed by Vodafone. Mr Jenkinson then accepted he had made up the letter, stating that he "was frightened and panicked."

The CAC referred Mr Jenkinson to the New Zealand Teachers Disciplinary Tribunal (Tribunal) for his conduct in misleading the School, by providing the letter, in a way that brings the teaching profession into disrepute.

The Tribunal agreed Mr Jenkinson's conduct amounted to serious misconduct. The Tribunal considered that Mr Jenkinson "instigated a relatively sophisticated deception to subvert the School's investigation. However, it was the School's vigilance that frustrated his efforts."

The Tribunal found that his attempt to mislead the School is "behaviour that strikes at the heart of the expectation for honesty and integrity that the profession and public have of practitioners."

The Tribunal censured Mr Jenkinson and suspended his practising certificate for six months. He must also inform any employer or prospective employer of this proceeding and provide them with a copy of this decision. The Tribunal ordered that the outcome be annotated on the register for three years from the date of the decision, and Mr Jenkinson to pay 40 per cent of the CAC's costs, and $458 to the Tribunal.

NZTDT 2018/14

BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

UNDER	the Education Act 1989
IN THE MATTER	of a charge of serious misconduct referred by the Complaints Assessment Committee to the New Zealand Teachers Disciplinary Tribunal
BETWEEN	**THE COMPLAINTS ASSESSMENT COMMITTEE** Referrer
AND	**TIMOTHY JOHN JENKINSON** Respondent

DECISION OF THE TRIBUNAL

Tribunal:	Nicholas Chisnall (Deputy Chair), David Turnbull and David Hain
Hearing:	On the papers
Decision:	17 September 2018
Counsel:	C Paterson and J Simpson for the referrer A Parlane for the respondent

Introduction

[1] The referrer, the Complaints Assessment Committee (the CAC) charges the respondent, Mr Jenkinson, with serious misconduct and/or conduct otherwise entitling the Tribunal to exercise its powers. Its notice of charge alleges that the respondent:

> [During] an investigation by Otorohonga College [the School] into a complaint made against him, provided the School with a fraudulent letter relating to that complaint with intent to mislead or deceive it.

[2] Mr Jenkinson agreed to this matter being heard on the papers and accepts that his behaviour amounts to serious misconduct.

The facts

[3] What follows is taken from the agreed summary of facts provided by the parties.

[4] The respondent was employed in a Deputy Principal position at the School from 25 January 2016 until his resignation on 2 June 2017.

[5] On 24 February 2017, the Principal of the School wrote to the respondent to advise him of a complaint that had been made. The Principal requested that Mr Jenkinson provide a response during a meeting scheduled to take place on 3 March 2017.

[6] The complaint was that students discovered pornographic material on the respondent's personal mobile phone when using it as a calculator during class. The respondent denied the allegation and stated that his telephone had a virus. The CAC subsequently investigated this allegation, but considered that there was insufficient evidence upon which to conclude that pornographic material was held on the phone when it was provided to the students to use. Therefore, the CAC took no further action.

[7] The School undertook its own investigation into the complaint. It is the respondent's actions during the course of that investigation that form the basis of the charge before the Tribunal.

[8] On 27 February 2017, the respondent provided the Principal with a letter on Vodafone letterhead. It was signed by "Lester (Skip) Parker, Technician, Vodafone Ltd" and describes the purported examination of the

respondent's phone by "Mr Parker". The letter proffered an innocent explanation – a virus - for the presence of the material on the phone.

