

BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

I TE RŌPŪ WHAKARAUPAPA O AOTEAROA

NZTDT 2022/43

UNDER | WĀHANGA

the Education and Training Act 2020
(the Act)

IN THE MATTER | MŌ TE TAKE

of a charge referred to the Tribunal

BETWEEN | I WAENGA I A

**COMPLAINTS ASSESSMENT
COMMITTEE (CAC)**
Kaiwhiu | Prosecutor

AND | ME

JANINA DRERUP
Kaiurupare / Respondent

**TE WHAKATAUNGA Ā TARAIPUNARA
DECISION OF TRIBUNAL ON CHARGES
15 Hanuere 2024 - 15 January 2024**

RECALLED DECISION 10 Mei 2024 – 10 May 2024

NOHOANGA - HEARING: Held on 2 November 2023 (on the papers)

TARAIPUNARA - TRIBUNAL: B R Arapere (Deputy Chair), D Spraggs and R McInernay
(Members)

HEI MĀNGAI - REPRESENTATION: E McCaughan, Kayes Fletcher Walker for the CAC
J Goddard, Barrister, for the Respondent
[B Nettleton, Barrister, for Evolve Education Group Centres
Ltd (as Third Party)]

Hei Tīmatanga Kōrero – Introduction

[1] Pursuant to s 497 of the Education and Training Act 2020 (the Act) the Complaints Assessment Committee (CAC) has referred a charge of misconduct to the Tribunal.

[2] The CAC charges that the respondent, a teacher¹ of Havelock North, has engaged in misconduct and/or conduct otherwise entitling the Disciplinary Tribunal to exercise its powers. While working at TopKids Manuroa the respondent engaged in any or all of the following conduct:

- a. On 7 May 2019, in respect of Child J (aged 2 years):
 - i. picked Child J up under both arms and carried him;
 - ii. placed Child J on a block in the playground.
- b. On 7 May 2019, picked up Child A (aged 2 years):
- c. On 7 May 2019, in respect of Child M (age unknown):
 - i. put her hands on Child M's forearms;
 - ii. raised her voice to Child M; and
 - iii. picked Child M up (then putting him on a pillow).

[3] The CAC further charges that the respondent while working at Lollipops Napier Port Centre, Ahuriri,² engaged in any or all of the following conduct:

- a. On 20 January 2020, in respect of Child M (age unknown):
 - i. picked up and carried Child M;
 - ii. pushed Child M's arms/hands down with her hands; and
 - iii. blocked Child M's path by standing in the doorway.

Ko te Hātepe Ture o tonono nei – Procedural History

[4] A pre-hearing conference (PHC) was held on 15 December 2022 before the Chairperson of the Tribunal at which interim non-publication orders were made for the names and identifying details of the respondent and any children involved in the case. Various timetabling orders were also made.

[5] An amended notice of charge and agreed summary of facts (ASOF) were filed on 29 May 2023.

¹ As set out in the Agreed Statement of Facts the respondent was a provisionally registered teacher and her practising certificate expired on 14 August 2021: ASOF at [1].

² The Notice of Charge referred to the centre as Lollipops Educare, Ahuriri. Counsel for Evolve Education Group Centres Ltd advised the Tribunal that the correct name for the centre is Lollipops Napier Port Centre, Ahuriri.

- [6] Despite the ASOF, an issue subsequently arose between the parties regarding the factual basis upon which the Tribunal ought to proceed. A further PHC was convened by the Deputy Chairperson on 25 September 2023 regarding the agreed facts and next steps towards a hearing that had been set down for 2 November 2023.
- [7] Following that PHC, on 12 October 2023, counsel filed a joint memorandum advising as to paragraphs of the ASOF that were now excluded and where agreement had been reached between the parties as to the charges and censure.
- [8] Originally, the respondent had faced a charge of serious misconduct. However, via the joint memorandum of 12 October the parties agreed that the conduct amounted to misconduct rather than serious misconduct.
- [9] A further amended notice of charge was filed with the joint memorandum of counsel. This is the notice of charge upon which the Tribunal hearing proceeded with a hearing on the papers on 2 November 2023.
- [10] On 27 October 2023 the Evolve Education Group Centres Limited (previously known as Lollipops Educare Centres Limited) (“Evolve”) applied for orders preventing publication of the respondent’s employer and the centre at which the respondent undertook her employment, including any brand associated with that centre. That application is addressed by the Tribunal below.

