EDUCATION COUNCIL
NEW ZEALAND | Matatū Aotearoa

Complaints Assessment Committee (CAC) v Risuleo
NZ Teachers Disciplinary Tribunal Decision **2018-8**

Teachers are required to promote the wellbeing of learners and protect them from harm, in this case the teacher accepted that he acted impulsively by using physical force on five-year-old who threw a felt pen to the ground.

Jean-Marc Risuleo was teaching a composite class of Year 1 and 2 students. The students were doing a colouring-in exercise when a child ('Child H', aged 5) and another child tipped a jar of pencils on the floor. Upon Mr Risuleo's instruction they picked up the pens. Child H then threw a felt pen to the ground. Mr Risuleo walked over to Child H and grabbed his arm and pulled the child towards him in the direction of where the felt pen had landed and instructed him to pick the pen up. He told Child H it was not okay to throw pens in the classroom.

Mr Risuleo's actions caused Child H to fall to the floor and hit his head. Child H cried and was upset. Mr Risuleo acknowledged that Child H might have bumped his head but did not see it occur. Child H went home and told his mother about the incident and that "Mr Risuleo pushed me over and I bumped my head and it hurts." Mr Risuleo phoned Child H's mother to apologise after school and explained what had happened.

Mr Risuleo acknowledged he acted impulsively and there were better ways to respond, for example, re-issuing the instruction to pick up the pen. He wrote to the Teaching Council and acknowledged his "serious error in judgment" accepting he used physical contact where he should not have. Mr Risuleo resigned from his job following the incident, stated he did not wish to return to teaching and wanted to voluntarily de-register.

The matter was referred to the New Zealand Teachers Disciplinary Tribunal (Tribunal). It stated that the conduct was likely to bring discredit to the teaching profession and therefore amounted to 'serious misconduct'.

The Tribunal censured Mr Risuelo and ordered that if he wanted to return to the profession that conditions were imposed on any subsequent practising certificate for a period of three years and that he must complete any programmes the Teaching Council may require. Mr Risuelo was also ordered to provide any prospective employers with a copy of the Tribunal's decision and the register was annotated to reflect the censure and conditions. He was ordered to pay costs of $458 and was refused name suppression.

BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

NZTDT 2018-8

IN THE MATTER	of the Education Act 1989
AND	
IN THE MATTER	of a charge referred by the Complaints Assessment Committee to the New Zealand Teachers Disciplinary Tribunal
BETWEEN	**COMPLAINTS ASSESSMENT COMMITTEE**
AND	**JEAN-MARC RISULEO** **Respondent**

TRIBUNAL DECISION

17 September 2018

HEARING: Held at Wellington on 14 August 2018 (on the papers)

TRIBUNAL: Theo Baker (Chair)

Kiri Turketo and Nikki Parsons (members)

Representation: Mr Simpson for the CAC

Mr Sharpe-Davidson for the respondent

1. The Complaints Assessment Committee (CAC) has referred to the Tribunal a charge of serious misconduct and/or conduct otherwise entitling the Tribunal to exercise its powers. The charge is that on 20 October 2016 the respondent grabbed a five-year-old child (Child H) by the arm, pulling him out of his chair, and causing Child H to fall to the floor and hit his head.

Summary of decision

2. The charge was heard on the papers, the respondent agreeing that the conduct amounted to serious misconduct.

3. We found the conduct amounted to serious misconduct on the basis that it adversely affected the wellbeing of Child H, it brings the teaching profession into disrepute and that it is of a character or severity that meets the Education Council's criteria for reporting serious misconduct because it is likely to bring discredit to the profession.

4. We imposed the following penalty:

    (a) censure (s 404(1)(b)
    (b) should the respondent wish to return to the teaching profession, the following conditions to be imposed on any subsequent practising certificate for a period of three years from the date of issue:
        (i) the respondent must complete any programmes that the Education Council may require, that the Education Council considers will assist with rehabilitation and/or behaviour management; and
    (c) the respondent must provide prospective employers with a copy of the Tribunal's decision.

5. We declined the respondent's application for name suppression, but make an interim non-publication order for a period of 28 days from the date of this decision to allow the respondent to take advice and inform others of the decision.