[9] On 21 March, the Principal advised the respondent that the School needed to validate the authorship of the letter from Vodafone. In response, Mr Jenkinson replied:

> They were extremely rude to me when I ran back to get the information about an acknowledgement that he had worked there and did not want to even divulge that he had worked for them at all. In the end after some considerable pushing they reluctantly said, "he must have worked here and has moved overseas". I then said that it was all very odd and told them what had happened and that he had written an explanation of what happened to my phone. They then said no one at Vodafone would have done that because it was against company policy to do this. I am more than a little perturbed by this and now no one admits that he worked for them it is entirely bizarre [sic]. Therefore I am forced to withdraw that evidence as explanation for any student found on my now ex-phone. Most perplexing …

[10] The Principal made direct enquiries with Vodafone regarding the authenticity of the letter. On 22 March, the respondent sent a text message to the Principal stating:

> [Have] been lying here thinking and worrying about what's happened about that letter. No one seems to know who this guys [sic] is. So the best thing to maintain my integrity as to withdraw the letter altogether and carry on insisting on my innocence are deliberately having porn on my now dead phone. I do not want this hanging over my hanging over my head any longer, it is starting to affect my health which is no good at all. I understand the process. Hopefully the outcome will be positive. Regards Tim J.

[11] On 23 March, the Principal received an email from Vodafone confirming that it had no employee by the name of Lester Parker. Vodafone's email stated:

> Our internal assessment indicates there is sufficient information available at this stage to conclude that the document is false and has been created to mislead or deceive.

[12] The Principal duly provided the email from Vodafone to Mr Jenkinson, who responded:

> I did make up the letter from Vodafone not to cover up that I had been accessing porn because I hadn't but because I was frightened and panicked. It was a stupid and irrational thing to do and for that I am truly very sorry and ashamed…

[13] On 6 April 2017, Mr Jenkinson provided the School's Board of Trustees with a written response. It stated:

[redacted], a series of events led to my having an emotional and physical breakdown. Being presented on 22 February 2017 with [redacted] allegation brought me into a confused and panicky state, leading to emotional stress and faulty decision-making. I became irrationally afraid that even though I was innocent, no one would believe me.

I tried to find out on the Internet why these sites might have arrived on my phone. It said that viruses don't come on phones. Then I rang Vodafone and the man said, "there is a site that might help you".

I followed the instructions on the website and found that some puzzle games can bring with them when downloaded malware and Trojan viruses.

Any person acting rationally would have taken that information straight to the principal. However, my mind was working overtime and fear was controlling me.

I summarised what I had done to rid the phone of this problem in a letter and then made up a name and put it under a Vodafone logo I found online. In my confused and irrational state, I thought would give more credibility about what had happened rather than just my explanation.

This in no way excuses what I have done by falsifying a letter to the Principal, but provides light on how a normally rational honest person would do such a thing.

I am shocked and ashamed by my actions. I have had intense counselling and inner healing over the past week and have a plan in place that requires me to be accountable to a mentor and continue with counselling so that I can better understand why this happened and avoid a repeat episode. This has been a painful process for myself, my wife and our whanau. I face, and am facing the issues involved and am determined that this will never happen again.

[14] The respondent provided a letter of apology to the Principal. On 25 May 2017, the Principal filed the mandatory report with the Education Council, which was subsequently referred to the CAC for investigation.

[15] The respondent resigned from his position on 2 June 2017. On 20 June, he advised the Council that he was engaging in weekly counselling.

Our findings

[16] Section 378 of the Education Act 1989 defines "serious misconduct" as behaviour by a teacher that has one or more of three outcomes.[1] As was recently affirmed by the District Court, the test under s 378 is conjunctive.[2]

[1] Conduct that adversely affects, or is likely to adversely affect, the well-being or learning of one or more children; or reflects adversely on the teacher's fitness to be a teacher; or which may bring the teaching profession into disrepute.
[2] *Teacher Y v Education Council of Aotearoa New Zealand* [2018] NZDC 3141, 27 February 2018, at [64].

As such, as well as having one or more of three adverse professional effects or consequences, the conduct concerned must also be of a character and severity that meets the Education Council's criteria for reporting serious misconduct.

