

BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

DECISION NO: NZTDT 2022/56

UNDER THE Education Act 1989

IN THE MATTER of a charge laid by a **COMPLAINTS ASSESSMENT COMMITTEE** against **MIRIAMA NGAHINA HARMER** registered teacher (Registration Number 133206), of Whanganui

Hearing held on the papers (liability only) on Monday, 16 October 2023

Hearing held by audio-visual link (AVL) (penalty and non-publication orders) on Tuesday, 17 October 2023

Tribunal: Jo Hughson (Deputy Chairperson),
Louise Arndt and Nichola Coe (registered teachers)

Shannon Hullett (Tribunal Coordinator)

Appearances: Elena Mok for the Complaints Assessment Committee

Georgia Bishop for Ms Harmer

Renika Siciliano and Jennae Matenga for Te Kura
Kaupapa Māori O Te
Ātihaunui-Ā-Pāpārangi
(as to non-publication
orders)

Decision: 4 December 2023

Summary

- [1] Ms Harmer is a fully registered teacher. At the relevant times, she was the Tumuaki (Principal) of Te Kura Kaupapa Māori o Te Ātihaunui-ā-Pāpārangi, a kura catering for primary school aged students (Years 1-8) in Whanganui (the Kura).
- [2] At the time of the hearing Ms Harmer did not hold a current practising certificate. Her last practising certificate had expired in September 2019.
- [3] A Complaints Assessment Committee (CAC) was established to investigate matters about the conduct of Ms Harmer that were the subject of a mandatory report that the Kura had made to the Teaching Council of Aotearoa New Zealand in April 2019. At the conclusion of its investigation, the CAC laid a charge¹ alleging that between 30 January 2017 and 21 January 2019, Ms Harmer had engaged in misappropriation and/or mismanagement of Kura finances and/or had engaged in poor financial management practices including:
- (a) Making cash withdrawals using the Kura Visa card without:
 - i. Obtaining approval and/or authorisation from the Kura's Board of Trustees; and/or
 - ii. Keeping adequate receipts or satisfactory budgeting or accounting for the spending; and/or
 - (b) Using cash withdrawn using the Kura Visa card for
 - i. Personal purposes; and/or
 - ii. To pay advanced wages and/or salary to staff at the Kura.
- [4] This conduct was alleged to amount to serious misconduct when each of the alleged acts are considered separately or cumulatively. Alternatively, it was alleged the conduct amounted to conduct which otherwise entitled the Tribunal to exercise its powers pursuant to section 404 of the Education Act 1989 (the Act).
- [5] The hearing of the Charge proceeded in two parts. As to whether the charge was established or not (liability), there was a hearing on the papers. The evidence

¹ Notice of Charge dated 1 November 2022 signed by the Chair of the Complaints Assessment Committee, Lynda Harris.

produced by the CAC was an agreed summary of facts which Ms Harmer had signed on 19 April 2023². Ms Harmer accepted the Charge.

- [6] Written submissions were received from Counsel for the CAC and for Ms Harmer addressing the issue of liability,
- [7] The Tribunal found the Charge made out and that Ms Harmer's conduct amounted to serious misconduct as that term is defined in section 378 the Act.
- [8] The second part of the hearing, relating to penalty and non-publication orders, was held by audio-visual link (AVL). Ms Harmer attended with her support person and her counsel, Ms Bishop, and the Tribunal benefitted by hearing directly from Ms Harmer. The members extend their gratitude to Ms Harmer for attending. The Tribunal also heard submissions from Counsel.
- [9] Prior to the hearing, Counsel for the Kura had filed written submissions in support of the Kura's application for name suppression but had indicated they did not wish to attend the hearing. The Tribunal heard the Kura's application on the papers but considered the oral submissions that were made by Counsel for the CAC and Ms Harmer at the AVL hearing, about the Kura's application.
- [10] For the reasons given below, the decision of the Tribunal is that penalties should be ordered against Ms Harmer for her serious misconduct. The Tribunal is ordering cancellation of Ms Harmer's registration, and she is also being censured.
- [11] In addition, Ms Harmer is being ordered to contribute towards the costs of the CAC and the Teaching Council associated with these proceedings.
- [12] The Tribunal decided it would not be proper to exercise its discretion and make a permanent order prohibiting Ms Harmer's name from publication, for the reasons discussed later in this decision. When making this decision one of the factors the Tribunal had regard to was tikanga, but ultimately it was not satisfied that the restorative process Ms Harmer had undergone with the Kura, or any of the other personal matters Ms Harmer raised in support of her application, were sufficient either individually or cumulatively, to outweigh the competing public interest factors that favour her being identified in connection with these proceedings. As the interim

² Agreed Summary of Facts dated 19 April 2023 signed by Counsel for the CAC (Ms Mok) and Ms Harmer.

non-publication order that was made in May 2023 is not being made permanent³ Ms Harmer's name may be published. However, the Tribunal is making permanent orders in respect of the names of certain whānau members of Ms Harmer and specific health information that was provided in support of her application for a permanent order.

- [13] For the reasons given below, the Tribunal declined the Kura's application for a permanent order in respect of the name of the kura, its location and other identifying particulars. The interim order that was in effect until this decision, will now lapse.

Factual Findings

- [14] The Tribunal made the following findings of fact based on the evidence in the Agreed Summary of Facts.

Inappropriate use of Kura's visa card

- [15] The Kura held a Westpac Visa card for making school-related purchases (Visa card). Ms Harmer, as Principal, had access to and control over the Visa card. Authorisation and approval of Visa card transactions was required from the Kura's Board of Trustees (Board).
- [16] Between 30 January 2017 and 21 January 2019, Ms Harmer used the Visa card to make various cash withdrawals and payments without authorisation from the Kura's Board of Trustees (Board) and without the approval and knowledge of the Board's Chairperson. Ms Harmer also failed to keep adequate receipts or satisfactorily account for her spending using the Visa card over this period.
- [17] Specifically:
- (a) Between 30 January 2017 and 27 December 2017, Ms Harmer carried out 20 unauthorised transactions using the Visa card totalling \$6,225.50.
 - (b) Between 28 December 2017 and 27 December 2018, Ms Harmer carried out 79 unauthorised transactions on the Visa card totalling \$19,583.50.
 - (c) Between 28 December 2018 and 27 January 2019, Ms Harmer carried out 18 unauthorised transactions using the Visa card totalling \$3,740.00.

³ Minute Dated 18 May 2023 – Pre-Hearing Conference Te Meneti I Te 18 O Mei 2023 – Rūnanga Rongonga Tōmua.

- [18] The total amount incurred in unauthorised spending on the Visa card for the relevant period was \$29,549.00.
- [19] The transactions history for the Visa card showed that Ms Harmer had made cash withdrawals at a range of different places, including multiple transactions at St Johns Club (a restaurant in Whanganui), Stellar Restaurant and Bar (another restaurant in Whanganui), Rosie O'Grady's Irish Pub in Palmerston North and ASB SkyCity Casino in Auckland (and other locations).
- [20] Ms Harmer used some of the cash withdrawn using the Visa card for personal purposes, unrelated to the Kura. She also used some of the funds to pay advanced wages and salary to Kura staff, which was not the correct process by which staff were to be paid.

Kura investigation and mandatory report

- [21] In December 2018, Cameron Town, a chartered accountant, and the Kura's auditor, was carrying out an audit for the 2017 financial year. On 17 December 2018, Mr Town expressed his concerns about unauthorised cash withdrawals on the Visa card, to Hohepa Campbell, a specialist advisor to the Board, during a telephone call. Mr Town reported that he had not been provided with receipts or documents to indicate what the spending related to.
- [22] On 26 February 2019, Mr Town emailed the Board regarding the 2017 audit to explain that, during the audit, he had identified approximately \$19,000 of cash withdrawals which had been made without the Board's approval. Mr Town recommended that the Visa card be cancelled with immediate effect and that the Board report the matter to the Ministry of Education. He also advised he had raised concerns about the audit findings with the Office of the Auditor-General.
- [23] On 28 February 2019, Mr Campbell raised these concerns at a Board meeting, which Ms Harmer attended in her role as Principal. The Board subsequently formed a sub-committee to investigate the spending on the Visa card and reviewed all statements for the Visa card for the relevant period (30 January 2017 to 27 January 2019).
- [24] On 4 March 2019, Ms Harmer went on certified medical sick leave from the Kura.
- [25] By 1 April 2019, Ms Harmer and her whānau had repaid \$25,000 to the Kura (in three transactions amounting to \$19,000, \$2,500, and \$3,500 respectively). Ms Harmer repaid the \$4,000 shortfall in funds owing to the Kura by September 2019 after being notified of the shortfall during a subsequent Police investigation.

[26] On 10 April 2019, Ms Harmer resigned from her employment at the Kura effective from 30 April 2019.

[27] On 16 April 2019, the Kura submitted a mandatory report about Ms Harmer to the Teaching Council, and the matter was referred to the CAC.

Police and Ministry of Education involvement

[28] The Kura notified the Police of the allegations on 15 April 2019. The Police subsequently declined to lay charges.

[29] Ms Harmer, when spoken to by the Police in October 2019, made the following statements:

- (a) When asked if she had to go through the Board when using the Visa card, she said she had to reconcile payments with the Board and put it through the Board for approval. She said best practice was to get approval first and then make the purchase, but that the Kura never adhered to this.
- (b) When asked if she used the Visa card for anything that was not intended for the Kura she said “yes, at times I would make a withdrawal”.
- (c) When asked if she made withdrawals for personal use, she said “yes and no”. She said that sometimes a purchase would come up and she would pay for it with the card. She said lots of purchases were paid for in cash, and she would keep a paper trail of it and give it to her secretary to maintain those records. However, sometimes things got overwhelming and piled up. She said that a lot of the cash purchases were made for the Kura and that she would buy items through Trademe and Buy, Swap and Sell on Facebook. These items came at a cheaper cost, which was beneficial to the Kura, but meant she could not get these items “through a proper channel”.
- (d) When asked what she had told the Board when they asked about the purchases made on the Visa card, she said that she had advised that she could not remember all the purchases but that she accepted and took responsibility for them and said she would pay the money back, and that the Board seemed happy with that. She said it was bad practice.

[30] The Ministry of Education was also notified of the matter (on the recommendation of the Office of the Auditor-General) but did not investigate.

