

NON-PUBLICATION ORDERS

BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

NZTDT 2023-62

RARO TE MANA O TE UNDER THE the Education and Training Act 2020
(the Act)

MŌ TE TAKE of a charge referred to the Tribunal
IN THE MATTER OF

I WAENGA I A **COMPLAINTS ASSESSMENT
BETWEEN COMMITTEE (CAC)**

Kaiwhiu | Prosecutor

ME **Fatalia FAAUI**
AND (Authorisation 348958)

Kaiurupare / Respondent

Hei Māngai | Appearance

Ellie Wilson, Govett Quilliam for CAC,
Respondent self-represented.

Decision

5 August 2024

Background | Tāhuhu kōrero

[1] Ms Faui is charged with serious misconduct or conduct otherwise entitling the Tribunal to exercise its powers, in relation to a single incident on 22 December 2020. A mandatory report was made to the Teaching Council on 8 January 2021.

[2] The matter proceeded on the papers on 3 July 2024, following an agreed

summary of facts being filed on 3 May 2024.¹ The Tribunal also received an agreed bundle containing submissions of counsel on behalf of the Complaints Assessment Committee (CAC), notes of an investigation meeting between Ms Faui and her employer, notes of a Police interview, a copy of a formal Police warning, and video footage showing the incident in question.

[3] The charge relies on the Police report and mandatory report and contains the single particular that:

1. The CAC charges that Faitalia Faui registered teacher, of Auckland:
 - a. On 22 December 2020, slapped the face of a learner, Child A.

The Agreed Summary of Facts

[4] Ms Faui first registered on 11 April 2014 and holds a current practising certificate. At the relevant time Ms Faui was employed at [REDACTED], an early learning centre from where she was dismissed on 7 January 2021, in relation to the conduct in the charge.

[5] Ms Faui admitted her actions to her employer and expressed remorse. The matter was also referred to Police, and she again admitted her actions, was remorseful, and received a formal written warning. The formal warning contained a statement that there was sufficient evidence that could have led Ms Faui being charged with an offence against s194(a) of the Crimes Act 1961, but no charge would be laid.² Ms Faui said in her Police interview said she was under pressure at work and was “*frustrated and tired*” and had no intention to cause harm.

[6] When Ms Faui was interviewed by the Teaching Council investigator in December 2022, she advised that she was again working as a teacher in early childhood and that her current employer is aware of the investigation.³ Ms Faui stated that she had chosen not to watch the footage but said:

Regarding the slap of [learner] I don't think it was a full slap as in it wasn't hard

¹ The respondent was required to be overseas for a period of time meaning unintentional delays in the filing of the summary of facts.

² ASOF at [13]. The warning may be released during a Police vetting check, where relevant.

³ At [13] of the notes of interview between the respondent and Teaching Council investigator, 15 December 2022.

at all, I used it to tell him to stop what he was doing as he wasn't listening to me. I know that I shouldn't have done it and I had no intention of hurting him.⁴

[7] The Tribunal received approximately 10 minutes of video footage. Ms Faau'i can be seen at all times, with other staff present and a small number of children playing in or around a small indoor bouncy castle. It is not easy to discern what the precipitating conduct was by the child, or whether Ms Faau'i spoke to the child first about his conduct. The summary of facts states that the child, aged ■■■, threw a toy car.

[8] The incident itself is brief. Ms Faau'i remains seated and beckons the child over to her with one finger. The child approaches, Ms Faau'i appears to say something, then slaps him quickly on the cheek, and the child pauses, then moves away. The slap appears to be an open palm 'tap' without force behind it.

[9] The summary concludes that Ms Faau'i states she has advised her current employer about these proceedings.⁵

Serious Misconduct – Principles and Discussion

[10] The test for serious misconduct as set out under s10 of the Act requires first, a finding that one of three limbs under s10(1)(a) are engaged, and secondly, that the one of the requirements for reporting serious misconduct under r 9 of the Teaching Council Rules 2016 are met.

[11] Section 10(1)(a) refers to conduct that:

- (a) adversely affects or is likely to adversely affect the wellbeing or learning of 1 or more students; or
- (b) reflects adversely on the teacher's fitness to be a teacher; or
- (c) is an act or omission that brings or is likely to bring the profession into disrepute.

[12] The charge pleads a breach of the rules:

- (a) r9(1)(a), which refers to the use of unjustified or unreasonable force on a learner;

⁴ At [7] of the notes of interview between the respondent and Teaching Council investigator, 15 December 2022.

⁵ ASOF at [17].

- (b) r 9(1)(j) being an act or omission that may be the subject of a prosecution for an offence punishable by imprisonment for a term of 3 months or more;
- (c) r9(1)(k), being an act or omission that brings, or is likely to bring, the teaching profession into disrepute.

[13] The CAC submits that all three limbs of s10 and each of the rules pleaded in the charge are engaged. For the reasons which follow, and which largely adopt the CAC submissions, we agree.