[17] The Education Council Rules 2016 (the Rules) describe the types of behaviour that are of a prima facie character and severity to constitute serious misconduct.[3] Those that apply in the respondent's case are r 9(1)(h), which describes a teacher's "theft or fraud" and r 9(1)(o), which encompasses "any act or omission that brings, or is likely to bring, discredit to the profession".[4]

[18] While the parties were agreed that the respondent's behaviour constitutes serious misconduct, the Tribunal is required to reach its own view. That being said, we have no hesitation accepting that the parties have correctly assessed the gravity of the conduct.[5]

[19] In terms of the first stage of the test, we are satisfied that the respondent's conduct reflects adversely on his fitness to teach and is of a nature that brings the teaching profession into disrepute when considered against the objective yardstick that applies.[6]

[20] In terms of the second stage of the test for serious misconduct, we agree that the respondent's deception is of a character and severity that engages r 9(1)(h) of the Rules.[7] In *CAC v Leach*,[8] we accepted that was utility in comparing the conduct of the practitioner concerned against the elements of the Crimes Act 1961 offence of obtaining by deception.[9] In

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[3] Rule 9 was amended on 18 May 2018, but this decision refers to the preceding iteration.
[4] The CAC also submitted that r 9(1)(n) applies. It describes "any other act or omission that could be the subject of a prosecution for an offence punishable by imprisonment for a term of 3 months or more". We agree it is arguably engaged, given the nature of the letter.
[5] We have kept in mind that, notwithstanding the parties' agreed position, the burden rests on the CAC to prove the charge, on the balance of probabilities.
[6] *Collie v Nursing Council of New Zealand* [2001] NZAR 74, at [28].
[7] As the CAC observed, the form of r 9(1)(g), which came into effect on 18 May 2018, expressly provides that "acting dishonestly in relation to the teacher's professional role, or committing theft or fraud" is reportable.
[8] *CAC v Leach* NZTDT 2016/66.
[9] Section 240, which provides that everyone is guilty of obtaining by deception, who, by any deception and without claim of right, obtains…any privilege, or any benefit…directly or indirectly.

Leach, the practitioner provided a false appraisal of her performance as Principal to her Board of Trustees. More recently, in *CAC v Clark*,[10] we considered the meaning of the term "fraud" in circumstances where the practitioner sought to subvert the Education Council's processes for assessing suitability for registration. We referred to the various meanings of the word contained in the Concise Oxford Dictionary and considered that most applicable to be, "a false representation to gain an unjust advantage".[11]

[21] The respondent instigated a relatively sophisticated deception to subvert the School's investigation. We acknowledge that Mr Jenkinson did not obtain the benefit that he sought. However, it was the School's vigilance that frustrated his efforts.

[22] The CAC submitted that, "It is well established that professional persons are expected to be honest and candid when faced with conduct allegations". We agree. We also agree with the CAC's submission that there is not a material distinction between the duty of candour that a teacher owes his or her professional body vis-à-vis that in respect to an employer. Moreover, we accept that this expectation of cooperation and honesty applies notwithstanding that the practitioner considers the allegation to be spurious.[12]

[23] On two occasions, we held that a failure to be truthful with the CAC amounted to serious misconduct. The first, NZTDT 2010/17, involved a practitioner who provided false information to the CAC during an investigation. We said:[13]

> [As] we have said in other cases, it is one of the hallmarks of a profession that it takes responsibility for ensuring that its members meet certain standards of conduct. The disciplinary processes involved – such as those contained in Part 10A of the Education Act 1989 – are the foundation for that. The Tribunal regards the maintenance of the integrity of those processes as of the highest importance. It is vital to their integrity that Complaints Assessment Committees and other such bodies can rely on the information they obtain in the course of investigations. In the Tribunal's view, for a teacher deliberately, as this Respondent has done, to forge exculpatory material and provide

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[10] *CAC v Clark* NZTDT 2017/4.
[11] Above, at [29].
[12] The CAC cited what was said by the High Court in *Hart v Auckland Standards Committee 1 of the New Zealand Law Society* [2013] NZHC 83, at [108], for this proposition.
[13] NZTDT 2010/17, 13 August 2010.

> misleading information unquestionably constitutes serious [misconduct].
>
> We have no difficulty in concluding that forgery and the provision of false or misleading information reflect adversely on this Respondent's fitness to be a teacher.
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> In addition to that, there is the further point made by Mr Lewis based on Rule 9(1)(o) of the Rules, and we agree that this Respondent's behaviour has brought, or is likely to bring, disrepute to teachers generally and is entirely inconsistent with any notion of his commitment to society and obligations of trust and responsibility to society and students.

