EDUCATION COUNCIL
NEW ZEALAND | Matatū Aotearoa

Complaints Assessment Committee (CAC) v Teacher N

NZ Disciplinary Tribunal Decision 2018/31

In this case, Teacher N "demonstrated a serious lack of professional judgement," however, he acknowledged his behaviour was serious misconduct, and took responsibility for his actions.

Teacher N was employed as a technology teacher at a secondary school. While teaching a class, he asked a 14-year-old male student (Student A) to move his table frame from the bench top onto the floor so it was easier to drill. Student A did this, and while Student A was kneeling on the floor, Teacher N pretended to unzip his fly and said "while you are down there" to Student A.

On the same day in the same class, another student (Student B) was sitting in a car seat in the classroom making car noises, Teacher N commented that the student was "having a wet dream over that".

Later that day Student A complained, and the school Principal started an investigation. When questioned, Teacher N said the students in the class often joked about "sensitive" stuff. He said he was "totally gutted and stressed that a classroom banter joke" had caused distress and discomfort to Student A.

Teacher N had previously been warned for using abusive language to students in class in 2016.

The matter was referred to the Teaching Council Complaints Assessment Committee (CAC), and they referred a charge of serious misconduct to the New Zealand Teachers Disciplinary Tribunal (Tribunal).

The Tribunal said Teacher N's behaviour "demonstrated a serious lack of professional judgement", and considered his conduct amounted to serious misconduct.

In determining penalty, given the seriousness of the misconduct, the Tribunal noted that cancellation might be an appropriate penalty. However, in this case, Teacher N had acknowledged his conduct with his principal and the Council. At the time of his conduct, he was suffering from symptoms of depression, but after the incidents he sought assistance to deal with these issues.

The Tribunal considered Teacher N should be subject to conditions to properly equip him with the skills to ensure that this type of conduct did not occur again. Accordingly, Teacher N was censured with a condition to undertake a course on teacher-student boundaries. He was also ordered to disclose the Tribunal's decision to any future employers for the next two years, and the Tribunal ordered that the register be annotated for the same length of time. Teacher N applied for name suppression and it was granted to protect the identities of the students.

NZTDT 2018/31

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	**TEACHER N** Respondent

DECISION OF THE TRIBUNAL

Tribunal:	Nicholas Chisnall (Deputy Chair), Susan Ngarimu and Graeme Gilbert
Hearing:	On the papers
Decision:	8 October 2018
Counsel:	M Mortimer for the referrer D King for the respondent

Introduction

[1] The referrer, the Complaints Assessment Committee (the CAC), charges Teacher N with serious misconduct and/or conduct otherwise entitling the Tribunal to exercise its powers. Its notice of charge alleges that on 23 August 2017:

(a) While Student A was on the floor completing a task, the respondent gestured as if to unzip his fly and/or unzipped his fly, in front of the student; and

(b) The respondent used sexualised language when talking to Student B.

[2] Teacher N 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 is a registered teacher with a full practising certificate. He was employed as a technology teacher at the School until the end of 2017. Teacher N has been a fully certified teacher since December 2008.

The first incident

[5] On 23 August 2017, the respondent instructed 14-year-old Student A to take his table frame from the bench top down onto the floor to make it easier to drill. When student A lowered it to the table frame, the respondent said words to the effect of "while you are down there" to him. The respondent then pretended to unzip his fly as Student A was kneeling on the floor in front of him. At this point, the respondent was about one to two metres in front of Student A.

[6] Five students observed the respondent's behaviour and were interviewed by the Principal of the School as a consequence of Student A's complaint.

The second incident

[7] During the Principal's investigation, Student B disclosed that the respondent made a sexualised comment to him about five to 10 minutes before the incident with Student A happened.

[8] Student B said that he was sitting in a car seat on the floor of the classroom making car noises and the respondent made a comment that the student was "having a wet dream over that".

Teacher N's explanations

[9] When he was spoken to on 23 August 2017, the respondent accepted that he mimicked lowering his fly as a joke. The respondent stated that he was "totally gutted and stressed that a classroom banter joke" had caused distress and discomfort to Student A. He also said that students in his class often joked about "sensitive stuff".

[10] In respect to the second incident, the respondent accepted that he had "ribbed" Student B and mimicked the noises he was making.

[11] The respondent resigned from the School at the end of the 2017 school year.

Further relevant background

[12] In June 2016, the respondent was provided with a written warning by the Principal for using abusive language towards a student during class.

Our findings

[13] 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] 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

[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].

severity that meets the Education Council's criteria for reporting serious misconduct.