Ms Harmer's explanations

[31] Although more relevant to the question of penalty than to the Tribunal's objective assessment of Ms Harmer's conduct and its severity, Ms Harmer made the following comments explaining her conduct. The following facts were agreed by the parties and the Tribunal found that:

- (a) In her written response to the mandatory report, Ms Harmer said she had suffered a mental breakdown because of the stress and pressure placed on her in the lead-up to her conduct, which led to her actions with respect to the Visa card. She provided a timeline of events leading up to her resignation, which included a brief reference to the repayment of the money towards the end of her time as Principal, but otherwise did not address the Visa card withdrawals and transactions in detail. She denied ever intending to steal from or defraud the Kura and said that, whenever she used school funds, she would inform others, often the school secretary. She said she had formally apologised to the Board and made sure all the funds were repaid immediately after the concerns were raised.
- (b) At her meeting with the CAC on 1 September 2022, Ms Harmer said she could not remember a lot of what had happened at the time the various payments and transactions were made. She admitted the payments were unauthorised and took full responsibility for them. She said that:
 - i. At the time, she was not thinking things through.
 - ii. Some of the payments were justified and used for things like advances to staff.
 - iii. She was prepared to pay everything back, regardless of whether the cash was used for the Kura or not.
 - iv. The Kura specified the amount of \$25,000 to be repaid by her, which she did.
 - v. While she loved teaching, she felt that she did not deserve to return to teaching after her actions.
 - vi. For this reason, she had deliberately not renewed her practising certificate.

Legal Principles - Liability

[32] It was for the CAC to prove the Charge on the balance of probabilities.

[33] The definition of serious misconduct in section 378 of the Education Act 1989⁴ was:

Serious misconduct means conduct by a teacher –

- (a) that-
 - (i) adversely affects, or is likely to adversely affect, the wellbeing 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 Teaching Council's criteria for reporting serious misconduct.

[34] The test is conjunctive⁵. That means that at least one of the criteria under (a) must be met as well as (b), for the conduct to amount to serious misconduct.

[35] In relation to limb (a)(i), "likely" means that the risk or possibility is real; one that must not be fanciful and cannot be discounted⁶.

[36] Previous Tribunal decisions demonstrate that "fitness to be a teacher" in limb (a)(ii) includes conduct that, when considered objectively, will have a negative impact on the trust and confidence which the public is entitled to have in the teacher and the teaching profession as a whole, including conduct which falls below the standards legitimately expected of a member of the profession, whether of a teaching character or not.⁷

⁴ This Act has been repealed and replaced by the Education and Training Act 2020 which contains an identical definition.

⁵ *Teacher Y v Education Council of Aotearoa New Zealand* [2018] NZDC 3141, 27 February 2018, at [64] with reference to the definition in section 378 of the Education Act 1989.

⁶ *CAC v Marsom* NZTDT 2018/25 adopting the meaning of "likely" in the name suppression context as described by the Court of Appeal in *R v W* [1998] 1 NZLR 35 – "real", "appreciable", "substantial" and "serious" are qualifying adjectives for "likely".

⁷ This is the approach taken to "fitness to practise" for the purposes of the Health Practitioners Competence Assurance Act 2003, and the approach which has been taken to the test for "fitness to be a teacher", by this Tribunal in previous decisions.

- [37] As to the Teaching Council's criteria for reporting serious misconduct (limb (b)), broadly, a teacher's employer must immediately report to the Teaching Council if the employer has reason to believe the teacher has committed a serious breach of the Code of Professional Responsibility. The examples of conduct that is of the nature and severity to amount to a serious breach of the Code are set out in Rule 9 of the respective Rules.
- [38] In this regard, for the conduct that occurred prior to 19 May 2018, the CAC relied on Rules 9 (1)(h), (n) and/or (o) of the Education Council Rules 2016. For the conduct that occurred after 19 May 2018, Rules 9(1)(g), (j) and/or (k) of the Teaching Council Rules 2016 were relied on.
- [39] Rule 9(1)(k) of the Teaching Council Rules 2016 (Rule 9(1)(o) in the Education Council Rules 2016) is a "catch all" provision⁸ in relation to both acts and omissions that bring or are likely to bring the teaching profession into disrepute. The question to be asked by the Tribunal is whether reasonable members of the public, informed of all the facts and circumstances, could reasonably conclude that the reputation and good standing of the teaching profession would be lowered by the behaviour of the teacher concerned.⁹ This is the test that also applies for the purposes of limb (a)(iii).
- [40] This approach reflects the fact that whether there has been serious misconduct (or misconduct simpliciter¹⁰), or not, and the severity of any such misconduct, is to be assessed by objective standards.
- [41] It is well established that subjective matters that are personal to the respondent teacher are not to be considered in any significant way when the Tribunal objectively assesses whether there has been serious misconduct. Personal factors raised by

⁸ *Teacher Y v Education Council of New Zealand* [2019] NZCA 637 at [69].

⁹ *CAC v Teacher C* NZTDT 2016/40 28 June 2018 at [203] citing *Collie v Nursing Council of New Zealand* [2001] NZAR 74 (HC) at [28]. This test was applied in *Teacher Y v Education Council of Aotearoa New Zealand*, above fn. 15 at [48].

¹⁰ The District Court on appeal, has ruled that if any one of the matters under limb (a) of the definition of serious misconduct are made out, the teacher's conduct will amount to misconduct, whereas if the conduct also meets limb (b), the conduct will meet the conjunctive test for serious misconduct; *Teacher Y v Education Council of Aotearoa New Zealand* [2018] NZDC 3141, 27 February 2018, at [64]. *Evans v Teachers Disciplinary Tribunal* [2020] NZDC 20062, 8 October 2020, at [42].

the teacher, including explanations for their conduct, may be considered at the penalty stage if a charge is found to have been established.¹¹

Relevant standards

- [42] The Tribunal assessed Ms Harmer’s conduct against the relevant standards of ethical and professional conduct set out in the Code of Professional Responsibility, as well as those set in previous comparable decisions of the Tribunal (discussed later).
- [43] The standards in the Code are high standards that are expected of every registered teacher. The Code is clear that teachers must “*respect [their] trusted position in society*”.
- [44] Clause 1 sets the expectation that teachers are expected to demonstrate a high standard of professional behaviour and integrity (clause 1.3). By acting with integrity and professionalism, teachers, and the teaching profession, maintain the trust and confidence that learners, whānau, and the wider community place in them to guide their children and young people on their learning journey and keep them safe.¹²
- [45] Teachers are also expected to contribute to a professional culture that supports and upholds the Code (clause 1.5).
- [46] Clause 2.1 reads:

I will work in the best interests of learners by promoting the wellbeing of learners and protecting them from harm.

Findings on the Charge

- [47] The Tribunal was satisfied and found that the alleged acts in the Charge were proved, on the evidence received.
- [48] Ms Harmer accepted that her conduct was serious misconduct. However, the Tribunal was itself, required to consider whether the conduct was serious misconduct for the purposes of the Act.

¹¹ See *Martin v Director of Proceedings* [2010] NZAR 333 and *Cole v Professional Conduct Committee of the Nursing Council of New Zealand* [2017] NZHC 1178, at [126]-[130] applied in previous decisions of this Tribunal.

¹² *CAC v Teacher Z* NZTDT 2020/19 at [26].

- [49] The Tribunal had no difficulty concluding that considered objectively, Ms Harmer's conduct in each of the particulars of the Charge, separately and cumulatively, was serious misconduct. In the Tribunal's opinion, Ms Harmer's conduct in using the Kura's funds for her own personal expenses, and otherwise spending funds without proper authorisation, reflect adversely on her fitness to be a teacher, especially as a tumuaki/principal.
- [50] As Counsel for the CAC identified, a key responsibility of a principal is to ensure that the kura's finances are properly managed. Ms Harmer's conduct involved her misusing her position and authority, including on occasions, for her own personal gain. She also failed to properly account for her spending. A significant sum of money was involved, over an extended period, and there were 117 transactions. Ms Harmer also failed to follow proper processes around pay. Ms Harmer has failed to respect her trusted position in society and her conduct involved a significant and very serious falling short of expected standards on multiple occasions, that reflect adversely on her fitness to be a teacher. Limb (a)(ii) is met.
- [51] Limb (a)(iii) is also met. In the Tribunal's opinion, Ms Harmer's conduct brings, or is likely to bring, the teaching profession into disrepute. As was submitted by the CAC, reasonable members of the public would expect teachers, particularly principals, to manage school funds appropriately and not use them for personal use or to bypass the proper processes in place, such as obtaining authority from the Board of Trustees. The Tribunal agreed with the submission made for the CAC that while Ms Harmer has claimed that she did not act intentionally to defraud the Kura, this is difficult to reconcile with her concession that she knowingly withdrew Kura funds for unauthorised purchases and purchases which on occasion, were for her personal benefit and not connected with the Kura.¹³ The Tribunal had little difficulty reaching the view that the reputation of the teaching profession has been lowered by Ms Harmer's conduct.
- [52] Further, Ms Harmer breached the Code of Conduct in more than one respect in that she failed to demonstrate a high standard of professional behaviour and integrity and she also failed to contribute to a professional culture that supports and upholds the Code. The Tribunal accepted the CAC's submission that this supports the

¹³ Affidavit of Application in Support of Application for Non-publication of Name at MNH1 p 6; Ms Harmer deposed "I honestly and truly can say that I never intended to steal or defraud the school" [sic].

opinion that Ms Harmer's conduct reflects adversely on her fitness to be a teacher and that it risked bringing the profession into disrepute.

- [53] The Tribunal did not accept the submission that was made for Ms Harmer at the hearing that her conduct had no direct impact on akonga (students) at the Kura. In her written submissions, Counsel for Ms Harmer submitted that the gravity of Ms Harmer's offending "*needs to be balanced against the indirect and minimal impact of the offending on a student*" (and that the funds that were taken have been repaid)¹⁴. As was submitted for the CAC, although there was no direct evidence of harm to student learning or wellbeing, Ms Harmer's conduct had the potential to result in harm of this nature. This is because some of her conduct involved the misuse of funds which ought to have been applied for the benefit of the Kura and its akonga, but which were instead used elsewhere for Ms Harmer's personal benefit. The Kura was deprived of resources which risked jeopardising the education, and potentially the wellbeing, of the students who attended there at the relevant times. The Tribunal did not agree that impact could fairly be characterised as indirect and minimal.
- [54] The Tribunal was also satisfied that limb (b) of the definition of serious misconduct is met. Ms Harmer's actions in using Kura funds for her own gain, going to restaurants, casinos, and the like, involved theft (Rules 9(1)(h), (n), and (o) of the Education Council Rules and Rule 9(1)(g) of the Teaching Council Rules). Theft is an offence that may be the subject of a criminal prosecution and is punishable by imprisonment for a term of three months or more (Rule 9(1)(n) of the Education Council Rules and Rule 9(1)(j) of the Teaching Council Rules). For the purposes of these Rules, it is irrelevant Police decided to take no further action after Ms Harmer undertook to, and did, repay the funds she had misappropriated.
- [55] As already stated, Ms Harmer's conduct involved acts or omissions that bring, or are likely to bring, the teaching profession into disrepute (Rule 9(1)(c) of the Education Council Rules and Rule 9(1)(k) of the Teaching Council Rules).
- [56] For all those reasons, the conduct in the particulars of the charge, when the particulars are considered both individually and then together, was serious misconduct. Accordingly, the Charge was established.

