NZTDT 2015/39S

BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

UNDER	the Education Act 1989
IN THE MATTER	of disciplinary proceedings pursuant to Part 10A of the said Act
BETWEEN	**THE COMPLAINTS ASSESSMENT COMMITTEE**
	Referrer
AND	**NATASHA JOY ASHTON** of Manukau, Teacher, Registration No. 319636
	Respondent

DECISION ON APPLICATIONS FOR NON-PUBLICATION ORDERS
27 June 2018

Tribunal:	Maria Johnson and David Spraggs John Hannan (Deputy Chair)
Decision:	26 June 2018
Counsel:	Rebecca Scott for CAC T Oldfield for Respondent

[1] The Tribunal issued its substantive decision in this matter on 18 May 2017. It found serious misconduct established with regard to the majority of the particulars of charge alleged against the respondent, although not with regard to what could fairly be regarded as the most serious particular of charge.

[2] The Tribunal now deals with applications for nonpublication made by both the respondent, and by the owners of the centre in which the incidents took place.

Applications by respondent and by her employer for non-publication orders

[3] The respondent applied on 28 August 2015 for an order prohibiting publication of both her name, [redacted] Interim orders were made by the Tribunal at a prehearing conference.

[4] The respondent made a further application on 11 March 2016 for permanent orders restricting the publication of her name or particulars [redacted]

[5] The grounds for the respondent's application for permanent orders are that the respondent and her family are part of the local community in which the centre was located. If the respondent is identified, [redacted]. [redacted] would suffer significant embarrassment, humiliation and other deleterious consequences if her name, [redacted] are published.

[6] It is also said that the respondent's husband works locally on a self-employed basis. He relies on his name and reputation. If the

names of his wife [redacted] or identifying details are published it is said that there would likely be seriously detrimental effects to his ability to maintain his level of income and provide for the family. It is said that the respondent's family has already suffered financial loss following her leaving her employment at the centre.

[7] The respondent also maintains that since she has worked at the Centre for 18 years and cared for hundreds of children over this time, publication of any identifying particulars of the respondent at the centre would impact a significant number of families.

[8] Counsel for the respondent also submitted a memorandum dated 2 June 2017, after the Tribunal's substantive decision was issued. This raised the further submission that publication of her name or identifying particulars [redacted] Counsel submitted that publication of the respondent's name would undermine [redacted] of the New Zealand Teachers Council (Conduct) Rules 2004 (which applies due to the date of these events) [redacted]. Counsel also submitted that publication of the respondent's name could have adverse effects on [redacted] Counsel submitted this [redacted]

[9] Counsel for the respondent also asked for the interim nonpublication orders to be extended even if the Tribunal was not minded granting permanent non-publication orders, so that the respondent would be able to appeal a decision not to grant permanent non-publication orders.

[10] The owner of the centre, The Children's Corner-Papatoetoe Limited (**the owner),** filed an application dated 25 October 2016 for orders prohibiting the publication of:

(i) the names of the children who attended the centre;

(ii) the names of the employees who gave evidence at the hearing;

(iii) its own identity.

[11] The reasons advanced by the owner were as follows.

[12] First, the children are under 16 years of age and there is an automatic restriction on publishing their names under the legislation and rules.

[13] The employees' expectations of privacy outweigh any public interest in publishing their identity. The owner submitted that the allegations concerned behaviours which were traumatic and/or embarrassing for the employees involved. Publication of their identities would compound the trauma. Set against this, it was submitted, there is no real public interest to be served by publishing the employees' identities.

[14] The owner also submitted that if identified it would suffer adverse publicity which would inevitably cause financial loss both at the Centre itself, and the other four related centres which share a similar name. Mr Cornelius, a director of the owner, swore an affidavit. He gave evidence that the 19 months of investigations, enquiries, and Tribunal appearances had been traumatic for himself and the employees. He said the allegations against the respondent had left him shocked, hurt and bewildered.

