**IN THE DISTRICT COURT**
**AT WELLINGTON**

**I TE KŌTI-Ā-ROHE**
**KI TE WHANGANUI-A-TARA**

**CIV 2021-085-409**
**[2021] NZDC 24379**

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| UNDER | the Education Act 1989 |
| IN THE MATTER | of an Appeal from a Decision of the New Zealand Teachers' Disciplinary Tribunal |
| BETWEEN | GREGORY WILLIAM ROBINSON<br>Appellant |
| AND | COMPLAINTS ASSESSMENT COMMITTEE<br>Respondent |

Hearing: 17 November 2021

Appearances: Ms G Phipps and Ms T Kennedy for the Appellant
Ms S Bishop and Ms J Dawson for the Respondent

Judgment: 10 December 2021

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**DECISION OF JUDGE K D KELLY**

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## Introduction

[1] This is an appeal pursuant to s 409 of the Education Act 1989 against a decision of the New Zealand Teachers' Disciplinary Tribunal (the Tribunal).

## Summary of result

[2] The appeal is allowed in part: the Tribunal's decision on costs is to be remitted back to the Tribunal to enable the parties to make submissions before a costs order is made.

[3] In all other respects, the appeal is dismissed.

## Background

[4] The appellant is a fully registered teacher whose practising certificate expires in August 2022.

[5] On 16 October 2019, while teaching in a relief capacity, an incident occurred which resulted in allegations that the appellant:

(a) attempted to remove and broke a student's headphones;

(b) did not de-escalate an aggressive situation; and

(c) hit a student.

*Investigation Summary and Mandatory Report*

[6] Following inquiries by the school, a draft 'Investigation Summary' was prepared which was sent to the appellant. The issue recorded in this summary was:

> An altercation occurred between [the appellant] and a student and that [the appellant] allegedly made physical contact with the student by hitting him across the head with his hand.

[7] Comments by the appellant were incorporated into the summary before it was finalised. This summary (along with other documents), was appended to a Mandatory Report which was sent by the Principal to the Education Council on 29 November 2019. The report was labelled "Alleged Serious Misconduct".

[8] The final Investigation Summary repeated the issue from the draft and includes as "Background Information":

> [The appellant] was relief teaching a Year 10 mathematics class, [the appellant] had had conversations with Student X[1] throughout the lesson about his behaviour whilst listening to music during class time. [The appellant] intervened with Student X after previous warnings and tried to remove the phone from the student's desk. [The

[1] Later referred to by the Tribunal as 'Student A'

appellant] tried to remove Student X's headphones and unintentionally broke them. A verbal altercation ensued.

[9] The summary also includes brief descriptions of the incident from ten students, and a summary of the written comments made by the appellant:

> [The appellant] acknowledges removing the student's headphones and breaking them. The breaking of the headphones was unintentional. The student responded by standing up and demanded that the headphones be replaced. The student's language was offensive and aggressive. [The appellant] believes that at this point he tried to defuse the situation by offering to replace the headphones. He then removed himself from the situation and sought assistance from a colleague close by. [The appellant] adamantly denies making contact with the student's head and indicates the only contact he made with the student was when his hand touched the student's hand when reaching over his shoulder to take the phone. [The appellant] believes the students who initially brought the incident to the attention of Senior Leadership were being malicious and mischievous. Based on the layout of the room, [the appellant] believes Students A, B, C and D would have been unable to clearly see what happened. He believes their view would have been obstructed by each other, Student F and the teacher himself.

[10] The summary also includes the appellant's response to it:

> Upon reading the summary [the appellant] has identified a number of areas in the students statements that appear contradictory for example, one student hearing a sound which wasn't mentioned by anyone else, and varying perspectives on where [the appellant] was standing, timing and direction of the alleged strike to Student X. [The appellant] believes the students either side of Student X are unwilling to verify [the appellant's] account as they do not wish "*to desert their friend*". [The appellant] believes there is a sufficient lack of corroborating detail to bring these accounts into question.
>
> Upon receiving Student G's account where the student mentions Student X saying "you hit me", [the appellant] has requested to amend his initial statement with the following "*I do remember him saying that this and I'm sure it was after I tried to take the phone but before he saw the broken earphone and the shouting and the abuse started. The tone was like he was trying to explain to himself what had just happened or trying it out for an idea. My immediate response was 'I certainly did not' which he seemed to accept, as after that it was all about the earphones*."
>
> [The appellant] feels this is significant as it may have "*implanted the idea into the minds of the girls who turned into hostile witnesses*". [The appellant] identifies that it was said before the witnesses say he struck Student X. [The appellant] reiterates that he did not hit Student X but he continues to acknowledge that he contributed to a less than ideal situation.
>
> (original emphasis)

[11] On receipt of the Mandatory Report the Teaching Council assigned an investigator to look into the matter. A copy of the mandatory report was sent to the appellant on 27 January 2020 and he was invited to respond. The covering letter reads, inter alia:

> The Mandatory Report and accompanying documents allege that:
>
> - on 16 October 2019 you made physical contact with a student by hitting him across the head with your hand.

[12] On 3 June 2020 the appellant responded amending his earlier statement:[2]

> With the clarity of time and distance these are the bare facts of what happened. Students were in a room on computers all facing the wall. Two students near me were sharing earphones and banging hard on the desk with their arms in a way potentially dangerous to the computers. I reached over one's shoulder to take the phone. He lunched forward and grabbed the phone before I did. I pulled the earphone out of the phone and broke it, also pulling the earphone out of his ear. He was shocked and wondered if I hit him which I assured him I hadn't. He then realised that the earphone was broken and jumped to his feet in anger and abused me. I backed off and left the room. Later two girls at the other end of the room claim they saw me hit him. It may have looked like that to them, but they were not seated with an unobstructed view. I also believe they are malicious and refuse to believe that what they saw was in fact something else. They have drummed up support from likeminded classmates whose testimony is confused at best. The real problem is that reliable witnesses were focussed on their work and did not see the whole episode and consequently cannot categorically confirm that I did not hit anyone. I also think it is significant that the two boys sitting next to the supposed 'hittee' - his mates and best placed to know what happened - would not confirm that he had been hit. I can only reiterate ad nauseum I never hit anyone in 40 odd years of teaching and did not on this occasion either. I am not that stupid. Thank you.

[13] The Investigator referred the Mandatory Report and investigation file to the Complaints Assessment Committee (CAC) which then considered the issues raised. The CAC determined that there was insufficient evidence to prove the allegation that the appellant hit the student but referred the other allegations in the report to the Tribunal.

[14] On 10 September 2020 the CAC sent the appellant a copy of the Notice of Charge, and a covering letter from the CAC Chair. The letter says that the CAC had decided that the appellant's conduct may possibly amount to serious misconduct and

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[2] email dated 3 June 2020

that as a result it must refer the matter to the Tribunal. Legal counsel was appointed to act for the CAC and the appellant was encouraged to seek 'appropriate advice and support'.

*Notice of Charge*

[15] The Notice of Charge reads:

> **TAKE NOTICE** that the Complaints Assessment Committee (the CAC) has determined that in accordance with s 401 of the Education Act 1989:
>
> (a) Information received in the mandatory report provided by [school] about the conduct of [the appellant] should be considered by the New Zealand Teachers Disciplinary Tribunal (the Disciplinary Tribunal).
>
> (b) The CAC charges that the teacher has engaged in serious misconduct and/or conduct otherwise entitling the Disciplinary Tribunal to exercise its powers.
>
> **Particulars of the charge**
>
> 1. The CAC charges that [the appellant], registered teacher, of [city], on 16 November 2019 at [school]:
>
>  a. Removed and broke a Year 10 student's [Student A] headphones; and/or
>
>  b. Failed to appropriately de-escalate the situation with Student A following the incident in paragraph 1(a).
>
> 2. The conduct alleged in paragraph 1, both separately and cumulatively, amounts to serious misconduct pursuant to s 378 of the Education Act 1989 and Rule 9(1)(a) and/or (b) and/or (k) of the Teaching Council Rules 2016 or alternatively amounts to conduct which otherwise entitles the Disciplinary Tribunal to exercise its powers pursuant to s 404 of the Education Act 1989.

*Tribunal Decision*

[16] The Tribunal decision dated 30 April 2021 records that the appellant denied the charge. The matter was down for a hearing on 2 March 2021. The decision then records that the appellant repeated his position that a hearing was not required. By way of reply, the CAC then filed a memorandum suggesting a hearing on the papers would be appropriate in the interests of reducing costs.