¹⁴ Counsel for Ms Harmer's Submissions as to Liability, Penalty and Costs dated 24 July 2023 (written submissions).

Penalty

- [57] Having made adverse findings of serious misconduct, the Tribunal was entitled to exercise its powers under section 404 of the Act. The Tribunal could do one or more of the things set out in section 404(1).
- [58] Written and oral submissions were received from both Counsel for the CAC and Counsel for Ms Harmer, including written and oral submissions for the CAC in reply. As noted, the Tribunal heard from Ms Harmer directly, during the AVL hearing.

Penalty Principles

- [59] It is well established that the primary purposes of the imposition of disciplinary penalties against teachers who have been found guilty of a disciplinary offence are to maintain professional standards (through general and/or specific deterrence, so that the public is protected from poor practice and from people unfit to teach), to maintain the public's confidence in the teaching profession, and to protect the public through the provision of a safe learning environment for students¹⁵. As was pointed out by the CAC, each purpose must be addressed in its own right; a particular case may not give rise to significant protection concerns but the maintenance of professional standards may require that certain orders should be made.
- [60] In previous decisions the Tribunal has accepted as the appropriate sentencing principles those identified by Collins J in *Roberts v Professional Conduct Committee of the Nursing Council*¹⁶. His Honour identified eight factors as relevant whenever an appropriate penalty is being determined in proceedings of this nature. Those factors are:
- (a) What penalty most appropriately protects the public.
 - (b) The Tribunal must be mindful of the fact that it plays an important role in setting professional standards.
 - (c) Penalties imposed may have a punitive function.

¹⁵ As discussed in *CAC v McMillan* NZTDT 2016/52 at [23].

¹⁶ [2012] NZHC 3354 at [44]-[51].

- (d) Where it is appropriate, the Tribunal must consider rehabilitating the professional.¹⁷
- (e) The Tribunal should strive to ensure that any penalty imposed is comparable to penalties imposed in similar circumstances.
- (f) It is important for the Tribunal to assess the practitioner's behaviour against the spectrum of sentencing options that are available. In doing so, the Tribunal must try to ensure that the maximum penalties are reserved for the worst offenders.
- (g) The Tribunal should endeavour to impose a penalty that is the least restrictive that can reasonably be imposed in the circumstances.
- (h) It is important for the Tribunal to assess whether the penalty it is to impose is fair, reasonable, and proportionate in the circumstances presented to the Tribunal, or not.

[61] In *Fuli-Makaua*¹⁸ the Tribunal identified that cancellation of a teacher's registration may be required in two overlapping situations:

- (a) Where the offending is sufficiently serious that no outcome short of deregistration will sufficiently reflect its adverse effect on the teacher's fitness to teach and/or its tendency to lower the reputation of the profession; and
- (b) Where the teacher has insufficient insight into the cause of the behaviour and lacks meaningful rehabilitative prospects. Therefore, there is an apparent ongoing risk that leaves no option but to deregister.

[62] Because Ms Harmer does not hold a current practising certificate, the Tribunal had more limited penalty options available to it under section 404(1); suspension of practising certificate and the imposition of conditions on her practice were not orders that could be imposed.¹⁹

¹⁷ *CAC v Teacher* NZTDT 2016/55 at [30].

¹⁸ *CAC v Fuli-Makaua* NZTDT 2017/40 at [54] citing *CAC v Campbell* NZTDT 2016/35 at [27].

¹⁹ The Tribunal did have the power under s. 401 to direct the Teaching Council to impose conditions on any subsequent practising certificate that may be issued to Ms Harmer in the future.

Matters raised by Ms Harmer as to the context of her offending and rehabilitation:

- [63] Ms Harmer told the Tribunal that she had been suffering from stress and anxiety since 2015 (that is, prior to her misconduct) because of an increased workload due to, among other things, the deputy principal resigning and there being no relievers.
- [64] In 2016 and 2017 Ms Harmer was admitted to hospital for stress-related illnesses. This was evidenced by medical records that were produced²⁰. She stated that because of the stress and pressure she was under in the time leading up to her conduct, [REDACTED]. At her meeting with the CAC on 1 September 2022 Ms Harmer told the Committee that she could not remember a lot of what had happened during the time of the misconduct. There was evidence that coinciding with her “battle with stress” Ms Harmer has had an increase in illness.
- [65] Ms Harmer’s Counsel noted that after her misconduct came to the light, Ms Harmer finally sought proper help for her mental health and was [REDACTED]
[REDACTED]
- [66] Ms Harmer had been diagnosed with asthma during childhood and the Tribunal was told that she had increased signs of asthma exacerbation since 2019 which she attributes to the physical manifestations of anxiety and stress.
- [67] Ms Harmer told the Tribunal that in 2021 she was diagnosed [REDACTED]
[REDACTED] and since then she has been on medication [REDACTED]
[REDACTED]
[REDACTED] With reference to an article, it was submitted that the interrelationship between [REDACTED] is significant, and each has the likely potential to worsen each other.²¹ It was submitted that most of these medical issues were consequential of the stress and anxiety that Ms Harmer was suffering in the lead up to and since her misconduct.

‘Responsibility, Rehabilitation and Contrition.’

- [68] In her submissions, Counsel for Ms Harmer referred to matters that were outlined under a heading ‘Responsibility, Rehabilitation and Contrition’. It was submitted as

²⁰ Affidavit of Miriama Ngahina Harmer in Support of Application for Permanent Non-Publication of Name affirmed on 27 June 2023.

²¹ The article cited was Jasmine L. Wong, Fernando Martinez, Andrea P. Aguila, Amrita Pal, Ravi S. Aysola, Luke A. Henderso & Paul M. Macey: *Stress in Obstructive Sleep Apnea* Scientific Reports (2021) 11: 12 631. [NB: The article itself was not produced to the Tribunal]

follows (with reference to evidence in the agreed statement of facts and in Ms Harmer's affidavit):

- (a) Ms Harmer immediately accepted liability for the \$29, 549.00 that she had misappropriated and cooperated with the Boards' investigation.
- (b) By 1 April 2019, Ms Harmer and her whānau had repaid \$25,000 to the Kura by accessing Ms Harmer's superannuation. This included the funds that Ms Harmer had used for Kura-related purposes.
- (c) Ms Harmer resigned from the Kura on 10 April 2019 *"to allow it to be restored and to heal"*.
- (d) Ms Harmer was unaware of the \$4000 shortfall until she was informed of this in September 2019, and she repaid it immediately.
- (e) Ms Harmer wrote a detailed letter setting out factors leading up to the misconduct.
- (f) In accordance with tikanga, Ms Harmer took restorative justice steps to heal her tapu and mana and she also sought to right her wrongdoings to the Kura *"and the wider teaching community"*. In accordance with tikanga and muru she attended a hui at the Kura whereby she apologised kanohi ki te kanohi for her misconduct.
- (g) The Kura accepted Ms Harmer's apology, and along with repayment of the funds, informed Ms Harmer that from the Kura's point of view, the matter was dealt with.
- (h) Cultural processes and values relating to justice should receive appropriate weight.
- (i) Ms Harmer resigned from her role as Tumuaki and does not intend to renew her practising certificate or work as a teacher or principal. For this reason, she had not taken as many rehabilitative steps as would normally be expected for someone looking to remain a teacher.
- (j) Ms Harmer has consistently expressed remorse for her conduct over the past four years.
- (k) The Police did not take the matter any further.

- (l) Ms Harmer has no record of dishonest behaviour before or since the misconduct the Tribunal has reviewed. She is a person “*who offended under a perfect storm of conditions*” which highlights that the need to punish is greatly reduced.
- (m) In 2019 Ms Harmer began counselling through Talking Therapy and identified the breakdown in key relationships during this time that lead to poor decisions and [REDACTED]. She has genuinely attempted to address the harm, restore trust, prevent repetition, and repair relationships. She then engaged with Flourish Counselling in 2019, seeing a registered psychotherapist and counsellor to discuss aspects of what was happening to her and to address her [REDACTED]
- (n) Ms Harmer then engaged weekly over a period of 6 weeks with Azian Inspired Hypnotherapy for processing trauma, [REDACTED] and addiction sessions.
- (o) As to the public interest, “*the maintenance of professional standards and public confidence has been addressed with Ms Harmer’s resignation; paying back the money; and following the Tikanga principles of kanoahi ki te kanoahi apology*”. Further, the public interest in penalising Ms Harmer is “*reduced*” on account of the steps she has taken, and this was “*ratified by the Police in deciding not to lay criminal charges*”. Also, “*the parties appear to have moved on and healed*” since Ms Harmer’s offending was brought to the Teaching Council’s attention and “*Ms Harmer’s actions played some part in this*”.

[69] It was submitted that Ms Harmer is aware of the causes of her offending behaviour and has been working on managing these issues; and that a “*heavy penalty*” would undermine Ms Harmer’s rehabilitative work.

[70] Further, that while the offending was over an extended period, it was a “*one-off period of offending*” which was characterised by stress and other medical issues. It was acknowledged that the offending could be seen as a pattern of behaviour (which the Tribunal considered it was) but Counsel submitted it was “*however, underpinned by an extraordinary and prolonged episode of stress and pressure*”; that since receiving proper, medical help, Ms Harmer has addressed and accounted for her actions and had not acted dishonestly since.

Relevant Aggravating and Mitigating Factors

[71] Counsel for the CAC submitted, and the Tribunal agreed, that Ms Harmer's conduct was highly serious. The conduct was repeated misconduct that spanned a period of two years and involved a significant sum of money (\$29,549.00). Ms Harmer repeatedly used her Kura's funds for her own personal benefit over an extended period, including at restaurants, pubs, and casinos. Ms Harmer was in a position of responsibility and trust as the Tumuaki of the Kura. She breached that position of trust by using funds for her own benefit. She failed to manage the Kura's funds appropriately and despite knowing that she needed Board of Trustees' approval, she failed to follow the proper processes.

[72] As to mitigating factors it was submitted for Ms Harmer:

- (a) There are medical factors which were directly relevant to the misconduct.
- (b) Ms Harmer accepted the summary of facts and liability for her actions.
- (c) Ms Harmer accepted that her actions were serious misconduct.
- (d) Ms Harmer engaged with tikanga principles and muru to restore the Kura and the community and make amends.
- (e) Ms Harmer immediately paid back in full the amount she had taken.