[15] He further said that he feared that reports about the respondent's behaviour, once published, would cause parents to remove their children from the Centre and enrol them in other centres. He was

concerned this would have a financial impact on the Centre's business. He said that early childcare is a competitive business. He said that "publishing the identity of the centre could be financially devastating for the centre". He also said that he was a director of other related companies which have a similar name to the centre, "The Children's Corner – (suburb) Ltd and so on. Those other centres might also be impacted by removal of children.

[16] Finally, he said he was concerned that publishing the Centre's identity could lead to the identification of the teachers who were involved as witnesses. He asserted, without advancing any particular basis for the assertion, that publishing the name of the centre would most likely lead to the identification of the centre's employees. He said it was only a small centre with seven employees.

Applicable principles relating to non-publication orders

[17] Section 405 (3) of the Education Act 1989 provides that hearings of the Tribunal are in public. This is consistent with the principle of open justice.

[18] The provision is subject to subsections (4) and (5) which allow for the whole or part of the hearing to be in private. Subsection (6) provides that if the Tribunal is of the opinion that it is proper to do so, having regard to the interest of any person including the privacy of the complainant, and to the public interest, it may make an order prohibiting the publication of the name, or any particulars of the affairs, of the person charged or any other person.

[19] In deciding if it is proper to make an order prohibiting publication the Tribunal must consider the interests of the respondent, [redacted], children in the centre, the staff of the centre, and the owner, but finally the Tribunal must also consider the public interest. If the Tribunal thinks it is proper it may make such an order.

[20] Many cases discuss the principle of open justice in courts and Tribunals. The principle has been described as a fundamental principle of common law, manifested in three ways.

[21] First, proceedings are normally expected to be conducted in "open court". Second, information and evidence presented in court is communicated publicly to those present in the court. Third, nothing is to be done to discourage the making of fair and accurate reports of judicial proceedings conducted in open court, including by the media. This includes reporting the names of the parties as well as the evidence given during the course of the proceedings.

[22] A passage from a judgement of Fisher J is often quoted:

> *In general the healthy winds of publicity should blow through the workings of the courts. The public should know what is going on in their public institutions. It is important that justice should be seen to be done. That approach will be reinforced if the absence of publicity might cause suspicion to fall on other members of the community, if publicity might lead to the discovery of additional evidence or offences, or if the absence of publicity might present the defendant with an opportunity to reoffend.*[1]

[23] The Court of Appeal has stated:

> *…the starting point must always be the importance in a democracy of freedom of speech, open judicial proceedings, and the right of the media to report the latter fairly and accurately as "surrogates of the public"… The basic value of freedom to receive*

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[1] *M v Police* (1991) 8 CRNZ 14, at 15

and impart information has been re-emphasised by section 14 of the New Zealand Bill of Rights Act 1990.[2]

[24] The principle of open justice exists regardless of any need to protect the public. The starting point has been said to be one of openness and transparency.

[25] A number of decisions discuss what differences, if any, there are between the courts and professional disciplinary tribunals in relation to non-publication orders. In *Director of Proceedings v I* [3] Frater J found that any differences between the courts and medical disciplinary processes under the Medical Practitioners Act 1995 were differences of emphasis and degree. The most significant difference was the threshold to be reached before the balance was tipped in favour of name suppression. Unlike the courts, where "exceptional" circumstances are commonly required, the criterion for cases before the Medical Practitioners Disciplinary Tribunal was whether suppression is desirable.

[26] In this jurisdiction the threshold is whether it is "proper". This is the same as under the Lawyers and Conveyancers Act 2006. That Tribunal has suggested that "proper" arguably sits between "exceptional" and "desirable", but in any event the threshold is somewhat lower than that imposed in the courts.[4]

[27] In NZTDT 2016/69 this Tribunal discussed the differences between name suppression applications in the ordinary courts (for example in criminal prosecutions) and in professional disciplinary

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[2] *R v Liddell* [1995] 1 NZLR 538 at 546

[3] [2004] NZAR 635

[4] *Canterbury Westland Standards Committee No2 v Eichelbaum* [2014] NZLCTD space 23

Tribunals. It too noted that the most significant difference is that the criterion in some disciplinary Tribunals is whether suppression is "desirable" (medical) or "proper" (law practitioners, and this Tribunal), whereas in the courts "exceptional" circumstances are commonly required.