[24] More recently, in *CAC v Teacher C*,[14] which was a case where the practitioner "lied by omission" to the CAC, we said that:

> [206] We agree that the principles articulated in NZTDT 2010/17 apply in the instant case. As we have said on previous occasions, there is an expectation for honesty and integrity owed by practitioners to both the public and to other members of the profession.[15]

[25] The respondent's attempt to mislead the School is behaviour that strikes at the heart of the expectation for honesty and integrity that the profession and the public have of practitioners. We are satisfied that the respondent's behaviour constitutes serious misconduct.

Penalty

[26] The primary motivation regarding the establishment of penalty in professional disciplinary proceedings is to ensure that three overlapping purposes are met. These are to protect the public through the provision of a safe learning environment for students, and to maintain both professional standards and the public's confidence in the profession.[16] We are required to arrive at an outcome that is fair, reasonable and proportionate in the circumstances in discharging our responsibilities to the public and profession.

[27] We accept the CAC's submission that the respondent's creation of the letter was calculated. When the validity of the letter was questioned by the School, the respondent initially maintained the charade that it had been

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[14] *CAC v Teacher C* NZTDT 2016/40.
[15] Applying what was said, albeit in different contexts, in *CAC v Teacher* NZTDT 2016/27 and *CAC v Leach*, above n 8.
[16] The primary considerations regarding penalty were helpfully discussed in *CAC v McMillan* NZTDT 2016/52.

penned by a genuine Vodafone employee. It follows that we cannot accept counsel for the respondent's description of Mr Jenkinson's behaviour as merely a "stupid mistake".

[28] We acknowledge that we must seek to ensure that any penalty we institute is comparable to those imposed upon teachers in similar circumstances. In *Leach,* we were referred to the outcomes in four decisions that involved employment-related fraud by teachers.[17] In addition, we were referred to four decisions by counsel for the CAC: *CAC v Clark*,[18] NZTDT 2013/4, *CAC v Gittins*[19] and *CAC v Thornton*.[20] We acknowledge the inevitable factual distinctions between those earlier decisions and the present. Nonetheless, the comparison tends to affirm that cancellation is the usual outcome in most cases involving deception.[21] Therefore, this is a very finely balanced case, where cancellation is a realistic possibility.

[29] Whether we must cancel a teacher's registration in order to discharge our disciplinary obligations tends to turn on the practitioner's degree of insight into the causes of the behaviour. We have taken into account the following mitigating factors, which, we have decided, have enabled Mr Jenkinson to avoid cancellation by a narrow margin. These features are:

(a) The respondent's belated acceptance of responsibility that he had created the letter, combined with his apology to the School;

(b) The fact that he has been attending counselling; and

(c) His cooperation with the CAC's investigation.

[30] It is not in dispute that censure is warranted. The CAC submits that we should also suspend the respondent's practising certificate for a period of three to six months. We agree that suspension, rather than cancellation, will meet the relevant disciplinary purposes. We have relied upon the fact that in 2010/17 we ordered suspension of the teacher's practising certificate for a year and also imposed a fine. There, the teacher misled the CAC

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[17] NZTDT 2013/12, NZTDT 2014/33, *CAC v Bickford* NZTDT 2016/21 and NZTDT 2016/27.
[18] *CAC v Clark* NZTDT 2017/4.
[19] *CAC v Gittins* NZTDT 2016/59.
[20] *CAC v Thornton* NZTDT 2015/63.
[21] Which is what we said in *Clark*, at [37].

during its investigation of an earlier-made complaint by providing it with a forged letter.[22] Unlike here, the teacher in 2010/17 maintained his denial that he had written the letter. For that reason, we agree that a shorter term of suspension is required in the present case. We therefore suspend the respondent's practising certificate for six months.

The respondent's application for permanent name suppression

[31] The respondent sought permanent name suppression. The CAC opposed the application.