[73] It was further submitted that Ms Harmer accepts the gravity of her offending in relation to the amount of money "taken" but, as above, this needs to be *"balanced against the indirect and minimal impact of the offending on a student, and that the stolen funds have been repaid"*; and that this reduces the overall gravity of the misconduct. As above, the Tribunal considered that there was a real risk at the time it occurred, that the conduct would cause harm to students, by depriving them of resources that could be applied to meet their educational and wellbeing needs at the Kura.

[74] Having considered the submissions that were made for the CAC and Ms Harmer, the Tribunal considered that the following mitigating factors personal to Ms Harmer needed to be taken account of:

- (a) Ms Harmer was under personal stress at the time of her misconduct. This was in part caused by a strained relationship she had with her Board of Trustees.

- (b) Ms Harmer has repaid the funds to the Kura. The Tribunal noted, however, that this was only done when her misconduct was discovered, and with the assistance of her whānau.
- (c) The Kura has provided evidence of the restorative process that was carried out with Ms Harmer in accordance with tikanga and muru. Ms Harmer apologised to the Kura for her actions and the apology was accepted.
- (d) Ms Harmer has accepted responsibility, and she has shown that she has at least some insight into the seriousness of her conduct, by agreeing the summary of facts and admitting the Charge.
- (e) Ms Harmer has no previous disciplinary history.

[75] The Tribunal also took into account the apology that Ms Harmer made to the teaching profession at the hearing. Ms Harmer stated that she knows her conduct demonstrated a lack of integrity on her part and that this has affected the profession. Ms Harmer was emotional and said she is deeply ashamed of her conduct and is humiliated about it and takes responsibility for her actions. She accepted she was wrong and said she has reflected about it and tried to make amends. Ms Harmer told the Tribunal she is not the same person she was in 2019. Her oral statements to the Tribunal in these respects indicated that she is genuinely remorseful.

[76] Those factors were, necessarily, required to be balanced against the prolonged nature of the misconduct and its character. The Tribunal agreed with the CAC's characterisation of the conduct as this not being one-off slip by a teacher who otherwise demonstrated a high standard of professional behaviour and integrity. It was a pattern of behaviour, perpetrated over time, and which was not compatible with Ms Harmer's professional obligations and her position of responsibility. While Ms Harmer may well have been under stress at the time of her conduct, caused by her strained relationship with the Board of Trustees and other related stressors, this does not excuse the misconduct or mitigate its gravity, given the ongoing repeated and deliberate nature of it, and Ms Harmer's position of responsibility at the time.

[77] Further, while it is accepted that Ms Harmer has accepted liability and that her actions equated to serious misconduct, the Tribunal was concerned that although at times through the CAC and Tribunal processes, she claimed not to have acted intentionally to defraud the Kura, this is difficult to reconcile with her concession that her spending was not authorised and was, at times, for her personal benefit. The

Tribunal was also troubled by the submission that her conduct had no direct impact on the students at the kura. The Tribunal viewed this as indicative of Ms Harmer not fully appreciating the flow-on effects of her conduct for others (the education interests of students in particular), which is concerning.

- [78] The Tribunal considered the evidence it received as to the rehabilitative steps Ms Harmer stated she has taken that address the underlying risk factors/triggers that she maintained led to her behaviour, including the counselling sessions with various organisations. In her affidavit of 27 June 2023 in support of her application for name suppression, for example, Ms Harmer referred to having attended “numerous” counselling sessions which gave her “tips and support”²².
- [79] At the hearing, Ms Harmer provided more information about the counselling she said she had undertaken. She said she had had counselling with the Problem Gambling Foundation in 2020 (weekly, both face-to-face in Palmerston North and online due to the COVID-19 lockdown situation) and with Flourish Counselling. She stated that by 2021 she felt she was in a space where she could just rely on phoning the Problem Gambling Foundation if she was in a situation that could trigger her, and she said that this was also the situation in 2022.
- [80] Ms Harmer explained that she is almost 60 years of age and does not have a lot of time left in the workforce. She said she knows the triggers for her conduct, why she reacted as she did, and that the counselling that she has undergone over the past three and half years has enabled her to understand these triggers.
- [81] No independent supporting evidence was provided that outlined the nature and extent of the counselling sessions Ms Harmer told the Tribunal she has undertaken. Because of that, the Tribunal considered that the information available for it to be sufficiently assured that the underlying risk factors have been addressed adequately, was too limited. For example, if a gambling problem was causative of the conduct, without independent supporting evidence, the Tribunal could not be assured this trigger has been addressed so that the risk of repetition has been mitigated.
- [82] Ms Harmer told the Tribunal that the restorative justice process she went through with the Kura (which she said involved the old and newly comprised Board of Trustees members, akonga, and staff) helped to heal her tapu and mana and right her wrongdoing with the Kura. She confirmed that at the hui she had attended at the

²² Statement of Miriama Harmer, April 2021; Affidavit of Miriama Harmer affirmed in June 2023, at [27].

Kura she apologised for her behaviour, and that the apology was accepted²³. She said that tikanga Māori allowed people to talk and her to admit, say she was sorry, and heal. The Tribunal had no reason to doubt that this process helped to restore relationships and enable Ms Harmer's tapu and mana to be healed, and in those respects was rehabilitative.

- [83] Ms Harmer told the Tribunal that she uses rongoa (Māori medicine) and daily karakia to balance her as a person, and she indicated she will continue with this.

Current work

- [84] Ms Harmer told the Tribunal she is currently working as a senior consultant in a Māori professional services consultancy that has several government contracts, including a contract with the Ministry of Education to provide support and resources for Māori kaiako teaching in classrooms. She also said she does cultural capability work in several areas.
- [85] Ms Harmer stated that it is not a requirement of her employment that she is a registered teacher; she said that she is able to provide support for Māori kaiako "*from an outsider's perspective*".
- [86] The Tribunal was troubled by the fact then when she was asked by the Chair whether her employer was aware of her misconduct at the Kura, and these proceedings, Ms Harmer said that they are not aware (she had not told them). Ms Harmer told the Tribunal that in 2019 she was contacted by the consultancy and asked to consider taking up employment. She said that when she took up her role, this was not long after she had gone through the restorative process with the Kura. She said that she felt the matter was finished and that "*we had dealt with the situation*" and she was healing (and so she did not inform her new employer). Ms Harmer indicated that she has some concerns that were her employer to learn of these matters then she may no longer be retained by the consultancy.
- [87] Ms Harmer indicated that her support person (who was attending the AVL hearing with her) did not know about her misconduct or these proceedings, until the night before the penalty hearing in these proceedings. It was not clear from what Ms Harmer stated orally, that key whānau members, know anything about these

²³ This was confirmed by the current Board Chair, in her Statement filed in support of the Kura's application for a non-publication order in respect of its name.

matters. Ms Harmer did say that her former husband (who does not share her surname) does not know about these matters.

- [88] The Tribunal did not have the benefit of any character references as Ms Harmer did not seek to produce any references.

Findings on Penalty

- [89] The Tribunal considered the relevant penalty principles including previous comparable cases, as well as the evidence it received and the submissions that were made for the CAC and Ms Harmer.
- [90] Taking all relevant matters into account, the Tribunal was satisfied that it was appropriate and necessary to impose a formal penalty. There could be no doubt Ms Harmer's conduct was of sufficient severity as to warrant the imposition of disciplinary penalties to maintain professional standards and protect the public.
- [91] It was submitted for the CAC that because of the nature and gravity of Ms Harmer's conduct, her personal factors, and the principles and purposes of disciplinary proceedings, cancellation of registration was the appropriate starting point, and likely the appropriate end point.
- [92] The Tribunal considered that Ms Harmer's conduct was grave indeed. Ms Harmer could not be said to have been ignorant of, or indifferent to, her financial responsibilities as principal. When she used the Kura Visa card for her personal benefit, Ms Harmer was deliberately dishonest. The appropriate starting point was cancellation of registration.
- [93] The Tribunal considered four comparable cases involving employment-related fraud by teachers²⁴, to ascertain the appropriate starting point and to ensure that the penalty to be imposed on Ms Harmer is broadly consistent with the penalty orders made in other cases. The Tribunal agreed with the submissions for the CAC that on balance, Ms Harmer's offending is of a similar seriousness to that in *Fletcher*.
- [94] In *Fletcher* the teacher committed serious misconduct when, over a period of three years, he stole \$8,237.30 from the school where he was the principal. The conduct involved use of a school fuel card to purchase his own petrol, failing to pay rent for the schoolhouse for five weeks, and claiming reimbursement for attending six

²⁴ CAC v *Fletcher* NZTDT 2018/17, 21 November 2018, CAC v *Parsons* NZTDT 2019/50, 2 September 2020, CAC v *Rollo* NZTDT 2018/106, 24 September 2019 and CAC v *Coldstream* NZTDT 2019/18, 10 February 2021.

professional development courses which he did not attend. When he was confronted about the fuel card thefts, Mr Fletcher voluntarily disclosed his rental arrears and the false expense claims. He later repaid all the money, was remorseful and explained that he was in debt at the time. The Tribunal censured Mr Fletcher and ordered cancellation. While Mr Fletcher engaged in more overt deception than Ms Harmer on the six occasions he made false expense claims, the sums of money involved in Ms Harmer's case were more significant (Ms Harmer's offending involved sums similar to *Rollo*, a case which involved a refusal to return funds for a cancelled kapa haka group cultural exchange to Tahiti that had not been approved by the university that Ms Rollo was employed by).

[95] Ms Harmer's conduct was more serious than in *Parsons* where cancellation was the starting point. Mr Parsons, a principal, committed serious misconduct when he used school funds to purchase an iPad, iPad accessories and a television for personal use without permission and then lied to school staff about the purchase of the television. The total sum involved was \$1,873.99. In that case the Tribunal reviewed 16 previous decisions which involved employment-related fraud by teachers, including principals, including using work cards for personal expenditure. Based on this review, the Tribunal found that "*cancellation is often the outcome in cases involving deception*"²⁵ and Mr Parsons' registration was cancelled.

[96] Cancellation also appears to have been the starting point in *Coldstream*, which was a case involving the centre manager of a pre-school who, over eight months stole \$4,735 comprised of cash that parents had paid to the centre, and \$50 vouchers purchased with the centre's money and used personally. Ms Coldstream's offending was also repetitive but was over a shorter period (than Ms Harmer's) of eight months and involved \$5000. There were also considerable personal mitigating factors put forward and the teacher had undertaken significant rehabilitative steps to address the causes of her offending, as well as continuing to work as a teacher in the interim, with the support of her employer (the latter not being a feature in this case; Ms Harmer had not continued to work as a teacher in a kura since her resignation from the Kura and/or since her last practising certificate expired). In the end, a lesser penalty (than cancellation) was imposed taking into account the support the teacher was receiving from her family and current employer, and the mitigating features that

²⁵²⁵ CAC v Parsons NZTDT 2019/50, 2 September 2020 at [99].

were put forward. As noted, in Ms Harmer's case, the Tribunal was told that Ms Harmer's current employer is not aware of her offending, or these proceedings.