[14] 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 the CAC submits apply in the respondent's case are r 9(1)(c), which describes a teacher's "psychological abuse" of a child or young person and r 9(1)(o), which encompasses "any act or omission that brings, or is likely to bring, discredit to the profession".

[15] The respondent accepted that his behaviour constitutes serious misconduct. While the Tribunal is required to reach its own view, we accept that the parties have correctly assessed the gravity of the behaviour.

[16] In terms of the first stage of the test, we do not know whether the respondent's behaviour affected Students A and B: s 378(1)(a)(i) of the Education Act. While we consider it arguable that the respondent's behaviour is of a type "likely" to cause detrimental impact to young persons, it is not necessary to reach a concluded view, as we accept that the two other criteria in s 378(1)(a) are met.

[17] We are satisfied that the respondent's conduct reflects adversely on his fitness to teach: s 378(1)(a)(ii). It fell below the standard of professional behaviour and integrity expected of, and by, the profession. Teacher N did not "[engage] in ethical and professional relationships with learners that respect professional boundaries", which meant that he failed to act in Students A and B's best interests.[4] For the same reasons, we are satisfied that the respondent's behaviour is of a nature that brings the teaching profession into disrepute when considered against the objective yardstick that applies under s 378(1)(a)(iii) of the Education Act.[5]

[18] In terms of the second stage of the test for serious misconduct, we agree that the respondent's behaviour engages r 9(1)(o) of the Rules.[6]

---

[3] Rule 9 was amended on 18 May 2018, but this decision refers to the preceding iteration.
[4] *Code of Professional Responsibility* at p 10 [1.3] and [2.2].
[5] *Collie v Nursing Council of New Zealand* [2001] NZAR 74, at [28].
[6] It is not necessary for us to decide whether the respondent's behaviour constitutes "psychological abuse" under r 9(1)(c).

[19] We described the reason why it is necessary that teachers maintain professional detachment from their students in the following way in *CAC v Huggard*:[7]

> When a student feels uncomfortable with a teacher's interactions, it is difficult for the student to tell a teacher to leave [him or] her alone … as the adult and a teacher, the respondent had a responsibility to maintain professional boundaries … he was in a position of power and responsibility, where he should role model appropriate behaviour. His actions should attract esteem, not discomfort or fear.

[20] To similar effect is what we said in *CAC v Luff*:[8]

> As a teacher, he had a responsibility to exercise some self-discipline and restraint and maintain professional boundaries. The reasons for this are many. Students should be free from any type of exploitation, harassment or emotional entanglement with teachers. In other words, they should be free from having their learning or well-being adversely affected, as contemplated in the definition of serious misconduct in s 378(1)(a)(i) … There are enough emotional and social challenges for students without a teacher adding to the confusion.

[21] The respondent's sexual innuendo towards Students A and B demonstrated a serious lack of professional judgement. We are satisfied that its character and severity makes it serious misconduct.

Penalty

[22] 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.[9] We are required to arrive at an outcome that is reasonable and proportionate in the circumstances in discharging our responsibilities to the public and profession.

[23] We acknowledge that we must seek to ensure that any penalty we institute is comparable to those imposed upon teachers in similar circumstances. We were referred to three decisions by Mr Mortimer: NZTDT

---

[7] *CAC Huggard* NZTDT 2016/33, at [20]-[21].
[8] *CAC v Luff* NZTDT 2016/70, at [11].
[9] The primary considerations regarding penalty were helpfully discussed in *CAC v McMillan* NZTDT 2016/52.

2010/24, *CAC v Palmer*[10] and NZTDT 2010/26.[11] The first two cases are directly on-point, as they dealt with what was described as sexual "banter" by a teacher; albeit, as Mr Mortimer properly accepted, more repetitive and overtly sexual classroom commentary than that of Teacher N.

[24] We acknowledge the inevitable factual distinctions between those earlier decisions and the present. While cancellation was ordered in *Palmer*, we agree that is not the commensurate penalty for Teacher N's serious misconduct.

[25] We have taken into account the following mitigating factors:

(a) The respondent's candour about what he had said when spoken to by the School's principal.

(b) That Teacher N was suffering a heightened degree of anxiety and symptoms of depression when he misconducted himself. Afterwards, he responsibly sought assistance to address these issues.