Evidence

6. The evidence in support of the charge was contained in a Summary of Facts, which stated that the respondent is a registered teacher. From 2007 until his resignation in January 2017, he was employed as a primary school teacher at Christchurch Adventist School ("the school"). In October 2016 he was teaching a composite class of 17 Year 1 and 2 students.

7. On the afternoon of Thursday 20 October 2016 the respondent's class was completing a colouring-in activity. Child H (aged 5) and another student M, tipped a jar of pencils on the floor. On the respondent's instruction, the students picked up the pens. Child H then threw a felt pen to the ground, landing about two or three metres away. The respondent walked over to Child H and grabbed his arm and pulled Child H towards him in the direction of where the felt pen had landed and instructed him to pick the felt pen up. He told Child H it was not okay to throw pens in the classroom.

8. The respondent's actions caused Child H to fall to the floor and hit his head. Child H cried and was upset. He told his mother "Mr Risuleo pushed me over and I bumped my head and it hurts." Child H said that the respondent did not apply an icepack to his head. He also said that he did not want to go to the respondent's house to play with his daughter and that he would not go into a classroom with the respondent. Child H required assurances from his mother that she would collect him from school so he would not have to go to class in the afternoon with the respondent.

9. The respondent acknowledged that Child H may have hit his head but did not see this occur, and was unaware that Child H wanted an ice pack. He said that Child H approached him on a number of occasions after the incident, including on Tuesday 25 October 2016 where after chapel, Child H excitedly approached the respondent and told him about a certificate he was awarded, and the respondent congratulated Child H.

10. In a report to the Principal of the school outlining the circumstances of the incident, the respondent advised that the children had been restless and somewhat hyped up after lunch as they were unable to go outside due to the weather. He said:

> *At about 2.30pm, Child H decided that he no longer needed the yellow felt pen he was holding and deliberately threw it on the floor. I reacted instantly and took hold of his left arm pulling him towards me and towards the felt pen and told him to pick it up. Child H started crying immediately and was upset. I said something to the effect that it was never ok to throw unwanted objects on the floor. As I still had 16 other students to monitor, I had needed to react quickly to ensure that others did not copy this action which could have become dangerous. After a very short time, Child H regained his composure and carried on normally for the rest of the afternoon.*

11. The respondent said that when he arrived home, he telephoned Child H's mother, as

they were family friends, to explain what had happened and he apologised for dealing with the situation impulsively. He said that he regretted taking Child H's arm, and that he had no intention of causing harm or distress, and now recognises that "there would have been better ways to respond to [Child H's] inappropriate behaviour".

12. On 23 March 2017 in a letter to the Education Council the respondent acknowledged his "serious error in judgment" and accepting that he used physical contact where he should not have. He confirmed that if he had the opportunity to go back he would have reissued verbal instruction to Child H that it was unacceptable to throw pens in the classroom and considered temporarily removing stationery from his reach.

13. The respondent resigned from teaching at the school following this incident, and has left the teaching profession. He does not intend to return to teaching and wishes to voluntarily deregister as a teacher.

14. Based on this summary of facts, the charge is proved.

Serious misconduct and misconduct

15. Section 378 of the Act provides:

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

16. The criteria for reporting serious misconduct are found in r 9 of the Education Council Rules 2016 (**the Rules**). The Notice of Charge refers to rr 9(1)(a), (n) or (o):

> ***Criteria for reporting serious misconduct***
>
> *(1) The criterion for reporting serious misconduct is that an employer suspects on reasonable grounds that a teacher has engaged in any of the following:*
>
> *(a) the physical abuse of a child or young person (which includes physical abuse carried out under the direction, or with the connivance, of the teacher):*
>
> *…*

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

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

17. For the CAC, Mr Simpson submitted that the respondent's conduct has affected Child H physically and emotionally, that the use of physical force was a gross overreaction and, as acknowledged by the respondent, a serious error in judgement. He also submitted that the conduct may bring the teaching profession into disrepute and amounts to physical abuse under r 9(1)(a). It is a breach of s 139A of the Act, which prohibits the use of force, by way of correction or punishment, towards any student or child enrolled at or attending the school, institution, or service. He also referred to *CAC v Teacher NZTDT 2014/49* we said:

> *[We] repeat as we have said in a number of cases in the past that the use of physical force – even at a lower level such as evident in this case – is unacceptable in New Zealand schools, and that any teacher who uses physical force contrary to section 139A puts his or her status as a teacher in peril.*

18. Mr Simpson referred to the Code of Professional Responsibility which provides that teachers "will work in the best interests of learners by promoting the wellbeing of learners and protecting them from harm" and that teachers shall "manage the learning setting … to maximise learners' physical … and emotional safety". Mr Simpson referred to the following decisions:

19. *CAC v Haycock,*[1] involved a light smack to a child's bottom. This was found to be a form of physical abuse but no penalty was imposed. It was noted that the teacher had done everything possible to address the situation, including apologising immediately to the child, speaking to the class and saying that what he had done was wrong, and telling another staff member what had happened, and ensuring that the child was supported.

20. In *CAC v Papuni*[2] serious misconduct was found where a teacher responsible for Year 0-2 students asked the students to stand in front of the class and hold out their hands, then smacked the fingertips of one of the students. On another occasion, the teacher grasped the arm of a child and banged it on the table after the child failed to respond to her questions, while shouting at the child. We found that the teacher had used force in

[1] *CAC v Haycock* NZTDT 2016/2, 22 July 2016.
[2] *CAC v Papuni* NZTDT 2016/30, 20 October 2016.

the first incident as a form of punishment, amounting to physical abuse, albeit at the lower end of the scale, and on the second occasion, the teacher appeared to have lost her temper, which "increased the chance of her exerting more force than she intended, and therefore exposing the child to a risk of serious harm". The teacher advised that she deeply regretted what had occurred, had engaged in restorative justice meetings with both students and their parents, and had fully apologised for her behaviour. She voluntarily stopped practising for six months, undertook counselling to address the issues which had contributed to the respondent's conduct, and was working with a mentor. We censured the teacher and imposed a condition on her practising certificate that she complete a professional development course focussing on behaviour management. The censure and conditions were to be annotated on the Register for three years or until the conditions were met.

21. We agreed with the teacher's admission of serious misconduct in *CAC v Mackey,*[3] where a teacher pushed a 14-year-old student against a wall, held her there, and yelled and swore at her. The use of force was an assault, and was the consequence of the respondent becoming angry and losing her power of self-control. The assault was not merely technical in nature, as "its duration and intensity meant it had a violent element". We concluded "by a very narrow margin" that a penalty short of cancellation would achieve the purposes of protecting the public, maintaining professional standards and supporting the teacher's ongoing rehabilitation. Formal mentoring was ordered for a fixed period along with a condition on her practising certificate enabling the Education Council to require the completion of any further programme that it considered might assist rehabilitation. It was noted the teacher had accepted the seriousness of her conduct, had taken steps to minimise the risk of repeating her behaviour, and had engaged in a restorative hui with the student and her family. We also accepted the respondent was genuinely remorseful and had insight into her conduct.

22. On behalf of the respondent, Mr Sharpe-Davidson accepted that the conduct amounted to serious misconduct but at the lower end of seriousness. It was acknowledged that the respondent's use of force was not acceptable, but in mitigation, he never intended to harm Child H, nor was his behaviour malicious or demeaning. It was also noted that the fact that the Child approached the respondent excitedly to tell him about a certificate he

[3] *CAC v Mackey* NZTDT 2016/60, 24 February 2017.

was awarded at school was evidence that the boy's distress was not enduring.

23. Mr Sharpe-Davidson submitted that *CAC v Papuni*[4] was the most similar case, and was still more serious than the present case.

Discussion

24. Society's view of adults' use of physical force on children, whether in places of learning or in the home has undergone a major refocus over recent decades. This is reflected in our legislation. The use of the cane, strap or ruler for punishment or classroom management was commonplace in schools 50 years ago. Treatment of children that would not be tolerated if perpetrated by a stranger was permitted and endorsed where the child had a relationship with the adult either in a family or school context. Perversely, it seems, the greater the degree of the child's trust generated by the nature of the relationship, the more likely society condoned the adult's assault on the child.