Kōrero Taunaki - Evidence

Agreed Summary of Facts (ASoF)

[11] The ASoF is set out below:

1 Ms Drerup was a high school teacher in Germany before emigrating to New Zealand. Ms Drerup has been a provisionally registered teacher in New Zealand since August 2018. Her most recent practising certificate expired on 14 August 2021.

2 At the time of the first incidents, Ms Drerup was teaching at TopKids, an early childhood education facility in Takanini, Auckland. TopKids was licensed to provide services to up to 100 pre-schoolers. Ms Drerup started working at TopKids in September 2018.

Child J

3 On the afternoon of 7 May 2019, a parent who was walking into the centre observed a 2-year-old boy (Child J) throwing a plastic chair around the playground into an empty space. Although there was another child nearby, the parent did not consider that the boy was throwing the chair at the other child.

[Paragraph 4 excluded by agreement of the parties]

5 The parent noted that the boy looked shocked and quite frightened.

6 The parent estimated that the force used by Ms Drerup throughout the interaction was a 6 or 7 out of 10. Ms Drerup considers that the force used was 3 out of 10.

7 The parent was upset by the incident, and immediately reported it to another teacher. The teacher who the parent spoke to observed that the parent was very upset when disclosing what she had seen, and had burst into tears.

Child A

8 After reporting the above incident involving Child J, the parent walked out of the centre with her children. As she did so, the parent stated that she saw Ms Drerup forcefully pick up a 2-year-old girl (Child A), and place that girl on the same "playground block" where Child J was still sitting. The parent heard Ms Drerup raise her voice at Child A, telling her that she needed to stay there until she behaved. Ms Drerup sat on the block with Child A for a few minutes.

Child M

9 Ms Drerup was also involved in a further incident on 7 May 2019 involving a 2-year-old boy, Child M. Ms Drerup was standing in front of Child M's face saying, "don't do that, that's not okay". Ms Drerup placed her hands on the boy's forearms and used a loud voice.

10 On 8 May 2019, Ms Drerup provided a written response to the parent's allegations, where she stated:

- (a) Some of the procedures used at TopKids were quite different from what she was used to in Germany.
- (b) She did not feel that she had received sufficient induction when she started work at Topkids.
- (c) The previous week her mother had been admitted to hospital in Germany for surgery, which made her feel quite tense.
- (d) She was also struggling with the stress of recently emigrating from Germany to New Zealand.
- (e) However she did not want to use those stressors as an excuse, and she took "full responsibility for my actions and sincerely apologise for any misbehaviour."

11 In relation to the incident with Child M, Ms Drerup said that she had had a few days of challenging behaviour, with Child M often or constantly saying no to tidying up. Ms Drerup indicated that she went down and talked to him, asking him to listen to the teacher and then picked him up and put him back on the pillow to talk with him further.

Employment investigation

12 On 16 May 2019, Ms Drerup and her representative attended an employment meeting.

13 In relation to Child J:

- (a) Ms Drerup agreed that Child J had thrown a chair, and that she told him a couple of times not to do it.
- (b) Child J was too big of a boy for her to have picked him up with one hand.
- (c) She stated that she had picked him up under both arms and put him on the playground "block".
- (d) She described the level of force used as being 3 out of 10.
- (e) She acknowledged that there was no risk of immediate harm to other children or staff at the time.
- (f) She stated that she was "firm" when she spoke with Child J, but denied yelling. However she acknowledged that she had a loud voice, and that sometimes she did not recognise it as yelling.

14 In relation to Child A:

- (a) She stated that Child A would often demonstrate challenging behaviour, although she acknowledged that there was no development plan in place.
- (b) She acknowledged that she was already stressed due to the incident with Child J, and that she had been abrupt, impatient and frustrated when she dealt with Child A
- (c) She picked up Child A because she was frustrated that Child A would not stay with her, and had started walking away from her. She wanted Child A to sit down and stay where she was.
- (d) She picked up Child A under the arms, and brought her over to the block.

15 In relation to Child M:

- (a) She stated that Child M's behaviour was up and down.
- (b) When she observed Child M and another child playing roughly, she asked Child M to sit on the pillows, and he refused. She said that this behaviour had been happening for a few days.
- (c) She said that she picked him up under the arms.
- (d) She acknowledged that she should have asked for another teacher to deal with Child M, as Child M was not responding to her.