[28] In *CAC v Finch* NZTDT 2016/11 the Tribunal discussed the High Court decision of *ABC v Complaints Assessment Committee* [2012] NZHC 1901. In that case Chisholm J said that the test used in disciplinary proceedings involves a threshold that is "significantly lower" than that used by courts in the criminal jurisdiction (at [44]).

[29] So the threshold is whether it is "proper" to order non-publication. If the evidence gets across that threshold the Tribunal may exercise its discretion whether to order non-publication. The threshold is somewhat lower than that applying in the courts. It was said in *Finch* at [18] that while a teacher faces a "high" threshold to displace the presumption of open publication to obtain permanent name suppression, it is wrong to place a gloss on the word "proper" that imports the standard that must be met in the criminal context.

Non-publication: respondent

[30] The respondent submitted that her name should not be published because of the potential embarrassment and humiliation to her family members, and also to the potential for damage to her husband's self-employed work reputation and livelihood. Other arguments advanced by the respondent are outlined above, [redacted]

[31] The CAC submitted that the Tribunal has previously stated that "the fact that a teacher has a family who may well be embarrassed by the publication of his or her name in connection with disciplinary proceedings is not itself a ground for making an

order unless the circumstances are such as to demonstrate that publication will have a disproportionately adverse impact"[5]. The Tribunal has also stated that it is almost inevitable that a degree of hardship will be caused to the innocent family members of a teacher found guilty of serious misconduct, but that such "ordinary" hardships are not sufficient to justify suppression.[6]

[32] The CAC therefore submitted that the mere fact that identification of the respondent [redacted] is insufficient to warrant an order for non-publication.

[33] The Tribunal concludes that the matters put forward by the respondent as to the potential for embarrassment and humiliation to her family are not of sufficient intensity or consequence to take them out of the regrettable ordinary hardship which must inevitably follow the publication of the name of a teacher found guilty of serious misconduct. The assertions about her husband's work remain assertions with no particular evidence offered in support of the claims of likely effects.

[34] There was no evidence that the respondent, or any family member, suffers from a diagnosed medical or psychological condition or other vulnerability which would be aggravated by publication, or which would make her or such family member particularly vulnerable to being adversely affected by publication.

[35] There is a public interest in the respondent being identified in that otherwise other staff in the Centre may be wrongly suspected of having been the perpetrators of the misconduct which the respondent has been found to have committed.

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[5] *CAC v Finch* NZTDT 2016/11 at 18

[6] *CAC v Teacher* NZTDT 2016/27 at 65

[36] [redacted]

[37] The Tribunal considers that the respondent has not succeeded in satisfying it that it is "proper" to order non-publication, at least not so as to displace the ordinary principle of open justice. There will accordingly be no order for non-publication of the respondent's name.

Non-publication: [redacted]

[38] [redacted]

[39] [redacted]

[40] The CAC in its submissions noted that [redacted]

[41] The Tribunal agrees. [redacted]

[redacted]. Identifying [redacted] is not in the public interest.

[42] The Tribunal accordingly orders that the names of [redacted] The Tribunal also orders that the decision be redacted to remove all references [redacted]

Non-publication: names of other employees in the centre who gave evidence

[43] The CAC agreed with the submissions for the centre that the identity of the employees involved in the case who gave evidence should not be published. The CAC considered that suppression is appropriate because the employees who gave evidence cooperated with the CAC in doing so, and their actions were found to have been heavily influenced by the respondent who was in a position of power over them as a result of her management role.