25. Twenty-seven years ago s 139A was inserted into the Act.[5] This prohibits the use of "force, by way of correction or punishment" by any employee or manager in "early childhood services or registered schools."[6] Until it was removed by the Crimes (Substituted Section 59) Amendment Act 2007, parents and guardians were exempted under s 139A. In other words, a teacher could hit their own child for the purposes of correction or punishment, but not other students. This was consistent with s 59 of the Crimes Act 1961 which at that time justified parental "force by way of correction towards [a] child, if the force used is reasonable in the circumstances." That justification was explicitly reversed with the 2007 amendment. This marks society's increasing aversion to the use of force by adults on children, no matter what the relationship, and bringing it in line with the long-held intolerance of assaults on adults.

26. The CAC has asked us to find that the respondent's conduct in the present case is "of a character or severity that meets the Education Council's criteria for reporting serious misconduct," in particular that the respondent has engaged in "physical abuse of a child or young person" under r 9(1)(a); is an "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" under r 9(1)(n); and/or is an act or omission that brings, or is likely to bring, discredit to

[4] Above, note 2
[5] Amended by s 28 of the Education Amendment Act 1990
[6] The word "services" was substituted for "centre" by the Education Amendment Act 2006

the profession under r 9(1)(o).

27. In *CAC v Tregurtha* 2017-39,[7] in different circumstances from the present case, a teacher had received a police warning for assault as a result of her treatment of children in her care. In considering whether a finding of assault equates to a finding of physical abuse for the purposes of r 9(1)(a), we noted that because of the broad definition of assault,[8] not every assault will amount to "physical abuse".

28. There may be occasions when the use of force for correction also does not amount to physical abuse. In *CAC v Haycock*, the Tribunal commented that where an assault has occurred the level of force used will generally determine the appropriate penalty:[9]

> *[I]t is difficult to see how an act of force for the purposes of coercion or punishment, which is unlawful behaviour on a teacher's part, can be otherwise regarded than abusive… it needs to be emphasised that in order for any technical assault to constitute an offence under s 139A it must involve 'force' and be administered for the purposes of correction or punishment... once the application of force reaches the point of constituting a breach of s 139A and attracts disciplinary attention, it seems to the Tribunal it is better to deal with the gradations as a matter of penalty.*

29. However, this position was modified in NZTDT 2016-50,[10] where we said:

> *[26]* Haycock *appears to suggest that any use of force contrary to s 139A of the Education Act will automatically comprise serious misconduct, with the assessment to be made by the tribunal solely focusing on where on the seriousness spectrum the matter concerned sits. That impression, to our minds, is wrong. This is because, to be serious misconduct, the behaviour concerned must satisfy the character and severity threshold established in the Rules. This is an assessment that must be undertaken on a case by case basis to determine if the charge is provide – thus it is not merely a question of dealing with gradations at the penalty stage.*

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

30. We endorse the position in NZTDT 2016-50. In some cases the degree of force used easily sits within a common understanding of physical abuse. Sometimes the effect of the use of force is humiliation and might therefore amount to psychological abuse. Underlying both of these is the unique position of power and trust that a teacher holds. As we said in *CAC v Tregurtha:*

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

31. In *CAC v Emile* NZTDT 2016/51,[11] the only ground relied on under r 9 was physical abuse. We were reluctant to find physical abuse where the child was apparently not harmed either physically or emotionally. There was insufficient evidence for us to understand the context or motivation where respondent did not recall the event, and the only witness to the event did not remain to ascertain the wellbeing of the child, and did not immediately report it. A finding of misconduct was made.

32. We do not find the conduct in the present case as serious as *CAC v Karklins*[12] which involved inadvertent physical harm as a result of using force. A teacher lost his temper with a misbehaving student. He picked up the primary school student and forcibly removed him from the classroom, depositing him on the floor of the cloak room. The boy was thrashing about and banged his head against the wall. The Tribunal found serious misconduct, not as physical abuse (r 9(1)(a)) but as conduct likely to bring discredit to the teaching profession (r 9(1)(o)). We found that the harm was an "unfortunate but foreseeable consequence" of his actions.

33. For similar reasons to *Karklins*, we are not satisfied that the present case falls into the category of physical abuse. There are circumstances in which it is reasonable to guide a young student's hand to a directed task. It is evident that the respondent used more force than was required, and may have been motivated by some frustration, but we find this behaviour is conduct likely to bring discredit to the teaching profession, rather than physical abuse. In our view the test in *Collie v Nursing Council of New Zealand*[13] is met.