[17] The Tribunal says that a further email was filed by the appellant. This appears to be reference to the appellant's submission for name suppression should serious misconduct be found. Under the heading "Mode of Evidence" this note reads:

> I accept the evidence of [Investigator] and [Principal] be admitted by consent.
>
> I have not asked to cross examine any of the student witnesses. I do not know how to do this and I believe it would cause much more stress to the students than the very brief incident itself. I have set out my response to the student witness statements where I believe the evidence is incorrect or incomplete or contradicted by other witnesses.
>
> However if the students are called and say something that is not true I would then want the right to question them on that point.
>
> I do want to say for the record that the witness statements originally given to the CAC by the students were sufficient to clear me of any charge of hitting Student A without any hearing of the witnesses.
>
> Therefore I do not understand why it is now necessary to call the witnesses for the other charges and I am happy to use the available documents to support my defence on these charges.
>
> I am very concerned that the CAC has claimed that I should pay higher costs (if found guilty of serious misconduct) because of the cost of having a hearing and calling witnesses. Ms Baker[3] has said that it is in the interest of justice for there to be a hearing. However I am concerned that having a hearing in person results in increased costs to me.

[18] In light of this, the Tribunal concluded:

> We must therefore make findings on the basis of statements of the witnesses and the respondent. This is not a satisfactory position. In the absence of an in-person hearing we would normally as a minimum require sworn or affirmed statements. Usually where there is a dispute of facts, we would hear from the witnesses in person and allow them the opportunity to respond to comments and contrary evidence.
>
> In agreeing to consider the matter on the papers, we have taken into account the parties' desire to reduce stress for student witnesses as well as time and cost for all concerned. There is also little dispute on the first particular. We have reached a decision based on the information before us. That means we have not been able to make findings on all matters.
>
> There is some evidence that the respondent hit Student A. The respondent is not charged with this. We would prefer not to have had this evidence before us, but we

[3] the Chair of the Tribunal

understand the respondent wanted it included because it shows inconsistencies in the students' evidence.

[19] Despite there not being agreement between the witnesses and the respondent, the CAC agreed to the Tribunal hearing the matter on the papers.

[20] The decision also records that a teleconference was convened on 25 February 2021 during which the parties agreed that:

(a) The "headphones" referred to in the evidence are the "earbud" type.
(b) The student had one of the earbuds in his ear.
(c) The respondent pulled the headphones out of the student's ear.
(d) Somehow the headphones ended up broken, and it is not known how. It was not done intentionally.

[21] There was no agreement on the evidence in relation to the second particular (i.e. the failure to de-escalate the situation appropriately).

[22] The Tribunal found the allegations in the charge were proved saying:

> We have found that [the appellant's] conduct in pulling Student A's headphone from his ear amounts to serious misconduct for the following reasons:
>
> a. It was likely to adversely affect Student A's wellbeing and that of other students;
>
> b. It is conduct that reflects adversely on his fitness to be a teacher;
>
> c. It may bring the teaching profession into disrepute;
>
> d. Pulling Student A's headphone from his ear was an unjustified and unreasonable use of physical force and therefore is a breach of Rule 9(1)(a) of the Teaching Council Rules 2016.
>
> The respondent's failure to de-escalate the situation in a timely manner is conduct that reflects adversely on his fitness to be a teacher, but does not meet the criteria in rule 9. It is better characterised as misconduct.

[23] The Tribunal imposed:

(a) a censure under s 404(1)(b) of the Act;

(b) a condition pursuant to s 404(1)(c) that for a period of two years the appellant must provide any employer with a copy of the Tribunal's decision; and

(c) a condition pursuant to s 404(1)(e) that the register be annotated for a period of two years.

[24] The respondent was also ordered to pay 50% of the CAC costs, and the Tribunal costs.

[25] The appellant's application for non-publication was declined.

*Reasons*

[26] The reasons provided by the Tribunal for finding that the first particular of the charge was established were that:

(a) there was no dispute that the headphones were broken and it was not part of the CAC's case that the appellant intentionally broke them;[4]

(b) while the students were behaving in a way that was disruptive and not conducive to learning, and it was reasonable to require them to stop, it was the appellant's approach to correcting that behaviour that was the issue: "A 14 year old boy needs to be coached and given some reasons for modifying his action, not backed into a corner. This can be summarised as 'connection before correction'"; [5] and

(c) the appellant accepted that he reached for the phone and then pulled the earbud out of Student A's ear.[6]

[27] In relation to the second particular of the charge, the Tribunal said that there was no dispute that Student A was angry that his headphones had been broken and that

[4] Tribunal decision at [52]
[5] Tribunal decision at [56]
[6] Tribunal decision at [57]

he was yelling and swearing and demanding that the appellant fix the earphones. There was also no question that the appellant left the classroom. The question for the Tribunal, however, was "whether he should have done that sooner."[7]

[28] The Tribunal said that the CAC did not set out how the appellant should have managed the situation but said, as a specialist tribunal, it was the Tribunal's view that the appellant's response to Student A's outburst fell short of the standard expected of a reasonable teacher in his position.[8] The Tribunal continued:[9]

> There are other responses that would have been appropriate such as: apologising for the breakage, explaining it was unintentional, using a calm voice and backing away rather than having a "stand-off". Under the Code of Professional Responsibility, teachers are expected to demonstrate a high standard of professional behaviour and integrity (clause 1.3) and engage in professional and ethical relationship with learners (clause 2.2).

[29] As a result, the Tribunal found that the appellant failed to appropriately de-escalate the situation and that the second particular was established.[10]

[30] The Tribunal then turned to the definition of serious misconduct set out in the Act, and the criteria for reporting serious misconduct in rule 9 of the Teaching Rules 2016 (the Rules).[11]

[31] The Tribunal considered that the student's reaction of swearing and yelling demonstrated that he was distressed and that he was experiencing: "considerable angst from embarrassment that this exchange had occurred in front of his peers". In light of this, the Tribunal considered that the appellant's conduct adversely affected the student's wellbeing.[12]

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[7] Tribunal decision at [60] – [61]
[8] Tribunal decision at [63]
[9] Tribunal decision at [64]
[10] Tribunal decision at [65]
[11] The rules are defined by s 378 as being the rules made pursuant to s 388
[12] Tribunal decision at [68]

[32] The Tribunal considered that it did not need to find actual harm but only that the conduct was likely adversely to affect the wellbeing of one or more students. The Tribunal said:[13]

> In our view, the act of pulling ear buds is reckless and is likely to adversely affect that person's well-being. The fact that Student A was angry about this act is evidence of the effect on his wellbeing. That does not mean that if a student is upset with their teacher, an adverse finding against the teacher is warranted, but the respondent's actions were not within the acceptable range of classroom management and were likely to adversely affect Student A's wellbeing. We find the definition in s 378(1)(a)(i) is therefore met.

[33] The Tribunal considered the appellant's actions in isolation from his background and also found that the appellant's actions reflected adversely on his fitness to teach as per the definition of 'serious misconduct' in s 378(1)(a)(ii) of the Act.[14]

[34] Further, the Tribunal found that pulling a student's earphones out of his ears was an unreasonable use of force on the student under rule 9(1)(a):[15]

> Having reached for the students phone, he "pulled hard" on the headphones. The respondent said that he "snatched" it and also that he grasped the earphone at desk level with a view to pulling it out of the phone, but had no further purchase to pull it out. He said he let it go and straightening up, he grasped the earphone again about a foot from his ear. We are satisfied that this was an unjustified and unreasonable use of physical force and so rule 9(1)(a) is met.

[35] As a consequence, a finding of serious misconduct was made.

[36] The Tribunal found that the appellant's failure to de-escalate appropriately was not so serious as the appellant did not allow the exchange with the student to become protracted and because the appellant sought teacher help. Nevertheless the Tribunal

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[13] Tribunal decision at [70]
[14] Tribunal decision at [73]
[15] Tribunal decision at [75]

found that: "…his engagement with Student A reflects adversely on his fitness to be a teacher. It therefore amounts to misconduct."[16]

[37] The Tribunal found that the failure to de-escalate appropriately did not meet the threshold for serious misconduct as it was unlikely that this would bring the profession into disrepute or that it was a serious breach of the Code of Professional Responsibility. The Tribunal added, however, that: "Had it been of longer duration that might have been a different case."[17]

*Penalty*

[38] In considering an appropriate penalty the Tribunal noted that the CAC acknowledged that the appellant had provided long service to the profession and that this was his first appearance before the Tribunal. The CAC submitted, however, that the appellant lacked insight and continued to justify his actions by claiming that:[18]

(a) the breaking of the headphones was an accident;

(b) he suffered a "string of foul mouthed abuse" from Student A;

(c) he de-escalated the situation immediately by removing himself; and

(d) the CAC was adopting an "excessively student-centred approach".