The applicable principles

[32] On 1 July 2014, the default position became for Tribunal hearings to be conducted in public and the names of teachers who are the subject of these proceedings to be published.[23] The Tribunal's powers around non-publication, for the purposes of this proceeding, are found in s 405 of the Education Act. We can only make one or more of the orders for non-publication specified in the section if we are of the opinion that it is proper to do so, having regard to the interest of any person (including, without limitation, the privacy of the complainant, if any) and to the public interest.

[33] The purposes underlying the principle of open justice are settled and thoroughly enumerated. It forms a fundamental tenet of our legal system. As we said in *CAC v McMillan*,[24] the presumption of open reporting, "exists regardless of any need to protect the public".[25] Nonetheless, that is an important purpose behind open publication in disciplinary proceedings in respect to practitioners whose profession brings them into close contact with the public. In NZTDT 2016/27,[26] we described the fact that the transparent

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[22] We said, "We have no difficulty in concluding that forgery and the provision of false or misleading information reflect adversely on this Respondent's fitness to be a teacher".
[23] That open justice principle is contained in s 405(4) of the Education Act, found in Part 32, which came into force on 1 July 2015.
[24] *CAC v McMillan*, above n 16. See, too, *CAC v Teacher I* NZTDT 2017/12, where we summarised the relevant legal principles at [41].
[25] *McMillan*, at [45].
[26] *CAC v Teacher* NZTDT 2016/27.

administration of the law also serves the important purpose of maintaining the public's confidence in the profession.[27]

[34] In *CAC v Teacher (NZTDT 2014/52P),*[28] we considered the threshold for non-publication and said that our expectation is that orders suppressing the names of teachers (other than interim orders) will only be made in exceptional circumstances. In a subsequent decision, we said that we had perhaps overstated the position.[29] More recently, we observed in *CAC v Finch*[30] that the "exceptional" threshold that must be met in the criminal jurisdiction for suppression of a defendant's name is set at a higher level to that applying in the disciplinary context. As such, we confirmed that while a teacher faces a high threshold to displace the presumption of open publication in order to obtain permanent name suppression, it is wrong to place a gloss on the term "proper" that imports the standard that must be met in the criminal context.[31]

[35] In NZTDT 2016/27, we acknowledged what the Court of Appeal said in *Y v Attorney-General*:[32] While a balance must be struck between open justice considerations and the interests of a party who seeks suppression, "[A] professional person facing a disciplinary charge is likely to find it difficult to advance anything that displaces the presumption in favour of disclosure".[33]

[36] In *Finch,* we described a two-step approach to name suppression that mirrors that used in other disciplinary contexts. The first step, which is a threshold question, requires deliberative judgment on the part of the Tribunal whether it is satisfied that the consequence(s) relied upon would be "likely" to follow if no order was made. In the context of s 405(6), this simply means that there must be an "appreciable" or "real" risk.[34] In deciding whether there

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[27] See, too, *CAC v Teacher S* NZTDT 2016/69, at [85], where we recorded what was said by the High Court in *Dentice v Valuers Registration Board* [1992] NZLR 720, at 724-725.
[28] *CAC v Teacher* NZTDT 2014/52P, 9 October 2014.
[29] *CAC v Kippenberger* NZTDT 2016/10S, at [11].
[30] *CAC v Finch* NZTDT 2016/11, at [14] to [18].
[31] See our discussion about the threshold in *McMillan*, above n 16 at [46] to [48].
[32] *Y v Attorney-General* [2016] NZCA 474.
[33] Above, at [32].
[34] Consistent with the approach we took in *CAC v Teacher* NZTDT 2016/68, at [46], we have adopted the meaning of "likely" described by the Court of Appeal in *R v W* [1998] 1 NZLR 35 (CA). It said that "real", "appreciable", "substantial" and "serious"

is a real risk, we must come to a judicial decision on the evidence before us. This does not impose a persuasive burden on the party seeking suppression. If so satisfied, the Tribunal's discretion to forbid publication is engaged. At this point, the Tribunal must determine whether it is proper for the presumption in favour of open justice to yield. This requires the Tribunal to consider, "the more general need to strike a balance between open justice considerations and the interests of the party who seeks suppression".[35]

The respondent's grounds for suppression

[37] We now turn to the respondent's ground for suppression. The nub of the application is that publication, "would cause significant harm to the respondent, his family and the college which outweighs the benefit of publication".