[11] *CAC v Emile* NZTDT 2016-51, 14 December 2016
[12] *CAC v Karklins* NZTDT 2016-38, 3 October 2016
[13] [2001] NZAR 74 at [28]

We are satisfied that reasonable members of the public, informed of the facts and circumstances, could reasonably conclude that the reputation and standing of the profession is lowered by the behaviour of the practitioner.

34. The CAC has not elaborated on the offence under r 9(1)(n). Without further evidence of similar cases dealt with by the police or the criminal courts, we are reluctant to find that the respondent's actions could be the subject of a prosecution for an offence punishable by imprisonment for a term of 3 months or more.

35. We find that the respondent's behaviour amounts to serious misconduct for the following reasons. It:

- adversely affected the wellbeing of Child H, as evidenced by his distress, and reporting it to his mother (s 378(1)(a));
- for the same reasons that it meets the test for r 9(1)(o), it brings the teaching profession into disrepute under s 378(1)(c);
- and is of a character or severity that meets the Education Council's criteria for reporting serious misconduct under r 9(1)(o).

Penalty

36. For the CAC, Mr Simpson submitted that the respondent's conduct should be considered serious, given that the use of physical force indicates some loss of self-control and a degree of aggression. The conduct resulted in harm to Child H, whose young age of five is relevant in determining the overall seriousness of the respondent's conduct.

37. The CAC also recognised the following mitigating factors:

(a) The respondent took steps to apologise to the respondent's mother following the incident.
(b) The respondent has accepted that his conduct involved a serious error of judgement and has shown a degree of insight into his actions.
(c) The respondent has accepted the charge against him and cooperated with the Committee's investigation.
(d) Although aggressive, the behaviour was not particularly malicious or demeaning.

38. Observing the respondent's intention to voluntarily deregister as a teacher and not return to teaching, the CAC submitted that the following orders are appropriate to recognise the seriousness of the conduct, maintain proper professional standards, and act as a deterrent:

(a) censure;

(b) should the respondent wish to return to the teaching profession, the following conditions to be imposed on any subsequent practising certificate for a period of three years from the date of issue:

(i) the respondent must complete any programmes that the Education Council may require, that the Education Council considers will assist with rehabilitation and/or behaviour management; and

(ii) the respondent must provide prospective employers with a copy of the Tribunal's decision; and

(c) annotation of the censure and conditions on the register.

39. For the respondent, Mr Sharpe-Davidson reminded us that the respondent apologised to Child H's mother following the incident, acknowledged his serious error of judgment and has cooperated with the CAD at every opportunity to reduce the length and complexity of the proceedings.

40. Mr Sharpe-Davidson reiterated the respondent's intention to voluntarily deregister, noting that he does not intend to return to the teaching profession and has embarked on an alternative career. He submitted that the appropriate penalty is censure and that there is no need to annotate the register.

41. Section 404 (1) of the Act provides:

404 Powers of Disciplinary Tribunal

(1) Following a hearing of a charge of serious misconduct, or a hearing into any matter referred to it by the Complaints Assessment Committee, the Disciplinary Tribunal may do 1 or more of the following:

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

(b) censure the teacher:

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

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

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

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

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

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

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

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

42. The disciplinary functions of the Education Council and Disciplinary Tribunal are found in Part 32 of the Education Act 1989, and the purpose of the Education Council is set out in s 377.

> *The purpose of the Education Council is to ensure safe and high quality leadership, teaching, and learning for children and young people in early childhood, primary, secondary, and senior secondary schooling in English medium and Māori medium settings through raising the status of the profession.*

43. This section provides for protection of the public in the sense that the Council must ensure safe and high-quality leadership, teaching and learning for the children and young people, in other words, the "users" of teaching services. As with other professional regulatory acts, professional discipline is only one of the means by which this purpose may be achieved.