[97] In terms of rehabilitation, ultimately, while the Tribunal acknowledges that Ms Harmer has taken some rehabilitative steps, as noted, it could not be assured on the available evidence, that the steps she has taken have adequately addressed the issues underlying her course of conduct and that there is no ongoing risk that it will be repeated. Further, the Tribunal could not be assured that Ms Harmer had a sufficient degree of insight into the flow-on consequences of her actions for others; for akonga, for the Kura and the Kura Community, and for the reputation and good-standing of the teaching profession (as a whole).

[98] It is noted that Ms Harmer, through her Counsel, acknowledged that a teacher expecting to return to practice might be expected to have taken further rehabilitative steps. The Tribunal agreed.

[99] The Tribunal was unable to accept the submission that the restorative justice process Ms Harmer went through with the Kura, in accordance with tikanga principles, as well as her repayment of the money she had taken, meant that the need to maintain professional standards and public confidence in the profession had been addressed. The restorative justice process will have had a different focus to these proceedings and while it may have resulted in the healing of relationships between Ms Harmer and the Kura, as well as Ms Harmer's tapu and muru, it is unlikely to have involved the resolution of the issues the Tribunal was required to grapple with in terms of setting and maintaining professional standards and protecting the public in the wider sense (where there has been fraudulent conduct on the part of the respondent teacher in the circumstances as they were in this case).

Censure and cancellation of registration

[100] In the end, the Tribunal considered that the least restrictive penalty which meets the seriousness of the case and discharges the Tribunal's obligation to the public and the teaching profession is a censure of Ms Harmer and the cancellation of her registration as a teacher.

[101] A censure is required to mark the Tribunal significant disquiet about, and disapproval of, Ms Harmer's conduct, and to maintain professional standards.

[102] As for cancellation, both categories identified in *Fuli-Makaua* are met and public protection and the maintenance of professional standards through deterrence,

warrant cancellation of Ms Harmer's registration. The Tribunal did not consider that the mitigating factors it took account of meant that a lesser penalty would be appropriate, although whether a penalty short of cancellation was appropriate (and if so, what orders could reasonably be made) was considered by the Tribunal.

[103] The orders of censure and cancellation are not being made for the primary purpose of punishing Ms Harmer for her misconduct. They are being made because Ms Harmer's conduct was so serious that no outcome short of deregistration (combined with a censure) would sufficiently reflect its adverse effect on her fitness to teach and its tendency to lower the reputation of the profession; and to protect the public because the Tribunal was not sufficiently assured that there is no ongoing risk of repeat offending.

[104] If Ms Harmer decides she wishes to return to teaching and she makes an application to be registered again, the Teaching Council will be able to determine if Ms Harmer is suitable to be registered and hold a practising certificate. At that time the Teaching Council would need to have regard to nature of the conduct the Tribunal has reviewed in this case, and any information Ms Harmer may provide as to her fitness and suitability for registration, which may include evidence of all rehabilitative steps she has taken to demonstrate there would be no repeat her behaviours.

Costs

[105] It is usual for an award of costs to be made against a teacher once a charge is established. A teacher who comes before the Tribunal should expect to make a proper contribution towards the reasonable costs that have been incurred. Otherwise, the teaching profession (as a whole) would need to meet all the costs of a proceeding that has been brought about by the teacher's own making.

[106] Costs are at the discretion of the Tribunal.

[107] The CAC sought costs noting the general rule that where a charge is found proved, the starting point is 50% of the CAC's costs.²⁶

[108] As to liability, the matter has been able to be heard on the papers. Penalty was heard by AVL in this case, but this did not appear to increase the costs incurred by the CAC or the Tribunal associated with the hearing, to any significant extent. \$780 was indicated as the costs associated with Counsel for the CAC preparing for and

²⁶ Practice Note of the Teachers Disciplinary Tribunal, Practice Note 1: Costs, 1 April 2022 at [4].

attending the penalty hearing; and the Teaching Council's costs schedule that was presented to the Tribunal was identical to those presented in other cases that have been heard solely on the papers.

- [109] In cases where the charge has been heard on the papers, these typically attract a costs order of 40% of the costs and expenses incurred by the CAC²⁷.
- [110] Counsel for Ms Harmer indicated that a costs order under 40% would be appropriate "*in consideration of the extraordinary circumstances and the steps taken by Ms Harmer*".
- [111] No evidence of Ms Harmer's current financial circumstances was produced to support the submission that a reduced costs order would be fair and reasonable.
- [112] As Ms Harmer has been in paid work with a professional services consultancy for several years and as at the date of the hearing, she remained employed by the consultancy, it can reasonably be expected that she will have the means to meet an order of 40% of the CAC's costs. Total fees incurred by the CAC (billed and unbilled) excluding GST were indicated as being \$12,030.00, which the Tribunal considered were reasonable.
- [113] In this case, the Tribunal considered that an order of 40% contribution to the CAC's costs as claimed, would be appropriate. This takes account of Ms Harmer's acceptance of liability and agreement to proceed with a liability hearing on the papers with the benefit of an agreed summary of facts.
- [114] The Tribunal was not minded to further reduce the costs order because of any other circumstances.
- [115] Accordingly, the Tribunal is making an order pursuant to section 404(1)(h) that Ms Harmer is to pay the sum of \$4,812.00 to the CAC.
- [116] As for the costs of conducting the hearing, the Tribunal is making an order that Ms Harmer make a 40% contribution towards those costs (estimated to be \$1,455.00²⁸), being payment of the sum of \$582.00 to the Teaching Council. This order is made under section 404(1)(i).

²⁷ Costs Schedule filed by Counsel for the CAC.

²⁸ Schedule of Teaching Council's Costs for the hearing.

Non-publication orders

Applications

- [117] Ms Harmer has had the benefit of an interim non-publication order in respect of her name since May 2023. At that time, interim orders were also made in respect of name and identifying particulars of the Kura including the location of the Kura. Non-publication orders were also made in relation to the relatives and children, and grandchildren of Ms Harmer, and her medical issues. The orders were to continue in effect until further order of the Tribunal and the determination of any applications for permanent orders.
- [118] Ms Harmer sought a permanent order prohibiting the publication of her name and identifying particulars, as did the Kura in respect of its name, location, and any other identifying particulars. Ms Harmer's application was opposed by the CAC but supported by the Kura. The CAC indicated that it would abide the Tribunal's decision on the Kura's application for a non-publication order. Ms Harmer supported the Kura's application.

Summary of relevant law

- [119] The starting point when considering applications for non-publication orders is the principle of open justice. In a professional disciplinary context, the principle of open justice maintains public confidence in the relevant profession through the transparent administration of the law.²⁹ In previous cases, the Tribunal has endorsed the statement of Fisher J in *M v Police*³⁰ at [15]:

In general, the healthy winds of publicity should blow through the workings of the Court. 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 a defendant with an opportunity to reoffend.

- [120] The Tribunal's jurisdiction (under the Education Act 1989) to make non-publication orders is found in section 405(6)³¹. An order can only be made under section 405(6)

²⁹ *CAC v Teacher* NZTDT 2016/27 at [66].

³⁰ *M v Police* (1981) 8 CRNZ 14 at [15] cited in *CAC v Howarth* NZTDT 2019/87, January 2021 at [57].

³¹ Ms Harmer sought a permanent order under section 501(6) of the Education and Training Act 2020. However, as Counsel for the CAC noted, because the mandatory report in this matter was made before that Act came into force, her application fell to be considered under section 405(6) of the Education Act.

(a) to (c) if the Tribunal is of the opinion that it is proper to do so, having regard to the interests of any person (including, without limitation, the privacy of the complainant, if any) and the public interest.

[121] When considering whether it is proper for the open justice principle to yield, the Tribunal needs to strike a balance between the public interest factors and the private interests advanced by the applicant. A two-step approach is usually followed by the Tribunal the first of which is a threshold question, requiring deliberative judgement by the Tribunal whether, having regard to the various interests, it is “proper” to make a non-publication order. If the Tribunal concludes it is, then at the second stage the Tribunal may exercise its discretion and make the order sought.³²

[122] “Proper” sits below “exceptional” which is required in the criminal jurisdiction in the Courts and is more aligned with “desirable” which is what is required under the Health Practitioners Competence Assurance Act 2003.

[123] When deciding whether it is “proper” to make a non-publication order, the Tribunal must carefully evaluate the respective interests (private and public). The Tribunal’s principal objectives³³ are relevant to the balancing exercise.

[124] The relevant public interests to be evaluated are:

- (a) Openness and transparency of disciplinary proceedings
- (b) Accountability of the disciplinary process. The disciplinary process needs to be accountable so that members of the public and the profession can have confidence in it.
- (c) The public interest in knowing the identity of a teacher charged with a disciplinary offence.
- (d) The importance of freedom of speech and the right enshrined in section 14 of the New Zealand Bill of Rights Act 1990.
- (e) Unfairly impugning other teachers.

³² *CAC v Teacher* NZTDT 2016/27 at [61]; recently referred to in *CAC v Howarth* (above).

³³ Public protection, the maintenance of professional standards, and maintaining public confidence in the teaching profession.

[125] The public interest in knowing the identity of a teacher charged with a disciplinary offence includes the right to know about proceedings affecting a teacher, but also the protection of the public and their right to make an informed choice about the extent to which they engage with or interact with the teacher.

[126] In *Dr Tonga v Director of Proceedings*³⁴ on the issue of permanent name suppression following an adverse disciplinary finding (under the Health Practitioners Competence Assurance Act 2003), Panckhurst J made the following point:

[F]ollowing an adverse disciplinary finding more weighty factors are necessary before permanent suppression will be desirable. This, I think, follows from the protective nature of the jurisdiction. Once an adverse finding has been made, the probability must be that public interest considerations will require that the name of the practitioner be published in a preponderance of cases. Thus, the statutory test of what is 'desirable' is necessarily flexible. Prior to the substantive hearing of the charges the balance in terms of what is desirable may incline in favour of the private interest of the practitioner. After the hearing, by which time the evidence is out and findings have been made, what is desirable may well be different, the more so where professional misconduct has been established.

[127] The Tribunal considered those same points can be made in respect of what is "proper" where a charge of serious misconduct by a teacher has been established.