[38] The specific grounds relied upon are that:[36]

(a) The respondent's wife is studying to be a teacher and will in future seek employment in the education sector. Publication of the respondent's name will "cause her undue stress while trying to obtain future employment within the education sector, whilst living in a small community".

(b) The respondent's son and wife are expecting their first child and publication would "again cause undue stress and harm as it had caused them following the incident in 2006".

(c) Another son will be caused undue hardship, should a client of the business for whom he works draw the link between him and the respondent.

(d) [redacted]

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are qualifying adjectives for "likely" and bring out that the risk or possibility is one that must not be fanciful and cannot be discounted.

[35] *Hart v Standards Committee (No 1) of the New Zealand Law Society* [2012] NZSC 4, at [3].

[36] We were provided with eight affidavits and two letters from the respondent's general practitioner.

[redacted]

(e) The respondent's elderly mother lives in a retirement home. Therefore, "publication of her son's name will cause her undue stress and harm at her late stage in life".

(f) [redacted]. Publication of the respondent's name may identify the School and "cause unwarranted attention and harm to the college".

(g) The respondent has obtained employment outside of the education sector, thus "publication of his name will more than likely result in the loss of his employment, which will cause financial stress, as he will find it very difficult to find employment".

(h) Publication may cause the respondent "significant mental and physical harm".

A preliminary matter

[39] [redacted]

[40] [redacted]

[redacted]

[redacted][39]

[redacted].

[redacted][41]

The risk that the respondent will suffer physical and emotional harm

[43] The respondent said in his affidavit that he has anxiety, which "is affecting [his] depression and health adversely, including [his] diabetes".[42] He said he is in "a constant state of anxiety about [his] name being splurged all over the press [redacted]. He described a heightened level of anxiety about the possibility of losing his current employment.

[44] We were provided with two letters from the respondent's general practitioner, who has held that responsibility in respect to Mr Jenkinson for over 20 years. The first outlined the fact that the doctor "helped [the respondent] [redacted]", and that he

[redacted]

[42] There was no medical evidence provided affirming that the respondent has diabetes, or explaining how this might be relevant to the application for suppression.

prescribed the respondent medication after he came "medically depressed". In the second, the GP states, "[The respondent] has contacted me recently asking for a letter of support for name suppression". The doctor explained that [redacted], "In lay terms [the respondent] had a nervous breakdown that seriously also affected his wife and family". The doctor opined:

> [redacted] I believe it is highly likely that should he not have name suppression his health and [his wife's] [redacted] affected [redacted]

[45] We were also provided with an affidavit from a counsellor, who explained that he has known the respondent for about 14 years. The writer stated that he counselled the respondent [redacted] He opined:

> If [the respondent's] name is made public, it will have a serious effect on his mental health and send him into severe depression [redacted] I suspect that such a process had already begun and I fear for his well-being given all that he has already been through in the past.

[46] We readily accept that it may be proper to order suppression where there is a real risk that publication will either exacerbate an existing condition, or adversely affect a practitioner's rehabilitation and recovery from an illness or disorder.[43] However, in NZTDT 2016/27 we said that:

> [63] We start by addressing the ground that the respondent's mental health may be jeopardised if suppression is not ordered. Without wishing to sound unsympathetic to its sufferers, anxiety (and associated mental conditions) is not an unexpected consequence of a proceeding involving allegations of serious professional misconduct. It is important that the nature and effects of any such condition are carefully scrutinised when it is put forward as a ground for name suppression. A bare assertion that a condition exists, or that it may render an applicant seeking suppression more vulnerable to harm, will not suffice.