[39] The Tribunal noted that the appellant:[19]

(a) strongly objected to the submission that he lacked insight;

(b) acknowledged early on that he should not have attempted to remove the headphones;

[16] Tribunal decision at [76]
[17] Tribunal decision at [76]
[18] Tribunal decision at [78] – [80]
[19] Tribunal decision at [ 81] – [83]

(c) very early realised that the choice he had made was not helpful and attempted to rectify the situation by saying that he might pay for them, and later by leaving the room;

(d) did not accept the submission that by saying that the damage to the headphones was accidental, that he was justifying his actions: this, the appellant said, was a simple statement of fact;

(e) his reference to an "excessively student-centred approach" was an expression of his frustration at the extent to which the "false accusation" that he hit Student A had "destroyed the end of his career" and resulted in the stress of the proceedings and "a total loss of expected income".

[40] The Tribunal noted that the appellant considered that his conduct did not amount to serious misconduct, and that the appropriate penalty for a finding of misconduct is censure and professional development.[20]

[41] The Tribunal concluded that although the conduct was not at the most serious end of the scale, it still met the definition of serious misconduct.[21]

[42] The Tribunal expressed concerned about the appellant's initial use of the words "student-centred approach" saying that this was unfortunate and that: "Where students have made allegations, they must be listened to and investigated. They cannot be dismissed without proper consideration."[22]

[43] The Tribunal also expressed concern about the appellant's insight, saying its concerns stemmed from: "…his continued explanation for grabbing the headphones was to prevent harm to the computers or students. This is a very fragile justification for his actions which seemed to be borne out of irritation or frustration with the students."[23]

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[20] Tribunal decision at [84]
[21] Tribunal decision at [85]
[22] Tribunal decision at [87]
[23] Tribunal decision at [89]

[44] The Tribunal found it appropriate to mark its disapproval of the appellant's conduct. The appellant was censored under s 404(1)(b) of the Act, and conditions were imposed pursuant to s 404(1)(c) and (e) that for a period of two years the appellant is to provide any employer with a copy of the Tribunal decision, and that the register be annotated accordingly.[24]

*Non-publication*

[45] In declining the appellant's application for non-publication of his name, the Tribunal noted that there were two applications for non-publication, one from the appellant and one from the college.

[46] The Tribunal noted that the appellant considered that he had a 40 year unblemished teaching record and that it would be unfair to destroy this reputation without a strong basis for doing so and that because of the investigation, he said that he lost the opportunity for relieving work that he would otherwise have undertaken, with a corresponding impact on his supplementary retirement income.[25]

[47] The Tribunal found, however, that such grounds for name suppression are commonly advanced and have been routinely dismissed by the Tribunal as not rebutting the presumption in favour of publication. The Tribunal found:[26]

> If the existence of this decision would deter a prospective employer, then that tends to indicate that there is a public interest in publication that must have some weight in our considerations.

[48] The Tribunal was not persuaded that it was proper to order non-publication of the appellant's name and the application was declined accordingly.

[49] In terms of the school's application, the Tribunal said that it did not understand how identification of the teacher would lead to identification of the students beyond those who were present in the classroom and who witnessed the events. The Tribunal said that as the appellant is being named there is no risk of speculation about any other

[24] Tribunal decision at [90]
[25] Tribunal decision at [99]
[26] Tribunal decision at [100]

teacher. The Tribunal, therefore, was not persuaded that there would be disruption to the learning environment.[27]

[50] As a result, the Tribunal also said it did not find it proper to order non-publication of the school's name and declined the application.

**Grounds of appeal**

***First ground: procedural flaws***

[51] The appellant alleges the Tribunal's decision was procedurally flawed in that the Tribunal heard a charge about conduct that was not:

(a) referred to the Teaching Council (such that the Tribunal's finding is outside the scope of the investigation as defined by the Mandatory Report);

(b) notified to the appellant prior to the decision to bring charges; and

(c) investigated.

***Second ground: the decision was wrong in law and fact***

[52] The appellant also alleges that the Tribunal made errors of law and fact:

(a) by failing to ensure that it, and the appellant, were properly informed of the substance of the charge (or otherwise failed to ensure that the appellant had an opportunity to answer all matters that were the subject of adverse findings);

(b) in conducting a hearing on the papers when the charge was denied and when there were facts in dispute (such that the Tribunal did not have before it key evidence);

[27] Tribunal decision at [105]

(c) by failing to consider and apply the burden and standard of proof commensurate with a charge of serious misconduct, and by accepting and making credibility findings on unsworn, contradictory, untested, and unreliable evidence;

(d) by changing its position in terms of whether intent and causation were requisite elements of the charge;

(e) by failing to provide reasons;

(f) by making findings outside the agreed statement of facts; and

(g) insofar as the evidence was contradictory and did not support the findings that the:
    (i) appellant used unreasonable and excessive force;
    (ii) pulling of the earbuds was unexpected;
    (iii) appellant had been reckless;
    (iv) appellant had not acted to protect persons or property; and
    (v) appellant failed to de-escalate the situation.

***Third ground: penalty***

[53] The third ground of appeal is that the Tribunal erred by:

(a) imposing a penalty without considering or addressing all relevant factors; and

(b) not applying the least restrictive penalty possible or considering other alternative outcomes.

***Fourth ground: costs***

[54] The fourth ground of appeal is that the Tribunal failed to:

(a) comply with its own practice note when imposing costs; and

(b) offer the opportunity to make submissions on costs.

***Fifth ground: non-publication***

[55] Finally, the appellant says that the Tribunal failed to take into account all relevant factors when declining to make an order for non-publication.

***Relief sought***

[56] The appellant seeks orders:

(a) quashing the finding of serious misconduct and misconduct;

(b) quashing the censure, conditions and public annotation;

(c) quashing the order that the appellant pay 50% of all costs;

(d) preventing publication of the appellant's name and any detail relating to his identification, including the name of the school and the names of the students; and

(e) for costs on appeal.

**Decision and Reasons**

***Approach on appeal***

[57] Section 409 of the Education Act 1989 provides that a teacher who is the subject of a decision of the Tribunal under s 404 may appeal against that decision to the District Court.

[58] Section 409(4) provides that s 356(3) to (6) applies as if the appeal were an appeal under s 356(1). That is, the District Court has no power to review any part of decision that the appellant has not appealed against. Further, subject to any order of the District Court, every decision of the Tribunal continues in force and has effect

pending the determination of an appeal against it. On appeal, the District Court may make an order for costs in respect of the appeal.

[59] While s 409(4) does not refer to s 356(2), I consider that it is implicit, as with any appeal under s 356(1), that the court may confirm, reverse, or modify the decision concerned, or may refer the matter back to the Tribunal in accordance with rules of court, or may give any decision that the Tribunal could have given. There is no dispute between the parties in this regard.

[60] Following the approach adopted in *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* (given that the Court may confirm, reverse, or modify the decision of the Tribunal (or refer the matter back to the Tribunal), and the Tribunal imposed penalties under s 404 of the Act), an appeal pursuant to s 409 is by way of a rehearing.[28]

[61] Accordingly, as the Supreme Court said in *Austin, Nichols & Co Inc v Stichting Lodestar*, the appeal is to be:[29]

> … conducted on the basis of the record of the court or tribunal appealed from unless, exceptionally, the terms in which the statute providing the right of appeal is expressed to indicate that a de novo hearing of the evidence is envisaged. … , the appellant bears an onus of satisfying the appeal court that it should differ from the decision under appeal. It is only if the appellate court considers that the appealed decision is wrong that it is justified in interfering with it.

[62] Further:[30]

> The appeal court may or may not find the reasoning of the tribunal persuasive in its own terms. The tribunal may have had a particular advantage (such as technical expertise or the opportunity to assess the credibility of witnesses, where such assessment is important). In such a case the appeal court may rightly hesitate to conclude that findings of fact or fact and degree are wrong. It may take the view that it has no basis for rejecting the reasoning of the tribunal appealed from and that its decision should stand. But the extent of the consideration an appeal court exercising a general power of appeal gives to the decision appealed from is a matter for its judgment. An appeal court makes no error in approach simply because it pays little explicit attention to the reasons of the court or tribunal appealed from, if it comes to

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[28] *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354, at [36] - [37]
[29] *Austin, Nichols & Co Inc v Stichting Lodestar* [2008] 2 NZLR 141, 146 at [4]
[30] At [5]

a different reasoned result. On general appeal, the appeal court has the responsibility of arriving at its own assessment of the merits of the case.