[128] As for private interests, Gendall J in *Anderson v PCC*³⁵ agreed with Panckhurst J's statement in *Dr Tonga* as follows:

[36] Private interests will include the health interests of a practitioner, matters that may affect a family and their wellbeing, and rehabilitation. Correspondingly, interests such as protection of the public, maintenance of professional standards, both openness and 'transparency' and accountability of the disciplinary process, the basic value of freedom to receive and impart information, the public interest knowing the identity of a practitioner found guilty of professional misconduct, the risk of other doctors' reputations being affected by suspicion, are all factors to be weighed on the scales.

[37] Those factors were also referred to at some length in the Tribunal. Of course, publication of a practitioner's name is often seen by the practitioner to be punitive, but its purpose is to protect and advance the public interest by ensuring that it is informed of the disciplinary process and of practitioners who may be guilty of malpractice or professional misconduct. It reflects also the principles of openness of such proceedings, and freedom to receive and impart information.

[129] Suppression of the name of a teacher who has been found guilty of serious misconduct has the potential to erode public trust and confidence in the teaching profession.

³⁴ *Tonga v Director of Proceedings* High Court, Christchurch, Panckhurst J.

³⁵ *Anderson v PCC of the Medical Council of New Zealand* CIV 2008-485-1646 [14 November 2008]

[130] In *Anderson*, when considering a submission that the decision not to suppress the publication of the doctor's name was inconsistent with the Tribunal ordering non-publication of matters which might identify his wife and children, Gendall J commented, relevantly, at [54]:

I have given careful consideration to that submission but do not accept that it is a reason that makes non-publication desirable. It will always be the case that association of a family to a named transgressor will arise in the minds of those who know him/her and the family. It does not usually arise from the publication of the practitioner's name in the collective mind of the general public. It is implicit in the orders that the Tribunal made that it did not intend non 'publication' of information relating to the identification of the appellant's wife and children, to mean that there be no publication of the practitioner's name.

[131] The nature of the conduct found to warrant disciplinary sanction, including but not limited to the relative risk of some repetition, as well as the nature of the penalties imposed, are material considerations for the Tribunal when deciding whether it is proper to make a permanent non-publication order³⁶. The public interest in publication of a teacher's name is strengthened when the teacher's registration has been cancelled (or suspended), when there are concerns about a teacher's judgement or decision-making, or where the teacher poses an ongoing risk of harm including but not limited to kura, akonga, and kura communities³⁷.

[132] Put another way, where severe sanctions are imposed such as cancellation or suspension, the Tribunal is entitled to determine that the established serious misconduct is a factor that weighs in favour of publication of the teacher's name. This is not conflating name suppression with the imposition of penalties. Nor is declining to make a non-publication order in circumstances such as these a matter of holding the teacher to account publicly. Rather, where there has been deliberate or dishonest conduct or a pattern of serious errors or behaviours, publication is usually proper to achieve the Tribunal's objectives of protecting the public and maintaining professional standards. In a situation where the teacher's conduct was highly serious and involved dishonesty or deceit, for example, the Tribunal's view is that there is a material protective element which heightens the public interest in publication.

³⁶ *Ben-Dom v A Professional Conduct Committee of the Medical Council of New Zealand* [2020] NZHC 3094 (23 November 2020), Dobson J; *Johns v Director of Proceedings* [2017] NZHC 2843, Moore J.

³⁷ *ANG v PCC* [2016] NZHC 2949 and *B v B* HC Auckland HC 4/92, 6 April 1993 at 99.

Ms Harmer's application

[133] The grounds for Ms Harmer's application for permanent name suppression were:

- (a) There are medical factors which will be greatly disturbed by publication.
- (b) There are third parties who will be adversely affected by publication.
- (c) There were significant steps taken at the time to remediate the offending.
- (d) It is appropriate for the presumption in favour of open justice to yield as it is inconsistent with tikanga in the circumstances.

[134] Ms Harmer's affidavit contained supporting evidence of these grounds, including medical information and records, and she also addressed these matters orally. The medical factors relied on were those referred to above in the context of the Tribunal's penalty decision.

[135] As to the medical ground, it was submitted that by publishing Ms Harmer's name, she would be "*re-punished*" and the work she has done in the past four years managing these factors will be undermined and she will be "*catapulted back*" to where she began her "*4-year long journey*". As such, it was submitted that the medical factors that were said to dominate Ms Harmer's life will be immensely affected by the increase in stress and anxiety that would come with publication of her name.

[136] In terms of effects on third parties, reference was made to the evidence that Ms Harmer's daughter-in-law works at the Kura as part of the senior leadership team and her mokopuna attend the Kura. It was submitted these individuals are at risk of hurt and humiliation were Ms Harmer's wrongdoing to be "*re-hash[ed]*" in the public arena. It was submitted that it is not fair or necessary for these individuals to be affected by Ms Harmer's actions and that as the Kura is part of a small community there is intimacy and a lack of anonymity; as such there is a real and appreciable risk that those whanau remaining at the Kura will suffer more than the ordinary amount of hardship associated with publication of Ms Harmer's name and that publication would have a "*strong detrimental effect on the Kura*". The names of these individuals were not given in Ms Harmer's affidavit or in her Counsel's submissions. However, when asked by the Chair at the hearing, whether they shared her surname, Ms Harmer clarified that her daughter-in-law and her mokopuna do not share her surname.

- [137] As to the steps Ms Harmer has taken, including the restorative justice steps she took with the Kura in accordance with tikanga principles, it was submitted that tikanga principles are highly relevant to this situation as the Kura, staff and community are all part of Te Ao Māori; and they would be adversely affected by publication which would undermine the tikanga principles engaged with at the material time. It was submitted that both Ms Harmer's and the Kura's name "*must be suppressed in tandem*" to avoid those consequences.
- [138] In relation to the "*social and open justice*" ground, it was acknowledged, appropriately, that the principles of open justice are aimed at maintaining public confidence in the teaching profession.
- [139] Ms Harmer pointed to decisions she had made to resign from her principal role at the Kura, and not to renew her practising certificate since her offending which she said were for the purposes of healing the Kura and restoring it to what it was before her wrongdoing, the teaching community, and herself. It was submitted that any publication of the Kura or her name "*bears the risk of an innocent party being punished for a second time*" and Ms Harmer would be "*named and shamed*" which is not a reason to publish her name. Further, that the important considerations that arise from the matter would still be obvious, able to be reflected on, and be a warning to others, without Ms Harmer needing to be named.
- [140] It was submitted that Ms Harmer's private interests outweigh the open justice, public interest factors and that Ms Harmer's (and the Kura's) names should be permanently suppressed.

Discussion

- [141] Counsel for the CAC made the following submissions in response:
- (a) Although Ms Harmer has provided evidence of her medical conditions, she has not provided any specific evidence supporting her contention that publication will worsen her conditions, and to a sufficient degree to displace the presumption in favour of open justice and her being named.
 - (b) The source of Ms Harmer's stress and anxiety while working at the Kura is very different to that which may arise were her name to be published in connection with these proceedings.
 - (c) Without supporting medical evidence, such as an opinion from a medical practitioner as to the likely impact of publication, Ms Harmer's belief that

publication will have a material adverse impact on her conditions is speculative and not sufficient to render non-publication of her name proper.

- (d) It is speculative to suggest that Ms Harmer's daughter-in-law's work and the experience of her mokopuna at the Kura will be negatively affected simply because of their relationship with Ms Harmer. No evidence has been provided by Ms Harmer's whānau to support the risk of harm from publication or to suggest that the level of harm would rise above the level ordinarily associated with proceedings of this kind.
- (e) To the contrary, the Kura has been aware of Ms Harmer's conduct for over four years, during which time her mokopuna have attended the Kura, apparently without issue. Ms Harmer's daughter-in-law has risen to become a senior staff member and has no doubt established her own reputation and relationships at the Kura and within the wider community.
- (f) Given the number of people who knew about Ms Harmer's conduct when it came to light, the leadership role she held, and her sudden departure from the Kura, it may reasonably be inferred that, in such a small community, many people are already aware of her conduct. As noted, at the hearing Ms Harmer told the Tribunal that the old and new Board of Trustees as well as students and others were present at the hui she attended, and that the Kura accepted her apology at that meeting. Her use of the word "kura" in that context, rather than "Board" was indicative of members of the community already being well aware of Ms Harmer's misconduct.
- (g) There being no supporting evidence of risk of harm to Ms Harmer's daughter-in-law and mokopuna it cannot be said there is a real or appreciable risk in this regard. There is no evidence of harm having arisen despite the Board and others in the Kura community, including akonga, already being aware of Ms Harmer's conduct.
- (h) Ms Harmer was a principal who spent Kura funds for her personal benefit and also engaged in poor financial practices, incurring significant financial costs without prior Board approval. Her offending involved a significant sum of money that belonged to the Kura, over a period of years. Given the seriousness of the conduct, publication is plainly in the public interest.

- (i) In relation to the request Ms Harmer has made for the Tribunal, to take into account when considering the public interest, that Ms Harmer has left the teaching profession, the Tribunal in *Taurapa* made the following point in relation to the same request:

We do not consider that this is relevant in a case such as this. Many teachers walk away from their profession when facing serious allegations like these. Doing so doesn't influence the presumption of open justice to any great degree in most cases.

- (j) As to tikanga as a consideration in the context of name suppression applications, there are no previous decisions of the Tribunal or from the higher courts, although the Courts have recognised that tikanga can properly be taken into account in various contexts.³⁸ As name suppression is an inherently fact-based evaluation of the circumstances of a teacher, including the persons connected to them, and the public interest, and as there is nothing in the legislative scheme that precludes the Tribunal from taking into account tikanga as a relevant factor, it is open to the Tribunal to have regard to tikanga in its assessment of the question of name suppression.
- (k) It is acknowledged that Ms Harmer appears to have addressed the harm suffered by the Kura and its close-knit community by repaying the funds she took, and she engaged in a positive restorative process. However, the Tribunal must still consider the seriousness of the offending and the wider interests of the public when it considers whether a non-publication order would be proper. There have been many previous cases where teachers have engaged in some form of restorative process or hui with the school, or the student concerned. That has not necessarily been a factor warranting non-publication orders in those cases.

³⁸ In *Ellis v R* [2022] NZSC 114 at [117] the Supreme Court said as to the relevance of tikanga “As an overall comment, tikanga will need to be considered where it is relevant to the circumstances of the case. It will not be considered in cases where it is not relevant or where consideration will not or cannot assist, such as when it would be contrary to statute or contrary to binding precedent”. The Court found that where Treaty principles or tikanga have been incorporated into the relevant statute in a manner that makes them controlling or where the factual context justifies their strong position. However, in other cases tikanga may be one of the relevant factors to be taken into account and it may be “relevant to explain the social and cultural framework for the actions of Māori parties”. See also *Doney v Adlam (No 2)* [2023] NZHC 363.