16 On 17 May 2019 Ms Drerup was advised that TopKids would deal with the matter by way of a written warning, valid for a period of 6 months. TopKids also resolved to develop an action plan, which would cover positive guidance and manual handling of children, as well as following up any gaps in Ms Drerup's induction. Ms Drerup developed her own action plan on 29 June 2019.

17 Ms Drerup actively participated in further training and mentoring between June and November 2019 which included completing the "Incredible Years" course on positive behaviour management on or about 12 December 2019, participating in a personal Development Plan, taking part in a 1 on 1 meeting, participating in a performance appraisal process which included self-appraisal, an appraisal development plan and reflective comments from her mentor, and an induction and mentoring programme.
Mandatory report

18 Ms Drerup resigned from TopKids on 26 October 2019. Her last day of work was on 25 November 2019.

19 On 6 January 2020 the Teaching Council received a mandatory report regarding the incidents that took place at Top Kids.

20 On 8 January 2020, the Teaching Council's Triage Committee decided to refer the matter to a CAC investigation.

Allegations: That Ms Drerup, on 29 January 2020, in respect of Child M:

- (a) picked up and carried Child M;**
- (b) pushed Child M's arms/hands down with her hands; and**
- (c) blocked Child M's path by standing in the doorway.**

21 At the time of the second incident, Ms Drerup was teaching at Lollipops Ahuriri (Lollipops), an early childhood education facility in Napier. Lollipops was licensed to provide services to up to 100 pre-schoolers. Ms Drerup was employed as a relieving teacher, and started working at Lollipops on 13 January 2020.

22 Lollipops' "Positive Guidance Procedure within the Rising Five Junior and Senior Rooms" stated:

- (a) "We speak to tamariki at their level - Tamariki need to be treated as taonga and with respect."
- (b) "When stressful situations with tamariki arise, kaiako need to awahi each other and be able to tag team when needed - this can be done by communicating to one another and reading each other's cues/ emotions."
- (c) "Ensure our tamariki mana is being built up."

23 Lollipops' "Positive Guidance and Social Competence Policy" dated March 2019 stated:

- (a) "No child will be subject to any form of verbal, physical, psychological and/or

emotional ill-treatment, including but not limited to:
(i) Shaming, comparing, belittling, blaming, degrading and harsh language;
(ii) Corporal punishment;
(iii) Isolation, time out;
(iv) Immobilisation of the child or any part of his/her body. This shall mean restraint by means other than the child being held by a teacher to ensure the wellbeing of the child or others;
(v) Deprivation of food, drink, warmth, shelter or protection."

24 On 29 January 2020, another teacher (Teacher A) was inside the centre when she heard Child M (a different child than as referred to above for the TopKids incidents, aged 4 or 5 years) was upset. Teacher A went outside onto the deck and saw Ms Drerup carry Child M inside. One of Ms Drerup's arms was around the child's chest, and the other arm was around the child's legs. Teacher A told Ms Drerup that she could not carry Child M like that, but Ms Drerup did not respond. Teacher A returned to her classroom as a parent had arrived. Ms Drerup does not recall this conversation taking place.

25 Another teacher (Teacher B) saw Child M hitting and kicking Ms Drerup in the doorway to the outside area. Ms Drerup was standing in front of Child M. Teacher B says that she saw Ms Drerup holding Child M's arms down by the child's wrists. Ms Drerup denies doing this, but admits that she gently pushed Child M's arms/hands down with her hands in order to protect herself from Child M.

26 Teacher A subsequently saw that Child M was sitting on the ground crying, and screaming at Ms Drerup. Ms Drerup was standing with her hands at the doorframe blocking Child M from leaving. Teacher A thought that Ms Drerup looked angry. Teacher A told Ms Drerup to "go on her smoke break" and that she would take over, and Ms Drerup left. Teacher A comforted Child M, who eventually calmed down.

27 The next day Lollipops advised Ms Drerup by text message that it no longer required her for any relief work.

28 Two weeks after, Ms Drerup received a further text message, inviting her to attend a meeting to provide comment for the mandatory report to the Teaching Council.

29 Ms Drerup and her representative subsequently met with Lollipops management. She accepted that she had interacted with Child M, and that she had carried her inside, but denied the specific allegations (i.e. rough handling and immobilisation).