[63] Additionally: [31]

> Those exercising general rights of appeal are entitled to judgment in accordance with the opinion of the appellate court, even where that opinion is an assessment of fact and degree and entails a value judgment: If the appellate Court's opinion is different from the conclusion of the tribunal appealed from, then the decision under appeal is wrong in the only sense that matters, even if it was a conclusion on which minds might reasonably differ. In such circumstances it is an error … to defer to the [tribunal's] assessment of the acceptability and weight to be accorded to the evidence rather than forming its own opinion.

[64] As Gendall J summarised it in *Cole v Professional Conduct Committee of the Nursing Council of New Zealand*:[32]

> Thus, when it comes to a general appeal of the present kind, an appellate court must come to its own view of the merits. The weight an appellate court gives to the original decision is a matter of judgment. Deference to the assessment of the original decision-maker is not necessary, even where the assessment requires a value judgment. If an appellate court considers that the original decision is wrong, it must act on that opinion.

[65] Gendall J cautioned, however:

> … that is not to say that an appellate court is to pay no attention to the decision of the lower court or tribunal. In *Kacem v Bashir*, the Supreme Court noted:[33]
>
> > *[31] …The Court of Appeal was right to say that Courtney J had rather overstated the effect of Austin, Nichols when she indicated that she should approach the appeal the High Court "uninfluenced" by the reasoning of the Family Court. The High Court was required to reach its own conclusion, but this did not imply that it should disregard the Family Court's decision. What, if any, influence the Family Court's reasoning should have was for the High Court's assessment.*
> >
> > *[32] But, for present purposes, the important point arising from Austin, Nichols is that those exercising general rights of appeal are entitled to judgment in accordance with the opinion of the appellate court, even where that opinion involves an assessment of fact and degree and entails a value judgment. In this context a general appeal is to be distinguished from an appeal against a decision made in the exercise of a discretion.*

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[31] At [16]

[32] *Cole v Professional Conduct Committee of the Nursing Council of New Zealand* [2017] NZHC 1178 at [32]

[33] *Kacem v Bashir* [2011] 2 NZLR 1 (SC) at [31] and [32]

(citations omitted)

> [32] And it is also clear here that I must bear in mind the advantages that the Tribunal appealed from enjoys. These include its specialist technical expertise and the ability it has had here to assess witnesses and their credibility first hand.
>
> [33] On this aspect, in *A v Professional Conduct Committee*[34] Keane J stated at [65]:
>
> *An appellant still must show, the Supreme Court said, why the court appealed to should differ from the tribunal whose decision is under appeal. Unless the appellant can show that the tribunal appealed from was wrong the court on appeal is not entitled to interfere…The court on appeal will still recognise any advantage that the tribunal appealed from enjoys, like expertise or the ability to assess witnesses first hand, where these are important…but otherwise no deference is called for….*

[66] In the present case, while noting that the Tribunal has technical expertise, the specialist nature of the Tribunal must be balanced against the Tribunal having considered the charge on the papers without the benefit of having assessed the witnesses and their credibility.

***Scheme of the legislation***

[67] Section 394 of the Act requires that the employer of any teacher must immediately report to the Teaching Council if it has reason to believe that the teacher has engaged in serious misconduct. The report must be in writing, include a description of the conduct of the teacher that is believed to be serious misconduct, and include a description of what action (if any) the employer has taken in respect of that action.

[68] The term 'serious misconduct' is defined in s 378(1) of the Act:

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

[34] *A v Professional Conduct Committee* HC Auckland CIV-2008-404-2927, 5 September 2008

[69] The Teaching Council's criteria for reporting in (b) are to be found in the Teaching Council Rules 2016. Relevantly, rule 9 provides:

> **9 Criteria for reporting serious misconduct**
>
> (1) A teacher's employer must immediately report to the Teaching Council in accordance with section 394 of the Act if the employer has reason to believe that the teacher has committed a serious breach of the Code of Professional Responsibility, including (but not limited to) 1 or more of the following:
>
> (a) using unjustified or unreasonable physical force on a child or young person or encouraging another person to do so:
>
> (b) emotional abuse that causes harm or is likely to cause harm to a child or young person:
>
> …
>
> (k) an act or omission that brings, or is likely to bring, the teaching profession into disrepute.
>
> (2) Misconduct described in any of paragraphs (a) to (e) and (k) of subclause (1) may be—
>
> (a) a single act; or
>
> (b) a number of acts forming part of a pattern of behaviour, even if some of the acts when viewed in isolation are minor or trivial.

[70] The term 'misconduct' is not similarly defined but it has been interpreted to mean conduct that satisfies s 378(1)(a) but not (b).[35] This is not in itself in dispute.

[71] Amongst other things, *The Code of Professional Responsibility: Examples in Practice*, sets out what is expected of teachers as regards "promoting the wellbeing of learners and protecting them from harm". An example of behaviour that does not promote learners' wellbeing and may cause harm is "inappropriate handling such as physically grabbing, shoving or pushing, or using physical force to manage a learner's behaviour".[36]

*Penalty*

[72] Section 404(1) sets out the powers of the Tribunal following a charge of serious misconduct having been established:

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[35] *CAC v Teacher* NZTDT 2009/6, 5 August 2009 at [27] – [31]

[36] *The Code of Professional Responsibility: Examples in Practice*, Education Council, at 2.1

**404 Powers of Disciplinary Tribunal**

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

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

(b) censure the teacher:

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

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

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

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

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

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

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

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

[73] As Collins J said in *Roberts*, the imposition of the appropriate penalty involves consideration of a number of factors.[37]

[74] In this case, the first of these is to be gleaned from the purpose of the Teaching Council in s 377 of the Act:

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

[75] The other *Roberts* factors to be considered when imposing a penalty are:[38]

(a) the important role that penalties have in setting professional standards;

(b) their punitive function;

(c) their rehabilitative effect;

(d) consistency with other penalties imposed in similar circumstances;

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[37] Above n 25, at [44] – [51]
[38] Above n 25, at [45] – [51]

(e) the practitioner's behaviour against a spectrum of penalty options available;

(f) that the penalty is the least restrictive that can be imposed in the circumstances; and

(g) the need for the penalty to be fair, reasonable, and proportionate in the circumstances.

[76] I now turn to the grounds of appeal.

***First ground of appeal: procedural flaws***

*Submissions for the appellant*

[77] The appellant submits that there were serious procedural flaws that contributed to, or were compounded by, errors in the Tribunal hearing.

Scope

[78] The appellant submits that the scope of the investigation against him was defined by the Mandatory Report and the matters about which the appellant was given notice.

[79] It is submitted that the conduct referred to the Teaching Council was the allegation that the appellant hit a student and that this was the issue that was put to him to answer.

[80] While the investigator's letter also advised that the scope of the investigation might change depending on the information received, if this happened the appellant was to be kept informed throughout the investigation. It is submitted that at no time was the appellant given notice that the scope of the investigation had changed from hitting a student.

[81] When the investigator's report was prepared, the appellant says the allegation was slightly altered insofar as it became that the appellant: "removed and broke a student's headphones and hit the student across the back of the head with his hand".

[82] It is submitted, however, that the Investigator added the suggestion that the way the headphones were removed could reflect a lack of cultural competence. It is submitted that the Investigator did not put this change to the appellant or notify him of the potential significance of such a change.

[83] It is also submitted that the addition of a second particular, namely that the appellant failed to de-escalate the situation with the student was not referred to in the Investigator's report and that he first became aware of it when he received a copy of the charge against him.

Failure to Investigate

[84] It is submitted that the Investigator's role was to carry out an investigation of the report or complaint but he did not speak to any witnesses, did not test their evidence, and nor did he put to the witnesses a contrary view of any inconsistencies. It is submitted further that the Investigator made no detailed investigations into such matters as to what the earbuds looked like or how delicate or light and flimsy they might have been.

[85] This, it is submitted, was perhaps understandable given that the issue was framed as being about the appellant making physical contact with a student by hitting him.

[86] The issue of how long it took the appellant to leave the room, it is submitted, became an issue for the Tribunal but was not the subject of investigation.

[87] These deficits, it is submitted, were not remedied by the CAC who could have referred the matter back for further investigation when adding the matter of de-escalation, or the CAC could have exercised its powers to hear from the teacher and witnesses.

[88] It is submitted therefore that both the Investigator and the CAC failed in their fundamental obligations to investigate, resulting in a miscarriage of justice.