44. When discharging the responsibilities owed to the public and profession, the Tribunal is required to arrive at an outcome that is fair, reasonable and proportionate in the circumstances.[14]

45. We agree with Mr Sharpe-Davidson that the respondent's conduct falls into the lower end of the scale of seriousness. Although the respondent has indicated his intention to voluntarily deregister, we must still consider the most appropriate penalty in the circumstance. We agree that cancellation would not be an appropriate penalty. Section 357(3) of the Act provides that the fact that a person's registration has been cancelled does not prevent the person from again being registered. Therefore we have decided to

[14] *Roberts v Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354, at [51].

impose a penalty that is commensurate with the seriousness of the behaviour and fulfils the need to ensure safe and high-quality leadership, teaching and learning for the children and young people. We therefore agree with the penalty proposed by the CAC and order:

46.1 censure under s 404(1)(b);

46.2 should the respondent wish to return to the teaching profession, the following conditions to be imposed on any subsequent practising certificate for a period of three years from the date of issue:

(a) the respondent must complete any programmes that the Education Council may require, that the Education Council considers will assist with rehabilitation and/or behaviour management; and

(b) the respondent must provide prospective employers with a copy of the Tribunal's decision; and

46.3 annotation of the censure and conditions on the register.

Costs

46. The CAC asked for an order for 40% of its costs.

47. The respondent submitted that costs should be reduced to 33% on the basis that this is in line with NZTDT 2016-18 where the respondent had approached the case in a responsible way and claimed impecuniosity. The respondent had filed a financial statement, showing a monthly shortfall of $25.

48. Impecuniosity is a factor to take into account. So too, is quantum. Although in NZTDT 2016-18, costs of 33% were ordered, a review of the decisions of the past two years will show that in most cases where the respondent has co-operated fully, costs of 40% are ordered. In that case, where there had been a hearing in person on some matters, 50% was sought, which amounted to $7,589.61. We do not yet have the CAC's costs, but based on similar recent cases where there has been an agreed statement of facts indicated at the pre-hearing stage, followed by a hearing on the papers we expect the CAC costs to be significantly less than that. For example, in *CAC v Tregurtha* [15] the CAC sought costs of 40%, amounting to $1,851.13, and in *CAC v Te Peeti*, noting that 40% was $1,428.76.

[15] Above, n 7

49. We therefore make an order under s 404(1)(h) that the respondent pay 40% of the CAC costs or $1,750.00, whichever is the lesser amount.

50. The Tribunal's costs are $1,145, of which 40% is $458. We therefore order under s 404(1)(i) that the respondent pay costs of $458.

Non-publication

51. The respondent has applied for name suppression on the following grounds:

    (a) publication of his name will cause extreme hardship to his two daughters, aged seven and eight, who attend school with Child H (the school where the incident occurred);
    (b) publication of his name will lead to identification of Child H and Child H's family, given the previously close ties between his family and Child H's family within a relatively small Seventh Day Adventist community;
    (c) the respondent intends to leave the teaching profession and is concerned that publication of his name will have a negative impact on employment in his new career of electrical engineering.

52. In an affidavit in support, the respondent stated that he taught at the school for nearly 10 years before resigning in January 2017 following this incident. He is well-known by teachers and students at the school. The school and church community is relatively small.

53. The respondent's daughters attend the school and one is in the same class as Child H's sister. He has seen their significant discomfort when interacting with Child H or his family. He is concerned that his children will suffer negative attention, hurtful gossip and potentially ridicule and will have a detrimental impact on them, such that they would need to remove them from school and enrol them in a secular school.

54. Mr Sharpe-Davidson likened the present case to CAC v Teacher S 2016-6916 where name suppression was granted because of the respondent's personal privacy interests.

55. In response, Mr Simpson summarised the respondent's grounds as:

    (a) publication of the respondent's name is not required in the public interest, as public protection is served by his decision to leave the teaching profession;

[16] *CAC v Teacher S* NZTDT 2016-69

and

(b) the effect on his children, who attend the same school where the respondent taught and with Child H.

56. He submitted that neither ground, separately or cumulatively, establishes a proper basis for making an exception to the principle of open justice. In respect of the first, a decision to leave the teaching profession would not ordinarily, of itself, be considered sufficient to meet public protection objectives. The principle of open justice has a wider aim, particularly in the professional disciplinary context where public protection is achieved by a disciplinary response aimed at maintaining the standards of the profession. This is achieved through transparent administration of the law, holding the teacher to account, and denunciation and deterrence. Something more must be shown by the respondent to outweigh the public interest in publication.