Mandatory report

30 Lollipops submitted a mandatory report to the Teaching Council on 4 March 2020.

31 On 1 May 2020 Ms Drerup provided a response to the mandatory report:

- (a) She denied that she was angry that day.
- (b) She did not consider that the incident at Lollipops was comparable to the incident at TopKids. She acknowledged that at the time of the TopKids incident she was "definitely worked up and under a lot of pressure", and had not received any specific training on dealing with such incidents (such as the Incredible Years workshop).
- (c) She denied that her attention had been drawn to Lollipops' policies and guidelines regarding positive guidance on the first day that she worked at Lollipops, although she admitted that she had seen the documents and read through them.
- (d) She denied that she had witnessed several tantrums by Child M during her time at Lollipops, and that she had been given instructions how to handle those situations.
- (e) She denied that she had held Child M's wrists to keep her from going outside, or to immobilise her.

32 On 26 June 2020, the Council's Triage Committee decided that this matter should be addressed within the ongoing investigation relating to the TopKids matter.

33 On 4 September 2020, Marg Roper, a Professional Practice Evaluator for the Teaching Council, completed an evaluation of Ms Drerup's competence as a teacher on behalf of the Teaching Council. Ms Roper noted that Ms Drerup's strategies were less than ideal but she had been proactive in taking appropriate action to address the concerns. The Evaluator was satisfied that Ms Drerup was receiving the support she needed from her new employer to address the concerns in the mandatory report and recommended that the matter of Ms Drerup's practice be referred to her employer under rule 39 of the Council's Rules.

34 On 22 November 2021, the CAC investigator provided the draft investigation report to Ms Drerup. Later that day Ms Drerup advised that she had nothing further to add to what she had previously stated.

CAC meeting

35 The CAC met on 28 July 2022 to consider both matters. Ms Drerup attended the meeting.

36 In relation to the TopKids matter:

(a) Ms Drerup said that Child J was an active and strong boy. She said she asked Child J not to throw the chair, but he continued to do so. Ms Drerup said she went up to Child J, picked him up and sat him down. She said that he seemed fine. When asked by the CAC whether she dragged Child J, Ms Drerup said it may have looked that way because Child J was heavy. Ms Drerup acknowledged that Child J throwing the chair posed no immediate threat to other children though noted it was still a possible threat.

(b) Ms Drerup acknowledged that Child A was not at risk (or posing any risk) when she picked her up and moved her to the block.

(c) Ms Drerup acknowledged that Child M was not at risk (or posing any risk) when she picked him up and put him on the pillow.

37 In relation to the Lollipops matter:

(a) Ms Drerup said that she never held Child M's hands down. Ms Drerup said she was trying to support Child M and that it was a tricky situation because the other two children involved had challenging behaviour. Ms Drerup said that she tried to calm Child M down. She said Child M was splashed with water and was about to "go off" so she told Child M she couldn't lash out and would be brought inside. She said she put her hands out to the side to block the door so Child M could not get out and hurt the other children. Ms Drerup said the normal procedure for protecting children was to move other children away. However, Ms Drerup recalled that Child M was in attack mode and felt she would have pushed over any child that got in her way

Te Ture – Legal Principles

[12] In this case, we are asked to consider misconduct rather than serious misconduct. Unlike serious misconduct, misconduct is not defined by statute. However, we are guided by earlier decisions of the Tribunal which have concluded that to find misconduct we should consider whether the criteria in s 378(1)(a) but not the criteria in s 378(1)(b) of the Education Act 1989 are established, or in other words the statutory criteria for misconduct are made out but none of the reporting requirements are established.³ We have adopted that test for misconduct.

³ *Evans v NZTDT* (2020) NZDC 20062 at (40) and *Teacher Y v Education Council of Aotearoa New Zealand* (2018) NZDC 3141 at (64).

[13] Section 378 of the Act defines “serious misconduct”:

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

[14] The test for serious misconduct is conjunctive.⁴ That is, as well as being conduct that has one or more of the adverse professional effects or consequences described in subsection (a)(i)-(iii) the conduct must also be of a character or severity that meets the Teaching Council’s criteria for reporting serious misconduct. In other words, if any of the criteria under s 10(1)(a)-(c) are satisfied, but the criteria under s 10(1)(b) is not satisfied, then the conduct will amount to “misconduct” rather than “serious misconduct”.