[47] In *CAC v Teacher S*[44] we said that a letter from a GP was "not so much an expert medical opinion, as an expression of advocacy for what he believes to be in his patient's best interests". We consider that a similar description can be used in respect to the conclusory opinions provided by

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[43] A recent case where we ordered suppression for this reason, and where we were provided with evidence from the teacher's clinician setting out the risks associated with publication, is *CAC v Teacher B* NZTDT 2017/35, 25 June 2018.
[44] *CAC v Teacher S* NZTDT 2016/69, 14 June 2017.

the respondent's doctor and counsellor. As has been said previously, the opinions of medical professionals deserve respect, but a court need not defer to them.[45]

[48] While the possibility that the respondent's wellbeing may deteriorate if his name is published gives the Tribunal cause for anxious consideration, we have concluded that the opinions of the GP and counsellor presuppose that publication will generate a series of adverse outcomes [redacted] We consider that it is not the fact of publication itself that poses the risk described, but its potential flow-on effects. It is relevant that the respondent has a strong support structure in place. This mitigates the risk that publication poses.

[49] We accept that, should the respondent lose his new employment, it may have a destabilising effect on his mental health. However, we are asked to speculate about whether it is likely that will occur if his name is published. We consider that the adverse effects described are too remote a possibility to justify suppression. [redacted] we do not accept that this case will attract unusually extensive or critical media publicity.

[50] We conclude that there an insufficient evidence to satisfy us that publication is likely to have the sustained effects described.

The hardships faced by the respondent's family

[51] We can briefly address the concerns raised regarding the effect that publication might have on members of the respondent's family. We said in NZTDT 2016/27 that it is almost inevitable that a degree of hardship will be caused to the innocent family members of a teacher found guilty of serious misconduct, although we acknowledged that more acute forms of professional and familial embarrassment may make suppression of a teacher's name a proper outcome.[46] The effects that the respondent

[45] As the Court of Appeal said in *D (CA443/2015) v R* [2015] NZCA 541, (2015) 27 CRNZ 614 at [30]. It also appositely observed that "such opinions may assume that any risk is too much risk or (as in this case) urge suppression without adequately addressing alternative ways in which the risk might be managed".
[46] NZTDT 2016/27, at [65]. See, too, *McMillan*, above n 16 at [50] to [53].

describes are not in this category, however. They constitute the types of hardship that ordinarily follow publication.

[52] We are sympathetic to the respondent's fear that his misdeed may impact upon his wife's career and ability to obtain employment. However, we do not accept that it is likely that her future employment will be jeopardised by publication of this proceeding. Simply put, we doubt that a school would decide not to employ a teacher solely on the basis that his or her partner committed misconduct.[47]

[53] We therefore decline to order suppression on the basis of the evidence provided by the respondent's family members.

Should we suppress the respondent's name to protect the School?

[54] The respondent relied upon the detrimental reputational impact he says will be caused to the School if his name is published and argued that his name should be suppressed to protect its interests.

[55] The regularity with which we address applications for non-publication from learning institutions led us to say in NZTDT 2016/27 that:[48]

> [When] a teacher commits serious misconduct in the course of his or her duties, it is inevitable that there will be a degree of fallout for the school concerned. However, in light of the central role that schools have in disciplinary proceedings, it is safe to assume that their potential to suffer detrimental reputational (and potentially financial) impact through open publication was factored in when Parliament introduced the presumption of open justice. We do not rule out the possibility that in rare cases suppression may be required to protect a learning institution's interests. In the majority of cases, however, the principle of open justice places the interests of the educational community at large ahead of those of an individual school.

[56] In *CAC v Teacher*[49] we said that the open justice principle, to have efficacy, must tolerate an element of hardship to the student body of a school that has its name published because of a teacher's misconduct. Whether that hardship progresses beyond the "ordinary" must be considered on a case-by-case basis.

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[47] We reached a similar view in *CAC v Gittins*, above n 19 at [80].
[48] *CAC v Teacher* NZTDT 2016/27, at [69]. See, too, what we said in *McMillan* above, at [56].
[49] *CAC v Teacher* NZTDT 2016/68, at [67].

[57] Our primary concern is whether naming the respondent and/or the School carries an appreciable risk of identifying the students whose use of the phone generated the original complaint.