- (l) As to the suggestion that publication will result in Ms Harmer re-living the “guilt, shame, and hurt”, this is an ordinary consequence of having engaged in the offending and being the subject of disciplinary proceedings. This factor alone should not displace the presumption in favour of open justice and name publication.

Discussion

- [142] The Tribunal balanced the public interest factors which favour open justice and Ms Harmer being named, against the competing private interests she raised, including as to tikanga and her health issues.
- [143] The Tribunal accepted the submissions made for the CAC as recorded at [141].
- [144] While it is acknowledged that a restorative process took place between the Kura and Ms Harmer in accordance with tikanga, in the Tribunal’s opinion, there remains a legitimate and wider public interest in publication of Ms Harmer’s name given the nature and gravity of her conduct.
- [145] The Tribunal considered that the public, including current and potential future employers of Ms Harmer, have the right to know that she has been found guilty of serious misconduct for misappropriating and mismanaging funds from an employer when she held a leadership role in a kura, for which she been censured and has lost her registration.
- [146] Even if Ms Harmer does not return to practise as a teacher, she is working and could seek work in a position that involves a significant element of trust and integrity. Given the nature of Ms Harmer’s misconduct, involving significant elements of breach of trust, the Tribunal considered that her misconduct has relevance beyond Ms Harmer’s work as a teacher/Principal.
- [147] The public interest in awareness of Ms Harmer’s conduct is greater given the gravity of the serious misconduct the Tribunal has found and the fact that her registration is being cancelled. That interest is not confined to the prospect of Ms Harmer returning to work in a professional environment as a teacher but has wider significance in terms of her suitability to work in a role where her past misconduct may be relevant.
- [148] The Tribunal was of the view that the interests of government agencies (for example, the Ministry of Education) will not be served by a permanent suppression order. This is another public interest factor which favours publication of Ms Harmer’s name in connection with the offending in these proceedings, in the Tribunal’s view.

- [149] The Tribunal also considered the risk that suppression of Ms Harmer's name could erode public confidence and trust in teachers and the teaching profession by limiting the accountability and transparency of the disciplinary process.
- [150] The Tribunal fully accepts that name publication will be stressful for Ms Harmer and that it may contribute [REDACTED]. However, stress and anxiety associated with name publication will arise in most cases that come before the Tribunal. Here there was not sufficiently strong evidence, for example, from a medical practitioner, detailing the impact that publication may have on Ms Harmer over and above the general stress and anxiety that the Tribunal accepted will have been created by the proceedings and the possibility of Ms Harmer being named in connection with them. The Tribunal had no reason to believe that those symptoms could not be managed
- [151] In relation to the submissions made about the potential adverse effects on Ms Harmer's daughter-in-law and mokopuna, the Tribunal took into account that they do not share her surname. Although association of them to Ms Harmer will arise in the minds of those who know them and the whānau, and in those who are already aware of these matters, it is not likely that association will arise from the publication of Ms Harmer's name in the collective mind of the general public. As discussed below, the Tribunal is ordering the non-publication of the names of these individuals, to provide a degree of protection of their privacy and wellbeing interests. However, that is not intended to mean there should not be publication of Ms Harmer's name. The Tribunal did not accept, on the evidence before it, that there is a real and appreciable risk of harm to these individuals, noting that there was no evidence of harm having arisen despite the Board and others in the community already being aware of Ms Harmer's conduct.
- [152] Ultimately, the Tribunal did not reach the point of concluding that notwithstanding the gravity of the offending and the wider public interest, the tikanga processes engaged in by Ms Harmer and the Kura, and the other factors she relied on, when considered individually or cumulatively, were sufficient to render it proper that her name be permanently suppressed.
- [153] It followed that having evaluated the respective interests the Tribunal decided that it would not be proper to make a permanent non-publication order in respect of Ms Harmer's name. Accordingly, the Tribunal declined to exercise its discretion to make permanent the interim non-publication order in respect of Ms Harmer's name.

[154] This decision is not about holding Ms Harmer to account publicly. It is about the fact that the Tribunal was of the view that it would not be discharging its obligations to the teaching profession and the wider public were Ms Harmer's name to be prohibited from publication.

[155] Although Ms Harmer's name is not to be suppressed, the Tribunal considered that it would be proper to make an order under section 405(6) permanently suppressing the references to Ms Harmer's specific medical conditions [REDACTED] in [64], [REDACTED] in [65], and the medical conditions in [67] and related medications), in this decision and/or as referred to in the evidence and the submissions the Tribunal received. The Tribunal considered it would be proper to make this order having regard to Ms Harmer's privacy and wellbeing interests, which outweigh the public interest in those details being published.

Orders in respect of Ms Harmer's daughter-in-law and mokopuna

[156] Given the concerns Ms Harmer expressed about her daughter-in-law and mokopuna, there will be permanent orders suppressing from publication the names of Ms Harmer's daughter-in-law and mokopuna who are referred to (albeit not by name) in this decision and in the evidence.

[157] The Tribunal considered it proper to suppress from publication the names of these individuals to safeguard their privacy and wellbeing interests. There is no public interest in any of these people being identified by name in connection with these proceedings, in the Tribunal's opinion. There was no evidence that Ms Harmer's daughter-in-law was involved in any way or had any knowledge of Ms Harmer's offending at any time in the period when it was occurring.

[158] It is accepted that people who already know about Ms Harmer's offending, or who come to know about it through publication of her name and the Kura's name, may relate or connect her to her daughter-in-law and her mokopuna. However, a non-publication order will provide at least some degree of protection of their private interests in that media will not be able to name them in any reports that may be published about these proceedings.

[159] Non-publication orders are made accordingly.

Te Kura

[160] The Board's application for a non-publication order in respect of the name of the Kura, its location, and any other identifying particulars was made on the following grounds:

- (a) Publication/identification of the Kura poses a real risk of causing adverse effects to the Kura and the Kura Community, including students (past and present).
- (b) Publication/identification of the Kura also poses a real risk of causing adverse effects to Ms Harmer and her whānau, who are a part of the Kura Community and would be identifiable through the publication of the Kura's name, location, and other particulars.
- (c) The presumption in favour of open justice ought not to prevail here and is not consistent with tikanga in the present circumstances.

[161] It was indicated that the Board supported Ms Harmer's application for non-publication orders for the reasons relied on by Ms Harmer and as the non-publication of Ms Harmer's name is "*necessary to avoid identification of the Kura*".

[162] The Board's application was supported by a Statement signed by the Chair of the current Board, Pania Winterburn, on 22 June 2023. The Chair acknowledged that the unauthorised use of funds intended for the benefit of the children of the Kura for any purposes is "*simply unacceptable*" and that it placed the Kura in a very vulnerable position. The Chair stated that had the Kura not been in a sound financial position, the outcome and consequences could have been different. She noted that the reality is that the "*entire situation*" was unacceptable and caused significant hurt, distress, and stress to those who then had to deal with the situation put in front of them, including the Board and the advisors who were brought in to assist the Board when Ms Harmer's misconduct was first discovered.

[163] The Chair of the Board indicated that in 2019, after Ms Harmer's resignation and with the matter by then with the relevant authorities, the Board's primary focus was on progressing matters to move the Kura forward, including recruitment. She stated there were residual issues to deal with arising from the offending and these continued to be "*very stressful and time-consuming for the 2019 Board and external advisors*" notwithstanding that most matters were addressed by the Board. A new Principal was appointed, and the Kura navigated the challenges of Covid-19 and has

continued to thrive, with a significant growth in student and staff numbers (from mid-60's in 2018 to a roll of over 120 in 2023). The Chair confirmed that the Kura Community is small and tight knit.

[164] The Chair made the following additional statements (summarised):

- (a) The Board recognises that being accountable for one's actions is important.
- (b) However, a significant consideration for the Kura is the impact that publication of names would have on the Kura Community more broadly, and on key members of the community; specifically, Ms Harmer's daughter-in-law who is a valued member and leader amongst staff, and Ms Harmer's two mokopuna who attend the Kura. There is a risk of adverse consequences that may not be able to be mitigated to avoid adverse impact, no matter what supports are put in place.
- (c) Ms Harmer's daughter-in-law is a hard-working, well-regarded member of staff who now has a management role in the senior leadership team under the new Principal and who has the trust and confidence of the current Board, the Principal and her peers. She has specialist skills in certain subject areas and supports teaching across a number of year levels in addition to her own classroom responsibilities. The Kura is concerned that publication of names may adversely impact on her role in the Kura and the Kura community, including recruitment of other senior teachers for Māori-medium with specialist skills. As for Ms Harmer's mokopuna, they are happy and well-settled, and the Kura is concerned to protect them from adverse harm.
- (d) The current Board and the Board as it was comprised in 2019 and 2022 have strived to support the Kura to ensure Ms Harmer's conduct did not negatively affect the Kura, its students, staff, and the wider community. This has been in a situation where they were not responsible for what had occurred. The Board considers that publication of names at this point may negatively affect all the work that has gone into this in the past few years.
- (e) The Board is concerned that media coverage would lead to racial discrimination.