[15] The criteria for reporting serious misconduct are found in Part 3 of the Teaching Council Rules 2016. The Tribunal accepts that, if established, the respondent’s conduct would fall within the following sub-rule of Rule 9(1):

Rule 9(1)(k): an act or omission that that brings, or is likely to bring, the teaching profession into disrepute.

[16] The Tribunal also accepts that the test under Rule 9(1)(k) will be satisfied if reasonable members of the public, informed of the facts and circumstances, could reasonably conclude that the reputation and standing of the profession was lowered by the respondent’s behaviour.⁵

[17] The burden rests on the CAC to prove the charge. While the standard to which it must be proved is the balance of probabilities, the consequences for the respondent that will result from a finding of serious professional misconduct must be borne in mind.⁶

Ngā Kōrero a te Kōmiti me te Kaiurupare – Submissions of the CAC and the Respondent

⁴ *Evans v Complaints Assessment Committee* [2021] NZCA 66.

⁵ *Collie v Nursing Council of New Zealand* [2001] NZAR 74 at [28]; *CAC v Collins* NZDT 2016/43, 24 March 2017.

⁶ *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1 (SC).

[18] The parties originally filed submissions on the basis of the charge of serious misconduct. Following agreement between the parties in the joint memorandum of counsel dated 12 October 2023 and amendment of the charge to misconduct neither party filed any further written submissions.

CAC Submissions

[19] In summary, the CAC submits:

- a. The respondent's combined conduct amounts to misconduct.
- b. The appropriate penalty orders are:
 - a. Censure.
 - b. Conditions (to apply for a period of 1 year to any subsequent practising certificate issued to the respondent):
 - i. To provide a copy of the Tribunal's decision to her current teaching employer or prospective teaching employer.
 - ii. To practise under the guidance of a mentor approved by the Teaching Council, which may also stipulate the form of mentorship and the provision of mentorship reports or updates.

[20] The CAC says that misconduct is the appropriate charge on the basis that her combined conduct:

- a. Adversely affected, or was likely to adversely affects, the well-being or learning of 1 or more students; or
- b. Reflected adversely on her fitness to be a teacher; or
- c. May bring the teaching profession into disrepute.

Respondent Submissions

[21] The respondent, through her representative:

- a. Accepts that her combined conduct as described in the ASOF amounted to misconduct.
- b. Does not oppose the orders sought by the CAC; and
- c. Does not seek permanent name suppression.

Kupu Whakatau – Decision

[22] The Tribunal must be satisfied on the balance of probabilities that the CAC has proved the particulars of the charge. In this case, the ASOF and joint memorandum of 13 October 2023 provide an adequate basis to establish the particulars of the charge.

Accordingly, we find that the particulars are established. That does not, of itself, mean we have found the conduct amounts to misconduct. To decide that question, we need to assess the conduct against the criteria for misconduct or conduct otherwise entitling the Tribunal to exercise its powers.

[23] The Tribunal considers that for the reasons discussed below with respect to the legal position, the established particulars amount to misconduct pursuant to the Act and Rule 9 of the Rules. The Tribunal considers that the respondent's conduct:

- a. Adversely affected, or was likely to adversely affect, the well-being or learning of the children involved;
- b. Reflects adversely on her fitness to be a teacher;
- c. May bring the teaching profession into disrepute.

[24] The Tribunal addresses the two charges in turn.

[25] The Tribunal considers the respondent's interactions with Child J (aged 2 years), Child A (aged 2 years), and Child M (age unknown) on 7 May 2019 at TopKids Manuroa were inappropriate. In particular with respect to Child M she put her hands on Child M's forearms, raised her voice to Child M and picked Child M up (then putting him on a pillow). In respect of Child J she picked Child J up under both arms and carried him and placed him on a block in the playground. She also picked up Child M. The actions of picking up children and placing them in a "time out" like situation and using a loud voice with children as young as 2 years old are unacceptable.

[26] The respondent was a high school teacher before emigrating to New Zealand⁷ and her experience was therefore with learners who were older and possessed more mature language and cognitive skills and behaviour. The respondent had also been under stress due to a family member being unwell and having recently emigrated to New Zealand. In addition, she did not think she had received sufficient induction.⁸ However, the respondent stated that she did not want to use those stressors as an excuse and took full responsibility for her behaviour.⁹

[27] The Tribunal considers that the respondent's actions on this first charge adversely reflect on her fitness to be a teacher. The conduct in this charge related to 3 separate incidents on the one day. This in itself show a lack of insight into her own behaviour and

⁷ ASOF at [1].