[44] The particulars involve some behaviours that were traumatic, humiliating and/or embarrassing to the witnesses involved, of such a nature that all but one witness requested to have a screen between them and the respondent while they gave their evidence. Some witnesses displayed distress at the hearing.

[45] A further consideration is that the Tribunal's substantive decision also refers to employment disciplinary and competency processes involving 2 witnesses who were employed at the Centre. This evidence was required as a matter of narrative context in particular given the credibility issues involved. Those matters were not the subject of this disciplinary hearing. Were the affected

witnesses to be identified in the Tribunal's decision there could be further humiliation, detriment and distress caused to them.

[46] The CAC accepted that there is little public interest in the publication of the identities of these employees, especially if they were to be identified now, some years after the event. Some witnesses no longer work for the centre and are in other employment; publication of their names and involvement in the case might adversely affect their current employment.

[47] The Tribunal accepts these submissions and concludes it is proper to order that there is to be no publication of names and particulars likely to lead to the identification of the employees of the centre who gave evidence. It is hard to see what public interest there is in publishing their names, while there is evidence of distress and humiliation at the time of the events which were the subject of the charges, and at the hearing. This supports the possibility of various types of detriment to them should publication occur.

Non-publication – the identity of the centre

[48] The submissions from the Centre owner in support of non-publication of the Centre's name were based on two aspects. First, the possibility of identifying employees in the Centre, if the Centre was named, and the possibility of adverse consequences to them. Second, the potential financial consequences to the Centre, and to other centres with similar names owned by the same owner, if parents withdraw their children following publication of a decision naming the Centre.

[49] The CAC indicated it would abide by the Tribunal's decision. The CAC referred to NZTDT 2016/27 where it was said that *"… In light of the central role that schools have in disciplinary proceedings, it is safe to assume that the potential to suffer detrimental reputation (and potentially financial) impacts through open publication was factored in when Parliament introduced the*

presumption of open justice. We do not rule out the possibility that in rare cases suppression may be required to protect a learning institution's interests. In the majority of cases, however, the principle of open justice places the interest of the educational community at large ahead of those of an individual school".

[50] The CAC said that this establishes that the potential for some negative financial and reputational impact on a school is not sufficient to rebut the presumption of open justice. It also pointed out that any future financial damage in this particular case is purely speculative. It said that as the respondent is no longer involved in the centre and, given the number of years that have passed since these events, the likelihood for financial harm to the Centre by association with the respondent would be minimal.

[51] The CAC also observed that the claim by the Centre that identifying the school would identify or cause speculation about the staff involved could be dealt with by the witnesses' names being suppressed and redacted.

[52] This last point is, not strictly speaking, correct in that if the witnesses' names are suppressed but the school is identified there could be speculation about what staff were involved. But on the basis that the respondent's name is not suppressed, other staff are unlikely to be adversely affected by such speculation that they have engaged in misconduct even if the Centre's name is published.

[53] There is a public interest in knowing the identity of schools, and in this case early childhood education centres, in which acts of misconduct of the nature involved in this instance have occurred. The acts occurred "on the watch" of the Centre. Publication is likely to encourage vigilance by school and centre owners to ensure that high standards are maintained.

[54] The Centre will also be in a position to manage the potential for reputational impact by reassuring current parents that the

respondent is long gone and that practices she has been found to have followed are a thing of the past.

[55] No non-publication order is made with respect to the centre.

Orders

[56] The Tribunal orders as follows:

(a) [redacted]

(b) The names of the employees of the centre who gave evidence, and particulars likely to lead to their identification, may not be published. The decision is to be redacted accordingly;

(c) The names of children attending the centre who were mentioned in evidence or in the decision may not be published. The decision is to be redacted accordingly;

(d) The interim non-publication orders are to continue in force for 28 days from the date of this decision to allow time for an appeal. Any continuation of non-publication orders after that date will be a matter for the District Court.

Dated: 27 June 2018

JGH Hannan: Deputy Chair

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

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

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

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