57. According to Mr Simpson, the assertions about the effect on the respondent's children are made in a general manner without any specific details on what exactly the discomfort is. It is simply asserted that publication. It is not clear how, or why publication of the respondent's name would will exacerbate the children's discomfort and "force" the respondent to remove his children from the school. Mr Simpson submits that based on the respondent's affidavit, the cause of discomfort to his children is not from publicity, but from having to interact with Child H and Child H's family at the school where the incident occurred. While the CAC does not wish to minimise any effect on the respondent's children, it respectfully submitted that this is an ordinary consequence of the respondent's conduct which has already occurred. The assertion that publication will aggravate this discomfort, and have a detrimental impact, is largely speculative. Even if this were to occur to some degree, that would still be an ordinary consequence rather than one which is disproportionately adverse.

58. In preliminary submission, Mr Simpson noted that the Tribunal held in CAC v Kippenberger[17] that the fact the teacher's family might be embarrassed, or might suffer some impact, is not in itself a ground for making a suppression order, unless it can be demonstrated that the effects of publication will be disproportionately adverse.

59. Mr Simpson noted that one of the grounds for name suppression in 2016/69, which concerned a teacher who performed oral sex on a student, was that the teacher's son

[17] *CAC v Kippenberger* NZTDT 2016-10S, 29 July 2016

attended the school where the teacher had taught, and where the incident had occurred. The Tribunal found that the public interest in publication was "narrowly outweighed" by the son's personal privacy interests. In that case the Tribunal had the benefit of direct evidence from the son about the effects on him, which were over and above the normal consequences of the teacher's actions. No such evidence has been provided in the present application.

60. Mr Simpson submitted that while each case must be assessed on its own facts, the conduct in 2016/69 was significantly more serious, and of a different character than the present conduct. The seriousness and character of the conduct will be relevant to the Tribunal's assessment of the potential effects on family members, if the respondent's name is published.

61. Mr Simpson submitted that although the CAC has submitted that the respondent's conduct should be seen as serious, there are mitigating factors and that a penalty less than cancellation is appropriate. Against this background, the suggestion that the respondent would be "forced" to remove his children from the school if his name were published appears to be rather drastic. Accordingly, the respondent has not established that there are proper circumstances that outweigh the public interest in publication and displace the presumption in favour of publishing his name.

Discussion

62. Section 405(3) provides that hearings of this Tribunal are in public. This is consistent with the principle of open justice. The provision is subject to subsections (4) and (5) which allow for whole or part of the hearing to be in private and for deliberations to be in private. Subsection (6) provides:

> *(6) If the Disciplinary Tribunal is of the opinion that it is proper to do so, having regard to the interest of any person (including (without limitation) the privacy of the complainant (if any)) and to the public interest, it may make any 1 or more of the following orders:*
>
> *(a) an order prohibiting the publication of any report or account of any part of any proceedings before it, whether held in public or in private:*
>
> *(b) an order prohibiting the publication of the whole or any part of any books, papers, or documents produced at any hearing:*

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

63. Therefore, in deciding if it is proper to make an order prohibiting publication, the Tribunal must consider relevant individual interests as well as the public interest. If we think it is proper, we may make such an order. There is no onus on the applicant and that the question is simply whether the circumstances justify an exception to the fundamental principle.[18]

64. The correct approach is to strike a balance between the open justice considerations and the interests of the party who seeks suppression[19].

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

> *[F]irst, proceedings are conducted in 'open court'; second, information and evidence presented in court is communicated publicly to those present in the court; and, third, nothing is to be done to discourage the making of fair and accurate reports of judicial proceedings conducted in open court, including by the media. This includes reporting the names of the parties as well as the evidence given during the course of proceedings.*[20]

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

> *In general the healthy winds of publicity should blow through the workings of the Courts. The public should know what is going on in their public institutions. It is important that justice should be seen to be done. That approach will be reinforced if the absence of publicity might cause suspicion to fall on other members of the community, if publicity might lead to the discovery of additional evidence or offences, or if the absence of publicity might present the defendant with an opportunity to re-offence.*[21]