⁸ ASOF at [10].

⁹ ASOF at [10(f)].

to appropriate behaviour and responses when working with young learners. To an objective observer it appears that the respondent lacked self-regulation in regard to responding to very young children who may be upset or angry. The Tribunal finds the conduct is of a character and severity that meets the criteria for misconduct.

[28] Accordingly, on this charge, the Tribunal considers that this conduct alone was sufficient to amount to misconduct.

[29] The Tribunal considers the respondent's interactions with Child M on 29 January 2020 at Lollipops Napier Port Centre, Ahuriri, were also unacceptable. At this time, the respondent was working as a relieving teacher.¹⁰ In particular, the charge is that the respondent picked up and carried Child M (age unknown), pushed Child M's arms/hands down with her hands and blocked Child M's path by standing in the doorway.

[30] The Tribunal regards the conduct as meeting the threshold for misconduct. As set out above with respect to the first charge, the respondent's actions with respect to Child M show a lack of insight into appropriate behaviour when working with young learners. It appears that the respondent lacked self-regulation and self-awareness in regard to responding to very young children who may be upset or angry.

[31] The Tribunal considers the conduct meets the threshold for misconduct. The conduct may have affected the wellbeing or learning of the children involved, adversely reflects on the respondent's fitness to be a teacher and it may have brought the profession into disrepute.

[32] The Tribunal considers the two charges individually and cumulatively reflect poorly on the respondent's understanding of and respect for appropriate behaviours and boundaries around learners. The respondent's conduct shows that she had little insight into the impact of her conduct and when spoken to about the behaviours did not reflect on and correct them.

Utu Whiu – Penalty

[33] Having determined that this case is one in which we consider misconduct to be established, the Tribunal must now consider what an appropriate penalty is in the circumstances, pursuant to s 404:

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

¹⁰ ASOF at [21].

the following:

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

(b) censure the teacher:

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

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

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

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

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

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

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

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

(2) Despite subsection (1), following a hearing that arises out of a report under 397 of the conviction of a teacher, the Disciplinary Tribunal may not do any of the things specified in subsection (1)(f), (h), or (i).

(3) A fine imposed on a teacher under subsection (1)(f), and a sum ordered to be paid to the Teaching Council under subsection (1)(i), are recoverable as debts due to the Teaching Council.

[34] In determining penalty, the Tribunal must ensure that three overlapping principles are met, that is, protection of the public through the provision of a safe learning environment for students, maintenance of professional standards, and the public's confidence in the profession.¹¹ We note also decisions of the superior Courts which have emphasised that the purpose of professional disciplinary proceedings for various occupations is not to punish the practitioner for misbehaviour, although it may have that effect.¹²

[35] In *Mackay* we looked at the principles the Tribunal must turn its mind to when considering penalty following a finding entitling it to exercise its powers¹³:

- (a) Protecting the public;
- (b) Setting the standards for the profession;
- (c) Punishment;
- (d) Rehabilitation;

¹¹ *CAC v McMillan*, NZTDT 2016/52.

¹² *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [97]; *In re A Medical Practitioner* [1959] NZLR 784 at p 800 (CA).

¹³ *CAC v Mackay*, NZTDT 2018-69 at [40]–[62].

- (e) Consistency;
- (f) The range of sentencing options;
- (g) Least restrictive;
- (h) Fair, reasonable, and proportionate.

[36] The Tribunal does not repeat what it said in that decision, but notes that we have turned our mind to these principles in reaching our decision on penalty.

[37] Bearing in mind the above, as well as the obligation on the Tribunal to impose the least restrictive penalty in the circumstances and the agreement between the parties as to penalty, pursuant to section 404(1) of the Act, we order:

- a. Censure under s 401(1)(b) of the Act.
- b. Conditions to apply for a period of 1 year to any subsequent practising certificate issued to the respondent under s 404(1) of the Act:
 - i. To provide a copy of the Tribunal's decision to her current teaching employer or prospective teaching employer.
 - ii. To practise under the guidance of a mentor approved by the Teaching Council, which may also stipulate the form of mentorship and the provision of mentorship reports or updates.