[89] For its part, it is submitted that the Tribunal recognised that the state of the evidence was unsatisfactory but felt compelled to reconcile conflicting evidence and to make credibility findings without the evidence being sworn or tested.

*Submissions for the respondent*

[90] The respondent submits that the charge was within the scope of the Mandatory Report and the Investigation Report. These reports, it is submitted, contained a fulsome summary of the incident, and described the allegation of hitting, the removal and breaking of the earphones, and the ensuing verbal altercation.

[91] It is submitted that what is important is the substance of the complaint and that it is not to be interpreted in a literal or legalistic way. The CAC was not restricted to the particular wording of the issue in either the Mandatory Report or the investigator's report so long as the CAC was laying charges in relation to the incident to which the report related. It is submitted that the CAC had broad powers to frame those charges as it considered appropriate, which it did.

[92] It is further submitted that the appellant was aware of the full allegation both at the CAC stage and when the charges were referred to the Tribunal.

[93] In terms of the investigation, it is submitted that there is no requirement under the Act or the Rules for investigators to re-interview witnesses when there are already statements existing from the school's investigation. It is submitted that this makes particular sense when dealing with the evidence of child witnesses or students, as there is a desire to limit their exposure to further unnecessary questioning, as was recognised by the appellant when electing to have the matter heard on the papers.

[94] It is also submitted that the presumption under the Rules is that the CAC hearing proceed on the papers, and that the appellant was invited to attend but declined to do so. In any event, to the extent that there were any defects in the evidence, it is submitted that the Tribunal appropriately recognised that the quality of the hearsay statement is a matter for a weight, and applied such considerations accordingly.

*Discussion*

[95] I am satisfied that the charge reflected the Mandatory Report and that the scope of the charge did not change from that which was first put to the appellant by either his Principal, or by the Investigator.

[96] The Principal's letter of 22 October 2019 to the appellant expressly refers to allegations that the appellant:

(a) attempted to remove and broke a student's headphones;

(b) did not de-escalate an aggressive situation; and

(c) hit a student.

[97] That the three allegations were known and understood is apparent from the appellants email of 30 October 2019 in which he acknowledged that he unintentionally broke the student's earphones and explained how he de-escalated the situation:

> Here is my follow up in writing to your letter of 22 October 2019 and our meeting of yesterday 29 October. Point by point
>
> 1) Yes I attempted to remove the student's phone and broke his earphones. This was unintentional- an accident.
>
> 2) The student jumped up and shouted words to the effect that I would be replacing them. Knowing I had made a mistake, I offered to do so in a conciliatory fashion. There followed a string of foul mouthed abuse so I turned on my heels and left the room to locate [teacher]. From the time the aggressive situation started to me leaving the room was probably less than 10 seconds. I de-escalated the situation immediately by removing myself from it.
>
> 3) It appears that a group of students claim they saw me hit the student just before I left the room. If this was so it would have been seen by most if not all students, certainly the boys sitting next to him. [Teacher] and I returned to the room and she left with a student and his bag. In this time nothing had been said about me heading the student. It was after they left that the small group of girls sitting together in the adjacent corner said to me that they saw me hit [student]. Not wishing to get into a further argument and confident their story had no basis in fact I invited them to take it to the appropriate authorities.
>
> …

[98] The Incident Summary also includes a summary of the incident which includes reference to the appellant damaging the earphones.

> At the end of the school day, [the appellant] brought in his statement and briefly spoke with [the Deputy Principal] and the Principal, …. [The appellant] verbally added that Student X was speaking about his headphones being damaged rather than the hit to the head.

[99] The summary of written statements made by the appellant, in turn, records that the appellant acknowledged he removed the students headphones and broke them but said that the breaking was unintentional. The summary continues saying that the appellant tried to defuse the situation and removed himself from the situation and sought assistance from a colleague. Further, the appellant adamantly denied making contact with the students and indicated that the only contact he made with the student was when his hand touched the students hand when reaching over his shoulder to take the phone. The summary also says that the appellant said that he believed the students who initially brought the incident to the attention of Senior Leadership were being malicious and mischievous.

[100] The background information section of the report outlines how the appellant intervened with the student after previous warnings and how he tried to remove the phone from the student's desk. The appellant then tried to remove the student's headphones and unintentionally broke then, and that a verbal altercation ensued.

[101] The appellant was given the opportunity to comment on the draft incident summary before it was finalised, and his comments in response were included in the final report. This, in turn, was provided to the appellant with the Mandatory Report.

[102] On 21 November 2019, the appellant was undoubtedly focused on the allegation that he had hit a student, and seeks to explain the circumstances as to why he did not think this was possible, or why he thought that the circumstances were confused. In doing so, however, the appellant acknowledges that: "the earphones were broken after I attempted to remove the phone." The appellant also says when denying the allegation that he hit Student X, that: "I have acknowledged that I contributed to a situation which those who wanted to could misconstrue it as such."

[103] I am satisfied that the scope of the issue which formed the subject of the investigation was wider than the appellant allegedly hitting a student. The first words of the Issue statement are that: "An altercation occurred between Greg and a student…". While the issue then refers to the allegation that the appellant hit a student during this altercation, the substance of the summary and the appellant's response to it leads me to conclude that the appellant understood that the issue was about the wider circumstances of the altercation. The appellant commented on more than just the allegation that he hit a student.

[104] The Notice of Charge then cites two particulars: the removal and breaking of the student's headphones, and the failure to de-escalate the situation. These matters will not have come as a surprise to the appellant as they were both set out in the letter from his Principal of 22 October 2019, and were both matters on which the appellant had earlier commented.

[105] I am satisfied that there was no error in framing the charge as the CAC did. Moreover, rule 17(1)(a) of the Rules requires the CAC to consider "the matter that the report or complaint is about". As just stated, this is not just that the appellant hit a person, but that "An altercation occurred between [the appellant] and a student *and* that [the appellant] allegedly made physical contact with the student …". (emphasis added)

[106] There is nothing in s 401(5) of the Act that restricts the particular wording of the charge to the way in which the matter has been expressed by either the Mandatory Report or the Investigator's report. What is important is the subject-matter rather than the particular way in which the report is expressed, provided it is clear what is alleged.[39]

[107] The subject matter was the altercation. The Mandatory Report and Investigation Summary, with which the appellant engaged, was sufficiently wide to incorporate the matters which were translated by the CAC into the particulars of the charge even though the CAC chose not to pursue the allegation that the appellant hit student.

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[39] *Duncan v Medical Practitioners Disciplinary Committee* [1996] 1 NZLR 513, at 545

[108] To the extent that the appellant considered that the charge against him had somehow changed, this is not borne out by the evidence. In any event, the charge was provided to the appellant before the Tribunal determined the matter. The appellant had the opportunity to make submissions on it, which he did. Accordingly, there was no breach of natural justice.

[109] It also follows from what I have said, that I do not accept that it can be said that the appellant was not notified of the allegations.

[110] This again is clear from the appellant's statement of 9 February 2021. While the appellant said that his original statements focussed on the allegation that he hit a student, he made further comments about the charge. The appellant stated that it was not his intention to break the earphones and that was an accident (and he did not believe anyone knows how exactly they got broken). The appellant also described 'the aftermath' where he described leaving the room to get a colleague after making what he said was a reasonable attempt at de-escalation. These comments indicate that the appellant well understood the scope of the charge against him.

[111] In terms of the Investigator needing to undertake further inquiries, I agree that there was no requirement to do so given the statements provided by the school. The extent of any further investigation is a matter of discretion. In any event, the appellant himself was happy to proceed on the basis of the available documents and did not wish to cause further stress to the students. The appellant cannot now, after the fact, argue that he was disadvantaged as a consequence.

*Decision*

[112] For the reasons stated, I am not satisfied that the first ground of appeal has been established.

***Second Ground: The decision of the CAC was wrong in law and fact***

*Appellant's submissions*

[113] The appellant submits that the Tribunal failed to ensure that he was properly informed of the substance of the charge against him, or that the Tribunal otherwise

failed to ensure that he had an opportunity to answer all matters that were the subject of adverse findings.