[165] It was submitted for the Board that the Tribunal should exercise its discretion and determine that it is proper for the presumption of open justice to yield because:

- (a) The Kura will likely suffer adverse effects beyond general disruption because it is a kura kaupapa Māori within a small community (many of its members are whānau). As such, the Kura is already exposed to “*scrutiny and racial bias externally*” and any adverse publicity is likely to have a disproportionate effect on the Kura and its staff, students, and community³⁹, many who consider the matter dealt with.
- (b) Aligned with the Board’s obligations as kaitiaki for the Kura, the Board considers it is important to protect the wellbeing of staff and students, and their privacy, should adverse publicity be drawn to the Kura as a result of publication.
- (c) Publication of the location or other particulars of the Kura will likely lead to identification of the Kura itself.
- (d) Non-publication of name, location and particulars of the Kura will uphold the mana of the Kura and the Kura community, by protecting it from the harm and discrimination that is likely to result from being publicly identified and having those outside of the Kura community make comment.
- (e) To have these matters public and visible the Board’s resolution of matters with Ms Harmer in accordance with tikanga will be undermined.
- (f) If the Kura is identified, it is foreseeable that Ms Harmer’s identity will also be identified by association, regardless of any non-publication orders.
- (g) There should be regard for the tino rangatiratanga of the Kura to protect the privacy and mana of the Kura community in the manner it sees fit. Tino rangatiratanga recognises the collective rights of the Kura, including the protection of the privacy and dignity of individuals within the Kura community.
- (h) There is a real risk that the Kura could lose Ms Harmer’s daughter-in-law’s skillset if Ms Harmer is identified as a result of the Kura being named. This

³⁹ CAC v Ratu NZTDT 2020/30.

will disadvantage the Kura and there is a need to protect the Kura's interests.⁴⁰

- (i) The risk of adverse consequences to Ms Harmer's mokopuna (negative remarks or publicly carrying this mamae as a whānau) is heightened by the close-knit community and the size of the Kura; and it is the Board's role to safeguard these mokopuna.
- (j) Disclosing the names of the Kura and Ms Harmer is likely to have adverse effects on Ms Harmer's whānau through their association with her wrongdoing.
- (k) These circumstances of the Kura are sufficient to "displace" the principle of open justice. Open reporting and publication will have no real benefit to the public in terms of maintaining public confidence in the profession and protecting the public including through the maintenance of professional standards. Rather, publication of the Kura's name could:
 - i. Expose sensitive personal information about individuals associated with the Kura (her mokopuna and daughter-in-law).
 - ii. Lead to discrimination of students, staff or their whānau, through racial discrimination arising from publication.
 - iii. Have a negative impact on the Kura's reputation and undermine the public's trust in, and perception of, the Kura.
 - iv. Lead to media attention or sensationalised reporting which could impact the integrity and stability of the educational environment through discussions/disruption caused by publicity.
- (l) The Board has exercised its tino rangatiratanga and mana Motuhake in reaching an outcome with Ms Harmer in accordance with tikanga and which respects the mana of both parties.
- (m) There is little utility in identifying Ms Harmer or the Kura as Ms Harmer is no longer working as a teacher and has not sought to renew her practising

⁴⁰ CAC v Teacher 2016/27 at [69].

certificate; and the Board worked diligently to minimise fallout from Ms Harmer's misconduct and protect the Kura and the Kura Community.

- (n) There is "*limited to no public benefit*" in disclosing the name of the Kura as matters have long since been resolved between the parties and Ms Harmer is no longer teaching. When balanced against the risks to the Kura, the Kura community and Ms Harmer, the name of the Kura must be suppressed.

[166] As noted, the CAC indicated that it would abide the Tribunal's decision on the Kura's application.

Discussion

[167] Having decided that it would not be proper to order the non-publication of Ms Harmer's name, the Tribunal concluded there was no utility in suppressing the name, location, and identifying particulars of the Kura. The Tribunal considered that publication of Ms Harmer's name will inevitably lead to the identification of the Kura, as being her place of employment at the time of her offending in the period from 2017 to 2019.

[168] If the Tribunal is wrong about that, each of the grounds for the Kura's application was considered on its own merits, carefully. The Tribunal reached the view that on balance, these grounds, considered individually and cumulatively, are not sufficient to outweigh the competing public interests in the name the Kura and its location being identified in connection with Ms Harmer's serious misconduct.

[169] In a recent decision in *CAC v Taurapa*, the Tribunal declined the applications brought by the schools involved, noting that "*there will often be some fall out for schools following a finding of serious misconduct against a teacher, but it would rarely displace the principles of open justice*".⁴¹

[170] The Tribunal agreed with the submission for the CAC that:

The threshold for schools to obtain name suppression, particularly on the basis of a possible risk of reputational damage from publication, is a high one, and such applications will rarely be granted. In *CAC v Teacher* the Tribunal stated that, while there may be rare cases where suppression is required to protect a learning institution's interests, in the majority of cases, the principle of open justice places the interests of the educational community at large ahead of those individuals of an individual school. Further, in *CAC v Mackey* the Tribunal noted that, where reputational damage is

⁴¹ *CAC v Taurapa* NZTDT 2022/27 at [143], citing *CAC v Teacher* NZTDT 2016/27 at [69].

advanced as a ground for non-publication, “[e]vidence, rather than a bare assertion of hardship, is required”.⁴²

[171] In *CAC v Taylor*⁴³ the Tribunal noted:

In order to justify a conclusion that it is proper to order name suppression for a school there must be some evidence of a real risk that publication will cause real adverse effects which are at least more than speculative. It must be clear that such potential effects are likely to go beyond the normal embarrassment or disruption a school might suffer where one of its teachers is found to have engaged in professional misconduct. A bare assertion by a school, without evidence, that it will suffer beyond the norm will not usually be enough, although that possibility cannot be excluded.

[172] In terms of the Kura’s submissions that there will be sensationalised reporting and racial discrimination arising from publication because Ms Harmer is Māori and the kura is a Māori medium school, the Tribunal accepted the submission made for the CAC that this is purely speculative. In *Taurapa* the Tribunal addressed the asserted risk of unfair, “tabloid style” reporting, due to the teacher being Māori, in the following way:

The suggested risk is speculative and uncertain. Or, not real and appreciable. It requires us to proceed on the assumption that there will be racially biased reporting in this case. We are not in a position to make such determinations. In fact it could be taken from the *Stuff* article and apology made by *Stuff* (provided by Taurapa to us) that quite some lengths have been taken now to ensure that reporting is not infected by such issues (at least for the *Stuff* organisation).

[173] That the Board has exercised its tino rangatiratanga and mana Motuhake in reaching an outcome with Ms Harmer in accordance with tikanga and which respects the mana of both parties is acknowledged and respected by the Tribunal. However, the Tribunal had difficulty accepting that the tikanga process that was concluded over four years ago now, will be undermined by publishing names here. On their own, or in combination with the other private interests of the Kura that were raised, the Tribunal did not consider this to be a sufficiently strong reason to displace the presumption of open justice and open reporting of this case.

[174] While the interests and mana of the Kura and Ms Harmer may well have been respected by the tikanga process, the purpose of open reporting and name publication in the context of this disciplinary proceeding must also involve respecting additional interests, namely the interests of the educational community and the teaching profession as a whole, and the public interest in knowing the name of a teacher who have been found guilty of serious misconduct where there has been

⁴² *CAC v Mackey* NZTDT 2016/60, 24 February 2017, at [65].

⁴³ *CAC v Taylor* NZTDT 2019/92 at [29]-[30].

dishonesty and deceit relating to the management and use of school funds. There is also a need to avoid potentially unfairly impugning other Māori-medium kura in Ms Harmer's community. The Tribunal's task when considering applications for non-publication orders requires a balance to be struck between the competing interests.

[175] The Tribunal's view was given the nature and severity of the misconduct which was repetitive and occurred over an extended period, suppressing Ms Harmer's and the Kura's name would risk causing members of the public to lose confidence in the teaching profession. Publication of name would have a real benefit in terms of maintaining public confidence in the teaching profession and the regulation and discipline of teachers who transgress, in the Tribunal's view.

[176] As for the concerns about the interests of Ms Harmer's whānau members, as above, there is no evidence of harm having arisen despite the Board and others in the Kura community already being aware (including through the restorative justice process) of Ms Harmer's conduct. The Tribunal was of the view that it is speculative to suggest Ms Harmer's whānau members will be negatively affected simply because of their relationship with her. As was submitted by the CAC, the Kura has been aware of Ms Harmer's conduct for over four years and in that time her mokopuna have attended the Kura with no apparent issues. Ms Harmer's daughter-in-law has been promoted to a senior role and will have developed relationships at the Kura and in the community, and her own reputation.

[177] The Tribunal did not accept the submission that there is a real or appreciable risk of adverse consequences for the Kura if its name is published in connection with Ms Harmer's offending. Were members of the teaching profession and the wider public to read this decision they would learn that the Kura, the Board, and Ms Harmer's daughter-in-law were not involved in any of the wrongdoing the Tribunal has reviewed. Further, that the Kura and the Board took all reasonable steps to deal with Ms Harmer's offending when it was discovered, and in subsequent years, to minimise the fallout and protect the Kura and the Kura community. Those actions reflect well on the Kura, in the Tribunal's view. They are matters that mitigate the risk of negative impacts of name publication on the reputation of the Kura and the risk of reducing the public's trust in, and perception of, the Kura.

[178] As for the submission that there is no public interest in Ms Harmer's or the Kura's names being published because Ms Harmer does not hold a current practising certificate and does not work as a teacher or principal, and matters have long since been resolved between the parties (the Kura and Ms Harmer), the Tribunal placed

minimal weight on these factors. The fact that the matter of the offending was resolved between the Board and Ms Harmer several years ago and Ms Harmer is no longer teaching at the Kura is a further reason why it would not be improper to publish the Kura's name, in the Tribunal's view.

[179] On balance, the Tribunal concluded that the interests of the public, the teaching profession, and the wider education community, outweigh the private interests of Ms Harmer and the Kura.

[180] The Kura's application for a non-publication is declined, for all those reasons.

[181] The Tribunal was reassured by the Chair of the Board's indication that regardless of the decision on suppression of names, *"our Kura will come together as a whānau and support each other through this process, including our Tamariki, our staff and our wider whānau"*.

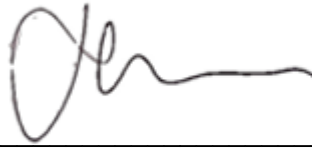
Conclusion

[182] The Charge is established. Ms Harmer is guilty of serious misconduct.

[183] The Tribunal's formal orders under the Education Act 1989 are:

- (a) Ms Harmer is censured, pursuant to section 404(1)(b).
- (b) Ms Harmer's registration as a teacher is cancelled, pursuant to section 404(1)(g).
- (c) Ms Harmer is to pay \$4,812.00 to the CAC as a contribution to its costs, pursuant to section 404(1)(h),
- (d) Ms Harmer is to pay \$582.00 to the Teaching Council in respect of the costs of conducting the hearing, pursuant to section 404(1)(i).
- (e) There are to be permanent orders under section 405(6) prohibiting from publication the names of Ms Harmer's daughter-in-law and mokopuna, who are referred to in this decision, and in respect of Ms Harmer's specific medical issues including [REDACTED] in [64], [REDACTED] in [65], and the medical conditions in [67] and related medications.

**Dated at Wellington this 4th day of
December 2023**



Jo Hughson
Deputy Chairperson

NOTICE

- 1 A teacher who is the subject of a decision by the Disciplinary Tribunal made under section 404 of the Education Act 1989 may appeal against that decision to the District Court (section 409(1)).
- 2 The CAC may, with the leave of the Teaching Council, appeal to the District Court against a decision of the Disciplinary Tribunal made under section 404 (section 409(2)).
- 3 An appeal must be made within 28 days of receipt of written notice of the decision, or any longer period that the District Court allows.
- 4 Schedule 356(3) to (6) applies to every appeal under section 409 as if it were an appeal under section 356(1).