He Rāhui Tuku Pānui - Non-Publication

Legal principles

[38] The default position is that Tribunal hearings are to be conducted in public. Consequently, the names of teachers who are the subject of these proceedings are to be published. The Tribunal can only make one or more of the orders for non-publication specified in s 501 if we are of the opinion that it is proper to do so, having regard to the interest of any person (including, without limitation, the privacy of the complainant, if any) and to the public interest.

[39] The purposes underlying the principle of open justice are well settled. As the Tribunal said in *CAC v McMillan*, the presumption of open reporting “exists regardless of any need to protect the public.”¹⁴ Nevertheless, protection of the public is an important purpose behind open publication in disciplinary proceedings in respect to practitioners whose profession brings them into close contact with the public. In *NZTDT v Teacher* the Tribunal described the fact that the transparent administration of the law also serves the important purpose of maintaining the public's confidence in the profession.¹⁵

¹⁴ *CAC v McMillan*, NZTDT 2016/52.

¹⁵ *NZTDT v Teacher*, 2016/27, 26.

[40] In *CAC v Jenkinson* the Tribunal summarised the principles on non-publication.¹⁶ The Tribunal referred to *CAC v Teacher NZTDT 2016-27*, where it acknowledged what the Court of Appeal had said in *Y v Attorney-General* [2016] NZCA 474: While a balance must be struck between open justice considerations and the interests of a party who seeks suppression, “[A] professional person facing a disciplinary charge is likely to find it difficult to advance anything that displaces the presumption in favour of disclosure”.

[41] In considering whether to grant such orders, the Tribunal in *CAC v Jenkinson* adopted a two-step process:

Step 1: "the threshold question". The Tribunal must decide if it is satisfied that the consequences relied upon would be likely to follow if an order prohibiting publication was not made. This simply means that there must be an “appreciable” or “real” risk that the asserted consequence would occur based on the evidence before it.

Step 2: If so satisfied, the Tribunal must determine whether it is proper for the presumption in favour of open justice to yield. This step requires that the Tribunal consider the more general need to strike a balance between open justice considerations and the interests of the party who seeks suppression.

[42] This approach was adopted in *CAC v Finch* where the Tribunal noted that the “exceptional” threshold that must be met in the criminal jurisdiction for suppression of a defendant’s name is set at a higher level to that applying in the disciplinary context. As such, the Tribunal confirmed that while a teacher faces a high threshold to displace the presumption of open publication in order to obtain permanent name suppression, it is wrong to place a gloss on the term “proper” that imports the standard that must be met in the criminal context.¹⁷

Applications for non-publication

[43] There was an interim order for non-publication issued at the PHC on 15 December 2022. The Tribunal must now deal with permanent orders.

Learners and their parents

[44] We consider it appropriate to make permanent orders prohibiting from publication the names of any learners, their parents, or teachers (apart from the respondent) referred to in this case.

¹⁶ *CAC v Jenkinson* (NZTDT 2018-1413).

¹⁷ *CAC v Finch*, NZTDT 2016/11, at [14] to [18].

[45] The ASOF does not contain any names of the learners, parents or other teachers involved in any of the incidents and it appears to be an extremely low risk that there would be an inadvertent publication of the names of those people. However, the Tribunal considers that an order for non-publication of the names of any learners, their parents or teachers (apart from the respondent) referred to in the ASoF is appropriate and makes orders accordingly.

The respondent

[46] The respondent does not seek orders prohibiting publication of her name.

The centres

[47] Topkids Manuroa does not seek orders prohibiting publication of its name.

[48] Evolve applied on 27 October 2023 for permanent non-publication of its name as employer and the centre at which the respondent undertook her employment, including any brand associated with that centre.

[49] Submissions in support of the application were filed on 1 November 2023. An affidavit sworn on 2 November 2023 and amended submissions were filed in support of the application.¹⁸

[50] In summary, the application was based on the following:

- a. The respondent's employment with Evolve was casual, brief, and ceased following the incident on 29 January 2020 after Evolve undertook an investigation into the incident. Its investigation resulted in a mandatory report to the Teaching Council Aotearoa New Zealand;
- b. Evolve disagrees with any suggestion by the respondent that she was not made aware of Lollipops' "Positive Guidance Procedure and Social Competence Policy";
- c. Evolve as a 3rd party was not directly involved in the proceedings and not afforded an opportunity to counter any allegations or inaccurate comments levelled against it therefore a level of risk arises from inferences in the ASOF and submissions;

¹⁸ Affidavit of Barry James Sadlier sworn 2 November 2023. The Tribunal was not originally made aware of the existence of Mr Sadlier's affidavit. Once the affidavit was drawn to the attention of the Tribunal the panel reconvened to consider it. Subsequently the panel decided to recall and reissue its decision.