The Charge

[114] In respect of the charge, it is submitted that:

(a) the charge lacks particulars as to how the appellant's conduct amounted to serious misconduct;

(b) the charge was framed as a single charge with two particulars but that the Tribunal treated the charge as two separate charges and made two separate findings; and

(c) despite the CAC clarifying that intent was an element of its case the Tribunal did not:

(i) amend the charge;

(ii) require intent to be proved; or

(iii) dismiss the charge when the parties agreed that the appellant did not act with intent;

On the papers decision

[115] It is further submitted that the appellant always denied the charge, and that there were contradictory and inconsistent statements from the students. Given this, and the lack of agreement as to the facts in relation to the second particular of the charge (i.e. that the appellant failed appropriately to de-escalate the situation), it is submitted that the matter should not have been determined on the papers without a hearing. Given the seriousness of the allegation, the more cogent the evidence needed to be. By not having a hearing and allowing the evidence to be tested, it is submitted that the tribunal made findings based on unsafe, unreliable and inadmissible statements.

Burden and standard of proof

[116] The appellant also submits that the errors in relation to the charge and the decision being made on the papers, were compounded by the Tribunal not making any

reference to the burden or standard of proof in its decision and that it did not analyse the evidence against the requisite standard.

[117] Furthermore, it is submitted that the Tribunal allowed hearsay statements as evidence in the form of interviews with students, and made credibility findings based on and unsworn and contradictory statements. It is submitted that the Tribunal abdicated its role to determine the form and nature of the best evidence to be put before it resulting in a miscarriage of justice in so far as the Tribunal found that the appellant:

(a) should have apologised to the student, when this was never asked of him;

(b) failed to use a calm voice, when this was never put to him;

(c) engaged in the act of "pulling ear buds out of someone's ears unexpectedly" when:

  (i) there was no suggestion that more than one ear bud removed;

  (ii) this was contrary to the agreed statement of facts; and

  (iii) the appellant had given warnings to the student and initially attempted to confiscate the phone;

(d) behaved recklessly, when this was not the case for the CAC nor a matter put to him;

(e) engaged in a stand-off, when this was not put to him and was contrary to his submission that he tried to de-escalate the situation;

(f) had used unreasonable force, when there was no questioning or evidence about the degree of force used; and

(g) had conducted himself in a way that impacted on his fitness to teach for reasons that are unclear.

First particular – wrong in fact

[118] It is submitted that the Tribunal also made errors of fact which rendered its decision unsafe by:

(a) not requiring a causative link between the earphone breaking and the appellant's misconduct when the charge was that the appellant "removed *and* broke" the earphones;

(b) going beyond the agreed facts and:

(i) proceeding on the basis that the earphone was pulled from the student's ear where there was no agreement about the force used, the evidence was contradictory, and the appellant was not questioned; and

(ii) making adverse comment on the appellant's uncontested claim that he was acting to protect students and property from harm, and using that as the basis for finding that he lacked insight; and

(iii) introducing two new elements namely that:

a. the earbud was pulled unexpectedly; and

b. the appellant behaved recklessly.

[119] In relation to the earbuds being pulled unexpectedly, it is submitted that this is not supported by the evidence which is that the student was given several warnings to stop his behaviour; that the appellant continuously called the student's name; and the student acknowledged that the appellant had tried to pull the phone from his hand.

[120] In relation to a finding of recklessness, it is also submitted that there was no objective analysis of risk, or of a conscious decision to take that risk.

First Particular – wrong in law

[121] It is submitted that the Tribunal failed to provide reasons why the conduct met is serious misconduct.

[122] Moreover, the appellant submits that the Tribunal was wrong in law in finding that the conduct amounted to serious misconduct because there was little analysis of the circumstances leading up to the act of him pulling the earbuds out of the student's ear, or of the student's contribution to the situation.

[123] A finding that because the student was angry the conduct had an adverse effect on the student's wellbeing, it is submitted, is an inappropriate application of the test for serious misconduct.

[124] It is submitted that to find serious misconduct, an analysis of the likely impact of the conduct and the risk of harm that it poses is necessary, and that the Tribunal failed to reconcile the evidence.

Second particular – wrong in fact

[125] The appellant submits that despite the Tribunal questioning whether he should have left the classroom to get assistance sooner than he did, the Tribunal did not analyse how long he did take before leaving the room.

[126] Further, despite finding that the appellant failed to use a calm voice, it is submitted that there is no evidence about the tone of voice used.

[127] In relation to whether there was a 'stand-off', the appellant says that the evidence is that he did leave the classroom.

[128] Further context for the Tribunal finding that the appellant failed to deescalate the situation, it is submitted, is that he caused damage to the earbuds and should have apologised. It is submitted that this finding was not open to the Tribunal on the facts.

Second Particular – wrong in law

[129] In addition, it is submitted that it was not open to the Tribunal to treat the two particulars of the charge as separate charges and to make a finding of serious misconduct in relation to the first, and a finding of misconduct in relation to the second.

[130] Moreover, it is submitted that the Tribunal gave no reasons for finding that the failure to deescalate was not so serious but that it still adversely reflected on his fitness to be a teacher.

[131] The failure to give reasons, it is submitted, compounded the Tribunal's failure to provide proper particulars.

*Submissions for the respondent*

[132] Generally, the respondent submits that the Tribunal was not wrong to determine that the appellant's conduct amounted to serious misconduct (in relation to the first particular) and misconduct (in relation to the second particular).

[133] It is submitted that the factual findings of the Tribunal were open to it on the evidence and that no new factual elements were introduced by the Tribunal. It is submitted that while some facts were agreed, not all were and the Tribunal was required to make additional findings in determining the charge.

[134] It is also noted that the appellant did not dispute that there should be an adverse finding in relation to the charge. While the appellant disputed a finding of serious misconduct, it is submitted that he acknowledged that there could be a finding of misconduct and accepted that censure was an appropriate penalty.

[135] In relation to the first particular, it is submitted that there was little dispute about the factual allegations and that in response to the CAC submissions, the appellant stated that he agreed with most of the facts. These facts then formed the basis of the Tribunal's decision.

[136] It is submitted further that the Tribunal did not introduce new elements to the charge.

[137] In terms of the second particular, it is submitted that there was no dispute that Student A was angry and started yelling and swearing. The Tribunal arrived at its finding on the basis of the appellant's own evidence of a verbal altercation prior to leaving the room to obtain assistance from another teacher. The reference to the appellant not leaving the room sooner, it is submitted, is not a reference to a particular time period but rather, that the respondent should not have engaged in a verbal altercation with Student A at all.

[138] Similarly, the reference to the use of a calm voice and apologising, was referred to by the Tribunal as it canvassed other potential responses that the appellant could have made as part of its assessment of the appellant's conduct.

[139] It is also submitted that the Tribunal did give reasons for its finding notably that despite not allowing the engagement with Student A to become protracted and his seeking help, the engagement reflected adversely on the appellant's fitness to be a teacher. It is submitted that the Tribunal was not required to give lengthy reasons.

[140] Having found that the conduct occurred, it is submitted that the Tribunal was not wrong to find that the conduct amounted to serious misconduct, and misconduct, under the Act.

[141] The respondent submits that the allegation that the appellant was not informed of the substance of the charge is very similar to the issue of procedural error complained about.

[142] It is submitted that there is nothing vague about the charge and that the particulars and the factual allegations were clear.

[143] Further, it is submitted that the Tribunal records that the parties agreed that the breaking of the headphones was unintentional as discussed at a teleconference on 25 February 2021. Accordingly, it is submitted that the appellant was not operating under a misunderstanding of the nature of the charge. Nor, it is submitted, did the appellant understand the finding of serious misconduct was contingent on a finding of intent.

[144] In terms of the Tribunal making separate findings on the two particulars of the single charge, it is submitted that there is nothing inherently problematic with an omnibus charge but also, faced with a single charge with two particulars, it was open to the Tribunal to determine the charge on the basis that one or the other was proved. In this instance, it is submitted, the Tribunal found that the first particular amounted to serious misconduct and that the second particular amounted to misconduct. This, it is submitted, is not novel and nor is it an error in law to determine both particulars.

[145] In terms of determining the matter on the papers, it is submitted that the Tribunal may regulate its own procedure as it sees fit including whether a hearing is to be in person or by any other means. It is submitted that this matter proceeded on the papers following repeated requests of the appellant. Further it is submitted that a teleconference on 25 February 2021, the parties agreed the facts in relation to the first particular, and it was on this basis that the Tribunal agreed to consider the matter on the papers.

[146] It is submitted that while the Tribunal did not expressly refer to the burden and standard of proof, the Tribunal's pre-hearing minute of 12 January 2021 makes it clear that the tribunal understood that it was for the CAC to prove the case against the appellant. It is submitted that the Tribunal's decision demonstrates a weighing of the evidence notably that the evidence of students A, B and C did not differ markedly from the statement the appellant gave to the Principal. The evidence above the other three students was given little weight because the Tribunal questioned the reliability of it.