[58] In the usual course of events where serious misconduct involved behaviour directed at a student or students, naming the teacher and school will tend to result in suspicion falling on a cohort of learners. However, as we said in NZTDT 2016/68:[50]

> [It] is unlikely that this possibility escaped the attention of Parliament when it opened the Tribunal's proceedings to the public and, had this degree of connection between the teacher and affected student been enough of a concern to require blanket suppression in every case, it would have legislated for that.

[59] While we accept that the School services a relatively small community, we are not satisfied that blanket suppression is required to protect the interests of the students.[51]

[60] Finally, we have concluded the fact that [redacted] does not provide a principled basis to suppress their names in this proceeding. [redacted]

Conclusion on name suppression

[61] Stepping back, we have considered whether the interests of the respondent and his family members, cumulatively, displace the public interest in open reporting. We are not satisfied that they do. It is therefore not proper for suppression to be ordered.

Costs

[62] The CAC seeks a contribution from the respondent towards its actual and reasonable costs incurred undertaking its investigative and prosecutorial functions – the first two categories of costs described in our 2010 Costs

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[50] At [50].
[51] Compare with *CAC v B* NZTDT 2015/68, where we ordered suppression to protect a student who attended a small school in a small town, and where we were provided with comprehensive evidence by the school outlining its reasons why the student might be identified if it and the teacher were named.

Practice Note. We must also consider whether to make an order that the respondent contributes to the Tribunal's own costs, which is the third category described in our Practice Note.

[63] Our Practice Note sought to achieve an "objective and predictable" approach to costs applications. However, we acknowledge that costs must be considered on a case-by-case basis to ensure that a fair result is achieved.

[64] We have not been provided with a schedule of the CAC's costs. The Tribunal's costs are $1,145.

[65] The respondent opposed the imposition of costs on the basis that this is an "exceptional" case because no one was directly harmed by his actions. However, we do not accept that the absence of a "victim" places this outside the ordinary run of cases.

[66] The respondent also contends that the imposition of a costs order, when combined with the legal expenses he has incurred, will cause him undue hardship. In previous cases we have reduced awards of costs from 50 per cent to one-third where the Tribunal has been provided with evidence by a respondent that he or she is impecunious.[52] However, the respondent has not adduced evidence to support his assertion that he will face undue hardship if costs are ordered.

[67] In recent times, we have ordered a smaller contribution – 40 instead of the usual 50 per cent – where a practitioner has accepted responsibility for his or her misconduct and agreed to the matter being dealt with on the papers. That is the approach we intend to take here.

[68] We order the respondent to make a 40 per cent contribution towards the actual and reasonable costs incurred by the CAC. The CAC is to file and serve a schedule of its costs on the respondent within 10 working days. The respondent will then have 10 working days to file a memorandum should he dispute the reasonableness of the CAC's costs.

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[52] See, for example, *CAC v Rangihau* NZTDT 2016/18C and *CAC v Tuaputa* NZTDT 2016/13C

[69] We order the respondent to pay 40 per cent of the Tribunal's costs.

Orders

[70] The Tribunal's formal orders under the Education Act are as follows:

(a) The respondent is censured for his serious misconduct pursuant to s 404(1)(b).

(b) Pursuant to s 404(1)(d), the respondent's practising certificate is suspended for a period of six months from the date of this decision.

(c) Pursuant to s 404(1)(c), we direct that the respondent must inform any employer or prospective employer of this proceeding and provide it with a copy of this decision.

(d) The matters referred to in (a) to (c) will be annotated on the register, under s 404(1)(e), for three years from the date of this decision.

(e) The respondent is to pay 40 per cent of the CAC's actual and reasonable investigative costs pursuant to s 404(1)(h).

(f) The respondent is to pay $458 to the Tribunal pursuant to s 404(1)(i).

(g) [redacted]

Nicholas Chisnall
Deputy Chair

NOTICE

1 A person who is dissatisfied with all or any part of a decision of the Disciplinary Tribunal under sections 402(2) or 404 of the Education Act 1989 may appeal to a District Court.

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

3 Section 356(3) to (6) apply to every appeal as if it were an appeal under section 356(1).