- d. Evolve is a large early childhood education provider with over 1600 staff. Adverse comment directed at Evolve has the potential to “unjustifiably and unfairly tarnish the reputation of teachers at Evolve”;
- e. There are public policy considerations for the Tribunal related to the statutory framework requiring mandatory reporting by employers and employers being confident to be appropriately protected from adverse publicity as a result of referring complaints. Evolve’s referral of a mandatory report to the Teachers’ Council demonstrates its commitment to the highest professional standards and the firm approach it takes in adherence to policy.

[51] The Tribunal has carefully considered the adverse consequences of publication claimed by Evolve which include possible adverse comment, reputation of its staff and the organisation in the community, and mandatory reporting. The Tribunal does not consider there is any adverse comment relating to Evolve in the ASOF or this decision. Indeed, Evolve’s policies such as “Positive Guidance Procedure within the Rising Five Junior and Senior Rooms” and “Positive Guidance and Social Competence” summarised in the ASOF show the care and consideration that Evolve’s centres provide to learners in their care and the expectations of teachers employed at their centres. Further, as set out in the ASOF while the respondent denied that her attention had been drawn to Lollipops’ policies and guidelines regarding positive guidance on the first day that she worked at Lollipops, she admitted that she had seen the documents and read through them.¹⁹ That admission does not point to any failing by Evolve but rather that the respondent had knowledge of the policies and what was expected of teachers employed at Evolve centres and yet acted in the way that she did.

[52] The Tribunal notes that the respondent’s conduct at Lollipops Napier Port Centre, Ahuriri (an Evolve centre) that led to the charge occurred 4 years ago. While there may be speculation in the local community for a period after the release of this decision the Tribunal does not consider that to be a factor which would unjustifiably and unfairly tarnish the reputation of teachers employed by Evolve or the organisation as a whole. Nor is it a factor which weighs in favour of the grant of a permanent order.

[53] On balance, the Tribunal is not satisfied that the consequences relied upon by the centre would be likely to follow if an order prohibiting publication is not made. Following the two-step test in *CAC v Jenkinson* the Tribunal finds that there is insufficient evidence to support a finding that there is a real or appreciable risk to the centre if its name is published. Accordingly, the Tribunal finds that this is not a case where it is proper for

¹⁹ ASOF at [31(c)].

the principle of open justice to yield. The Tribunal declines to make the permanent non-publication order sought.

Utu Whakaea – Costs

[54] That brings us to the issue of costs. Ordinarily where there is a finding of serious misconduct, the Tribunal would order the payment of costs which would be in the region of 40% of the actual costs. However, in this case the charge was amended to misconduct and if misconduct had been dealt with at the CAC level (as it could have been) then no costs would have been payable.

[55] In the joint memorandum of counsel dated 12 October 2023 counsel submitted that the parties' costs should lie where they fall. Counsel also submitted that the respondent was legally aided and therefore s 45(2) of the Legal Services Act 2011 applies. Section 45(2) provides that no order for costs may be made against an aided person in civil proceedings unless the court is satisfied that there are exceptional circumstances.

[56] There are no exceptional circumstances in this case. We agree that this is an appropriate case to depart from the usual approach to the ordering of costs when some form of adverse finding has been made against the teacher. We could still have ordered the payment of the Tribunal's own costs, but we will not do so for the same reasons we do not order payment of a portion of the CAC's costs. Given the misconduct finding and our understanding that the respondent is not presently working as a teacher, we do not consider an order for costs would be appropriate or fair. Accordingly, the Tribunal orders that costs shall lie where they fall.



Mokotā - B R Arapere

Deputy Chair of the New Zealand Teacher's Disciplinary Tribunal

Date of decision: 15 January 2024

Date of recalled and reissued decision: 10 May 2024

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

1. This decision may be appealed by the 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).