[147] While it is true that the briefs of evidence do not include an attestation as to their truth, and are not sworn, and some are unsigned, rule 31 provides that the Tribunal has a broad discretion to accept as evidence material which considers me assisted in the matter before it. In any event the evidence was at admitted entirely by consent of the parties.

*Discussion*

The charge

[148] I am satisfied that the charge sufficiently particularised why the appellant's conduct amounted to serious misconduct.

[149] The Tribunal was clear that the appellant's conduct was likely to adversely affect the student's well-being, and that of the other students; reflected adversely on the appellant's fitness to be a teacher; and might bring the teaching profession into disrepute. This is a value judgement that was open to the Tribunal. The appellant himself acknowledged that he contributed to a less than ideal situation.

[150] I also find nothing novel in the approach whereby a single charge can be premised on multiple particulars. In *Morahan v Wellington Standards Committee 2*,[40] the particulars comprised 56 paragraphs of facts and matters relied on to support the charge. The Court of Appeal said that upon the tribunal having found that the appellant's conduct constituted negligence or incompetence, it need not have necessary to consider the alternative elements of the charge. In doing so, the court implicitly recognised that a charge may have more than one particular.

[151] In the present case, similar considerations apply. After finding that the appellant's conduct constituted serious misconduct on one particular, it need not have considered the alternative. That is did so does not detract from the finding of serious misconduct.

[152] In terms of the requirement to prove intent I am satisfied that the charge did not allege intent on the part of the appellant. While counsel for the CAC confirmed in the teleconference on 12 January 2021 that it was the CAC case that the respondent intentionally broke the student's headphones, at the substance teleconference of 25 February 2021 it was agreed between the parties that the headphones were not broken intentionally. It was on this basis that the Tribunal proceeded to determine the charge. While the CAC did not amend its charge following the teleconference on 12 January 2021 the charge itself makes no reference to intent. Neither did the Principal's letter of 22 October 2019 or the Investigation Summary annexed to the Mandatory Report. I am satisfied that reference to intent was in error in response to a question asked by the chair. Not only was this rectified in the teleconference on 25 February 2021 but it was acknowledged by the CAC in its memorandum of 22 February 2021 where the CAC said:[41]

> For clarification the committee's allegation is that the respondent intentionally grabbed the headphones which caused the headphones to break. At the PHC conference on 12 January 2021 the chair queried whether the committee was alleging the breaking of the headphones was intentional in respect of the first particular. Council mistakenly affirmed that the breaking was intentional but that is not the position. There is no reference in the charge notice to the breaking being intentional and similarly the submissions filed on behalf of the

[40] *Morahan v Wellington Standards Committee 2* [2019] NZCA 221 at [25] – [26]
[41] At [11]

committee are premised on the basis that headphones broke as a result of the respondent grabbing them from the student.

[153] I am satisfied that the confusion between 'intentionally breaking the earphones' and 'intentionally grabbing the earphones resulting in their breakage' was rectified prior to the Tribunal's consideration of the charge. I see no error in the Tribunal's understanding of this matter.

On the papers decision

[154] I am also satisfied that the presumption under r 17 is that meetings of the CAC proceed on the papers. This is evident from r 17(2) which says that a request for a teacher to be heard in person must not be unreasonably refused. Had the presumption been that the parties be heard in person, such a provision would be otiose. The appellant was invited to attend the CAC meeting and declined to do so.

[155] I am also satisfied that the appellant had the opportunity to be heard before the Tribunal but did not wish to do so. As the Tribunal noted in its minute of 12 January 2021 (convened in relation to an application by the CAC for a direction that the student witnesses might give their evidence remotely):

> 11. [The appellant] did not understand why the students needed to be called to give evidence. It was explained that because he denies the charge, the CAC has to prove the case against him. That is done by calling witnesses. It is up to the tribunal to hear the evidence and make findings of fact.
>
> 12. [The appellant] felt that he could simply answer the charge right away. He does not need to receive signed briefs of evidence from the students. I explained to him that I was directing the filing of signed briefs in the interests of fairness to him.
>
> 13. Although I did not say so at this morning's teleconference, I now record that [the appellant] is obliged to put his case to the relevant witnesses so that they can comment on it. If he disputes any aspect of a witness's evidence, he must tell that witness at the hearing what the contrary evidence will be and invite their comment. Failure to do so may mean a witness is recalled to respond after [the appellant's] case has closed.

[156] Subsequently, on 9 February 2012 in his 'Response to the Committee Submission on Threshold and Penalty', the appellant reiterated:

> 62 It is the CAC that has sought a full hearing with witnesses. I do not understand why this is necessary. It was not thought necessary to hear the witnesses when the CAC decided that I had not hit the student, which I understand to be a much more serious charge than removing headphones. I do not understand why it is now necessary to hear the witnesses in relation to these charges, especially as they have had an opportunity to provide the evidence twice already, and I object to being accused of causing more cost.
>
> 63 I have stated that I did not need to cross examine the witnesses and I believe it could cause much more stress to the students than the brief incident itself. The witness statements originally given were sufficient to clear me of any charge of hitting the students and I am happy to use the witness statements that have been provided to support my defence on these charges.

Burden and standard of proof

[157] In relation to the burden and standard of proof I am satisfied that the Tribunal understood this matter. The Tribunal's pre-hearing minute of 12 January 2021 says: "… The CAC has to prove the case against [the appellant]".[42]

[158] Moreover, the tribunal recognised that it needed to balance the evidence and did so by comparing the evidence between students and the appellant, and identified where there were areas of dispute or areas where they were sceptical of the evidence.[43]

First Particular

[159] For reasons already stated I am satisfied that the Tribunal provided reasons as to why the conduct of the appellant constituted serious misconduct. The finding that the conduct resulted in a verbal altercation was accepted by the appellant. I agree that this was likely to have an adverse effect on the student, and that this was a finding that was open to the Tribunal. I see nothing inappropriate in the way that the Tribunal applied the test for serious misconduct. The Tribunal recognised that the conduct was at the lower end of the scale but nevertheless, that the conduct met the definition of serious misconduct in the Act. I agree with this finding.

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[42] At [11]
[43] Tribunal Decision at [52] – [57]

Second particular

[160] In relation to the Tribunal questioning whether the appellant should have left the classroom to get assistance sooner than he did, I am satisfied that the Tribunal was not making a finding about the time it took for the appellant to do so but rather, the Tribunal was expressing its concern that the altercation occurred at all. The evidence of the appellant is that:[44]

> In response to the violent outburst I first attempted to reason with Student A saying I might replace the headphones but as he ignored me I raised my voice and tried to remonstrate with him which proved not to be the best option. When I realised that I was getting nowhere I defuse the situation by leaving the room to get another teacher.

[161] The Tribunal expressed this in this way:[45]

> The respondent says that he replied, "Maybe I will, if you sit down and behave yourself in a reasonable manner". After Student A continued his abuse, the respondent said, "Alright then, I won't". The abuse continued and then the respondent went to get another teacher. The respondent said he raised his voice in an attempt to get the student to listen to him.

[162] It was in response to this exchange that the Tribunal suggested that there were other responses that would have been appropriate such as apologising for the breakage, explaining it was unintentional, using a common voice and backing away rather than having a 'stand-off'. In saying this the Tribunal did not make findings that the appellant should have apologised but was canvassing what other responses might have been appropriate given that the CAC evidence did not do so. I consider this consistent with the specialist role of the Tribunal and frankly, common sense.

[163] The suggestion about using a calm voice was in direct response to the appellant saying that he raised his voice.

[164] I see no error in the reference to the altercation being a 'stand-off' given the engagement or interchange between the appellant and the student even though it is accepted that this was not prolonged.

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[44] Response to the Committee Submission on Threshold and Penalty, dated 9 February 2021, at [18]
[45] Tribunal Decision at [62] – [64]

[165] I find no error on the part of the Tribunal in these respects. For completeness, I am satisfied that the Tribunal did provide reasons in respect of the second particular. The Tribunal expressly acknowledged that the appellant did not allow the exchange to become protracted and that he did seek help but it was his engagement that reflected adversely on his fitness to be a teacher (albeit this particular did not itself meet the threshold for serious misconduct).[46] I agree with this finding.

*Decision*

[166] For the reasons stated, I am not satisfied that the second ground of appeal has been established.

***Third Ground: Penalty***

*Submissions for the Appellant*

[167] The appellant submits that it is unclear to what the Tribunal's penalty of censure and the impositions of conditions, relates.