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

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[18] *ASB Bank Ltd v AB* [2010] 3 NZLR 427(HC) at [14]
[19] *Hart v Standards Committee* (No 1) of the New Zealand Law Society [2012] NZSC4 at [3]
[20] Jason Bosland and Ashleigh Bagnall, 'An Empirical Analysis of Suppression Orders in the Victorian Courts: 2008-12' (2013) 35 *Sydney Law Review* 674.
[21] *M v Police* (1991) 8 CRNZ 14, p15

Liddell [1995] 1 NZLR 538 at 546:

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

68. The principle of open justice therefore exists regardless of any need to protect the public. The tenor of s 405 is consistent with s 95(2)(d) of the Health Practitioners Disciplinary Act 2003, which was considered in *Dr A v Director of Proceedings*[22] by Panckhurst J, who said:

> *The scheme of the section means, in my view, that the publication of names of persons involved in the hearing is the norm, unless the Tribunal decides it is desirable*[23] *to do order otherwise. Put another way, the starting point is one of openness and transparency, which might equally be termed a presumption in favour of publication.*

69. In *Director of Proceedings v I*,[24] Frater J found that any differences between the Courts and medical disciplinary processes (under the Medical Practitioners Act 1995) were ones of emphasis and degree. The most significant difference was the threshold to be reached before the balance was tipped in favour of name suppression. Unlike the courts, where "exceptional" circumstances are commonly required, the criterion for cases before the Medical Practitioners Disciplinary Tribunal (and its successor, the Health Practitioners Disciplinary Tribunal), is whether suppression is desirable.

70. In this jurisdiction, the threshold of whether it is "proper", is the same as under the Lawyers and Conveyancers Act 2006. That Tribunal has suggested that "proper" is arguably between "exceptional" and "desirable", but in any event the threshold is somewhat lower than that imposed in the courts.[25]

Public interest and the purpose of disciplinary proceedings

71. In considering the public interest, we remind ourselves of the purpose of disciplinary

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[22] (High Court, Christchurch, CIV 2005-409-002244, 21 February 2006, Panckhurst J)).
[23] The term, "desirable", as opposed to "proper" is used in the Health Practitioners Competence Assurance Act 2003
[24] [2004] NZAR 635,
[25] *Canterbury Westland Standards Committee No.2 v Eichelbaum* [2014] NZLCDT 23

proceedings as stated by Eichelbaum CJ in *Dentice v Valuers Registration Board:*[26]

> *Although, in respect of different professions, the nature of the unprofessional or incompetent conduct which will attract disciplinary charges is variously described, there is a common thread of scope and purpose. Such provisions exist to enforce a high standard of propriety and professional conduct; to ensure that no person unfitted because of his or her conduct should be allowed to practise the profession in question; to protect both the public and the profession itself against persons unfit to practise; and to enable the professional calling, as a body, to ensure that the conduct of members conforms to the standards generally expected of them; see, generally,* Re A Medical Practitioner *[1959] NZLR 784 at pp 800, 802, 805 and 814. In New Zealand, such provisions exist in respect of medical practitioners, barristers and solicitors, dentists, architects, pharmacists, real estate agents and a number of other professionals and callings, as well as valuers; …*

72. We agree with Mr Simpson that the facts of the *Teacher S* are not comparable. In that case the teacher's son attended the same school where she taught and at following the school leavers dinner she had engaged in oral sex with a Year 13 male student. There was evidence from the respondent that her relationship with her son had broken down, that he had been "utterly traumatised" by her actions. There was an email and letter from the son describing how he had felt people talking behind his back last year. This included people he had regarded as friends. This has affected his ability to trust people.

73. We also note that even having cancelled that teacher's registration, the application was successful only "by a narrow margin".

74. In the present case, we accept Mr Simpson's submission that it appears that the children's discomfort is linked to their relationship with Child H. Publication of the respondent's name is not relevant to that. We agree that the assertion that publication will aggravate this discomfort, and have a detrimental impact, is largely speculative.

[26] [1992] 1 NZLR 720, 724-725

75. Balancing the public interest in publication against the respondent's or his children's interests we are not persuaded that it is proper to order non-publication of the respondent's name.

Theo Baker
Chair

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

1. This decision may be appealed by teacher who is the subject of a decision by the Disciplinary Tribunal or by the Complaints Assessment Committee.

2. An appeal must be made within 28 days after receipt of written notice of the decision, or any longer period that the court allows.

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