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

[26] We have not been provided with information that enables us to assess whether there is a risk that the respondent will repeat his behaviour if he returns to teaching. We are concerned about the fact that this is not an isolated incident of inappropriate behaviour towards a student. It is an agreed fact that Teacher N was provided with a warning in 2016 for using abusive language. To ameliorate the risk of repetition, we intend to impose a condition requiring the respondent to undertake a course selected for him by the Education Council, focusing on the establishment and maintenance of appropriate teacher-student boundaries.

[27] We are satisfied that the relevant disciplinary purposes can be met by censure and imposition of the conditions referred to at the end of this decision. While we considered suspending the respondent's practising certificate until the rehabilitative condition is met, we agree with the parties that it is not necessary to do so. Instead, we have ordered that Teacher N

---

[10] *CAC v Palmer* NZTDT 2015/38.
[11] *CAC v Thornton* NZTDT 2015/63.

must disclose the outcome of this disciplinary proceeding to any prospective employer during the next two years.

Should we permanently suppress the respondent's name?

[28] We are satisfied that it is proper to make an order under s 405(6) of the Education Act for suppression of the names and identifying particulars of Students A and B.

[29] The respondent sought permanent suppression on the basis that naming him may identify Students A and B and thereby defeat the non-publication order we intend to make in respect to them. The Principal of the School, in a responsible and tempered submission, supported the respondent's application.

The applicable principles

[30] The Tribunal's powers around non-publication 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.

[31] 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*,[12] the presumption of open reporting, "exists regardless of any need to protect the public".[13] 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,[14] we described the fact that the transparent administration of the law also serves the important purpose of maintaining the public's confidence in the profession.[15]

---

[12] *CAC v McMillan*. See, too, *CAC v Teacher I* NZTDT 2017/12, where we summarised the relevant legal principles at [41].
[13] *McMillan*, at [45].
[14] *CAC v Teacher* NZTDT 2016/27.
[15] 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.

[32] In *CAC v Teacher (NZTDT 2014/52P),*[16] 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.[17] More recently, we observed in *CAC v Finch*[18] 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.[19]

[33] 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.[20] In deciding whether there 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".[21]

---

[16] *CAC v Teacher* NZTDT 2014/52P, 9 October 2014.
[17] *CAC v Kippenberger* NZTDT 2016/10S, at [11].
[18] *CAC v Finch* NZTDT 2016/11, at [14] to [18].
[19] See our discussion about the threshold in *McMillan*, above at [46] to [48].
[20] 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" are qualifying adjectives for "likely" and bring out that the risk or possibility is one that must not be fanciful and cannot be discounted.
[21] *Hart v Standards Committee (No 1) of the New Zealand Law Society* [2012] NZSC 4, at [3].

Our decision

[34] Our primary concern is whether naming the respondent and/or the School carries an appreciable risk that Students A and B will be identified.

[35] 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. 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.[22] As we said in NZTDT 2016/68:[23]

> [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.

[36] Further, we accept that the general proposition that - where the town to which the school concerned belongs has a relatively small population, and the pool of students to which the young person affected belongs is therefore also small – there may be a heightened risk that naming the teacher will identify the student.[24] This is the concern of the Principal, here.

[37] We accept that the School serves a relatively small rural community, and that the cohort of students taught by the respondent in 2017 was very small – just [redacted] students. While very finely balanced, we are satisfied that blanket suppression is required to protect the interests of Students A and B. This is because we are satisfied that, given the size of the class that the respondent taught, it is a "likely" consequence that naming the respondent will narrow the focus to the point where the two students are identified.

Costs

[38] The CAC seeks a contribution from the respondent towards its actual and reasonable costs incurred undertaking its investigative and prosecutorial

---

[22] *CAC v Teacher* NZTDT 2016/68, at [67].
[23] At [50].
[24] For example, in *CAC v B* NZTDT 2015/68 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.

functions – the first two categories of costs described in our 2010 Costs 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.

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

[40] 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.

[41] 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.

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

Orders

[43] 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) We direct under s 401(1)(c) that a condition be imposed on the respondent's practising certificate that, at his own cost, he is to undertake and satisfactorily complete a professional learning and development course, or courses, approved by the Education Council's Manager of Professional Responsibility, to assist him to develop and maintain appropriate relationships with students. This condition is to be fulfilled within six months of the date of this decision.

(c) The respondent is to advise prospective employers of this decision.

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

(e) There is an order permanently suppressing the names and identifying particulars of Students A and B, pursuant to s 405(6)(c).

(f) There is an order under s 405(6)(c) permanently suppressing the names of the respondent and the School.

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

(h) The respondent is to pay to the Tribunal costs in the amount of $458, under s 404(1)(i).

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).