[168] The appellant says that the factors that ought to be taken into account in professional disciplinary cases were not methodically analysed. In particular, it is submitted that:

(a) the protection of the public was not considered although the annotation of the register suggests an element of mistrust in the appellant;

(b) there was no consideration of the harm suffered by the appellant both financial and reputational given he has had a 40 year blemish free history in teaching and given the impact on him securing other positions; and

(c) there was no consideration of whether the matter should have been treated as a competence issue rather than a conduct matter.

[46] Tribunal Decision at [76]

*Submissions for Respondent*

[169] The respondent submits that although the conduct was not the most serious end of the scale, the Tribunal found that it met the definition of serious misconduct.

[170] It is submitted that the Tribunal has a range of severely period of penalty options available to it including imposition of a fine up to $3000, suspension of a teacher's practising certificate, and the cancellation of a teacher's practising certificate.

[171] It is also submitted that the Tribunal acknowledged the level of conduct the appellant had engaged in and selected a lesser penalty from the options available to it. Moreover, as already noted, it is submitted that the appellant accepted that at least a censure was appropriate in the circumstances. As a result the only issue in relation to penalty is whether the condition that was imposed, and the annotation of the register, are appropriate.

*Discussion*

[172] Having regard to s 404 of the Act, I agree that the Tribunal did not impose the most severe penalty available to it which includes the imposition of a fine up to $3000, and suspension or cancellation of a teacher's practising certificate.

[173] The Tribunal also expressly recognised the submissions of the CAC that the appellant has provided long service to the profession and that that this was his first appearance before the Tribunal.[47]

[174] Further, the appellant himself submitted that the appropriate penalty, albeit for a finding of misconduct, is censure and professional development. It follows then that the appellant could not consider censure to be at the severe end of the scale for a more grave finding of serious misconduct.[48]

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[47] Tribunal Decision at [78]
[48] Response to the Committee Submission on Threshold and Penalty, dated 9 February 2021, at [54]

[175] The issue for the appellant is the conditions imposed. It is clear from the appellant's submissions that his concern is that these will impact on his ability to secure further relief work to supplement his retirement income.

[176] I am satisfied that while the Tribunal did not expressly refer to the *Roberts* factors when imposing a penalty, the penalty imposed is fair, reasonable and proportionate.

[177] The Tribunal was concerned about the appellant's leadership, as reflected in its concerns about the insight demonstrated by the appellant. This goes to the statutory purpose. The censure was imposed in order to reflect professional standards. The conditions imposed are aimed at protecting the public. The Tribunal clearly considered it necessary and appropriate that anyone employing the appellant would be able to inquire into the circumstances of the incident. I agree with this. It is appropriate that future employers know about the matter so they can consider it as relevant. It is proportionate in the circumstances.

[178] On my consideration of the *Roberts* factors, I find the penalty that was imposed to be appropriate in the circumstances.

*Decision*

[179] I am not satisfied this ground of appeal is established.

***Fourth Ground: Costs***

*Submissions for the Appellant*

[180] It is submitted that the imposition of a 50% contribution towards costs was arbitrary and out of step with the Tribunal's own practice note. Further, it is submitted that no opportunity was provided for submissions on the issue and no discount was made for:

(a) the savings resulting from the matter being heard on the papers;

(b) for the send particular of the charge not resulting in a finding of serious misconduct;

(c) for the agreed facts; and

(d) the financial harm already suffered by the appellant.

*Submissions for Respondent*

[181] In relation to costs, the respondent agrees that given the matter proceeded on the papers and because the factual matters were largely agreed, it was open to the Tribunal to consider a reduction in the percentage contribution to CAC's costs. It is submitted that it is unclear whether this was considered by the Tribunal.

[182] The CAC notes that a final costs order has not been made, the usual process being for submissions to be made as to the reasonableness or otherwise of costs. It is submitted that it would be appropriate to refer the matter back to the Tribunal for submissions to be made in accordance with section 356(2) of the Act. It is submitted that there is insufficient evidence before the court to make a determination as to whether the costs of the CAC are reasonable or whether there is any other reason justifying a reduction to CAC's costs.

*Discussion*

[183] In relation to costs, as the CAC accepts that it was open to the Tribunal to consider a reduction in the percentage contribution to CAC's costs and it is unclear whether this was considered by the Tribunal, I agree that it is appropriate to refer the matter back to the Tribunal for submissions to be made in accordance with section 356(2) of the Act.

*Decision*

[184] The issue of costs is to be remitted back to the Tribunal to enable the parties to make submission on costs.

***Fifth Ground: Non publication***

*Submissions for the Appellant*

[185] In relation to the appellant's name, it is submitted that the decision does not refer to any non-publication orders despite mention of students' names. It is also submitted that the decision refers to allegations which were not in issue, namely the allegation that the appellant hit a student, which reference leads to an additional element of prejudice to appellant.

[186] Significantly, it is submitted this is a situation where non-publication orders are required to protect the privacy and well-being of the students. It is submitted that the Tribunal recognised that care should be taken in dealing with witnesses who have no opportunity to answer matters adverse to them. The appellant says that this is especially important given that the Tribunal made comment about the lack of credibility of some of the students. Enabling a situation where the students are identifiable, including through naming the appellant or the school, it is submitted, ought to have been avoided through non-publication orders to protect the privacy and wellbeing of the students concerned.

*Submissions for Respondent*

[187] The respondent submits that the Tribunal rightly considered that a balance must be struck between open justice considerations in the interests of any party seeking suppression, the privacy of the complainant, and the public interest.

[188] It is submitted that the Tribunal was not satisfied based on the applications and information provided to it that identification of the appellant would lead to the identification of the particular students involved, nor was there evidence of particular adverse effects to the well-being of students if they were identified.

[189] In relation to the appellant's application for non-publication, it is submitted that the Tribunal did not err.

[190] In relation to the students' names, before the Tribunal the CAC was not opposed the appellant's application for non-publication as the CAC considered that

the privacy interests of the students outweighed any public interest in the publication of their names such that it was proper to make an order pursuant to s 405(6)(c) for non-publication of the students' names.

[191] On appeal, however, the CAC raised a question about whether the District Court has jurisdiction to re-open the findings of the Tribunal on the matter of non-publication.

*Discussion*

[192] The CAC is correct that there is a jurisdictional obstacle to this ground of appeal.

[193] In *Thorne v Teaching Council of Aotearoa New Zealand*,[49] Judge Harrop had cause to consider the question of jurisdiction to appeal against a decision declining an application pursuant s 405(6) prohibiting the publication of the appellant's name and any of her particulars.

[194] Judge Harrop said that it is self-evident from s 409(1) that it is only a decision made by the Tribunal under either s 404(2) or s 404 which may give rise to an appeal to the District Court.

[195] Judge Harrop found that while it is clear that the Tribunal's decision to censure the appellant in that case was within the category of matters which may be appealed, there is no reference in s 404 to decisions about the failure to make non-publication orders. On the face of it, there is no ability to appeal such a decision.[50]

[196] Judge Harrop found that on a plain reading of the legislation Parliament has expressly provided for a right to appeal certain decisions which may be made by a Tribunal but that it has by clear inference deliberately not provided a right of appeal against other kinds of decisions which may be made.[51]

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[49] *Thorne v Teaching Council of Aotearoa New Zealand* [2019] NZDC 14828
[50] At [17]
[51] At [21]

[197] Judge Harrop concluded that there is simply no basis on which an appeal may be lodged by a teacher disappointed with a suppression decision made by the Tribunal,[52] and that the District Court lacks jurisdiction to consider the merits or otherwise of an appeal against a refusal to make a non-publication order.[53] I agree with this conclusion.

[198] For this reason, this ground of appeal must be dismissed.

[199] For the same reason, despite there being no opposition to an order for non-publication of the students' names, there is no basis upon which the appellant may found an appeal against the non-publication of the student's names.

[200] For completeness, I am also not persuaded that the Tribunal simply overlooked the matter of the student's names. The Tribunal was seized of the issue as it referred to this as one of the grounds upon which the school's application relied. The Tribunal nevertheless decided not to make an order. The appellant cannot now appeal against this.

*Decision*

[201] For these reasons, this ground of appeal must be dismissed.

**Result**

[202] The appeal is allowed in part: the Tribunal's decision on costs is to be remitted back to the Tribunal to enable the parties to make submissions before a final costs order is made.

[203] In all other respects, the appeal is dismissed.

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[52] At [23]
[53] At [25]

**Costs**

[204] In relation to this appeal, the parties are invited to agree costs between themselves. In the absence of such agreement, memoranda are to be filed with 10 working days. A decision will then be made on the papers.

K D Kelly
District Court Judge