[14] Regarding the wellbeing of the child, from viewing the video footage, Child A is not overly perturbed, but that is not particularly reassuring. The resort to a slap to correct behaviour and the lack of apparent effort to redirect the child's behaviour in a positive way had the potential to adversely affect their wellbeing, and that of other children who witnessed the incident. The child was aged ■ years old.

[15] We also find that the conduct reflects adversely on the respondent's fitness to be a teacher. The conduct, while not aggressive in the sense of significant force being applied, was an intentional and apparently casual resort to a slap as a means of correction. There is an absolute prohibition in the Act on the use of corporal punishment.⁶ The Code of Professional Responsibility sets an expectation that teachers will act with a high standard of professional behaviour and integrity, which requires avoiding behaviour that damages the trust and confidence that learners, family and whānau have in a teacher.⁷ The Code also expects that teachers will act in the best interests of learners, and such conduct falls short of this.⁸

[16] The conduct also has the potential to reflect adversely on the reputation of the teaching profession. Applying the objective test, a reasonable member of the public informed of the relevant facts (including viewing the footage of the behaviour leading up to, and after the incident) would be concerned by the use of a slap to correct the behaviour of a young child in an early childhood setting.

[17] Each of the rules pleaded are also engaged. The use of force was unjustified. There was no apparent risk of harm to the child himself, or to another child or adult, and the action was not done to prevent harm or even as an instinctive reflex. It appears casual and intentional. The summary of facts confirms that r 9(1)(j) is engaged. For the

⁶ Section 24 Education and Training Act 2020.

⁷ Clause 1.3 of the Code, and example from the Examples in Practice 2017.

⁸ Clause 2.1 of the Code.

reasons at [15] and [16] above we also consider that the conduct was likely to bring the profession into disrepute.

Penalty

[18] The principles of penalty are well established in disciplinary proceedings. Discipline is intended to meet the purposes of the Act by protecting the public, maintaining professional standards and in doing so, promoting public confidence in the profession. The Tribunal is to impose the least restrictive penalty in the circumstances, being one that is fair, just and proportionate. The primary purpose is not to be punitive, and we should aim for consistency with similar cases.

[19] The CAC provided examples of similar cases for the purpose of ensuring consistency in penalty imposed.⁹

[20] The Tribunal prefers to have as much information as possible from a teacher to best meet the penalty principles, including evidence of reflection on the conduct, professional development where relevant, and teaching intention. Ms Faui promptly accepted her conduct was wrong, was remorseful, and very swiftly lost her job, as well as being referred to Police, so she has clearly suffered as a consequence. There is however no evidence before the Tribunal of any steps that have been taken to provide reassurance the conduct will not be repeated. On the one hand the conduct occurred several years ago and there is no evidence of further concerns; on the other there has been ample time for Ms Faui to undertake appropriate professional development and to provide evidence of this to the CAC and Tribunal if she has done so.

[21] The CAC acknowledge that the conduct is at the lower end of the scale, proposed the following penalty, consistent with cases involving similar, singular conduct in the ECE setting:

- (a) Censure.
- (b) Conditions:
 - (i) annotation of the register for two years.

⁹ In particular, *Complaints Assessment Committee v Watson* [NZTDT] 2019-75, also involving an open palm slap to a young child's cheek. The CAC also referred to *Complaints Assessment Committee v Smith* [NZTDT] 2019-11, and *Complaints Assessment Committee v Teacher* [NZTDT] 2019-129.

- (ii) That Ms Faui informs her current employer of the Tribunal's decision and this is acknowledged to the Teaching Council within 14 days of receipt;
- (iii) Attend a programme designed to assist with the management of difficult behaviours, for example Incredible Years or another programme approved by the Teaching Council.

[22] We agree that censure and conditions are appropriate. While the conduct occurred some time ago, the limited information from Ms Faui means we do not have current evidence to suggest that conditions are not necessary to meet the purposes of the Act. Ms Faui will be invited to provide information to the Teaching Council as part of these conditions which may address the outstanding concerns we have.

[23] We agree with the CAC that censure is appropriate, and that some confirmation from Ms Faui's employer regarding her disclosure of these proceedings, and receipt of the decision is appropriate. Rather than professional development in the nature of a formal course, we will impose a condition requiring mentoring to provide evidence to the Council that the respondent is aware of her obligations under the Code and strategies for positive behaviour management, for a period of 12 months.

[24] The CAC sought a contribution of 40% of costs, in line with the usual practice for cases in which a teacher has cooperated with the prosecution and the matter has been dealt with as expediently as possible. The costs schedule outlined total costs for external counsel in the sum of \$5,000 excluding GST, 40% of which is \$2,000. While this is not an insignificant sum for any respondent to meet, there is nothing to suggest that the costs incurred by the CAC are unreasonable.

[25] Ms Faui did not make submissions as to costs or file evidence of her financial means. Accordingly, we have no basis to depart from usual practice and made the order as sought by the CAC.

Non-Publication Orders

[26] The CAC's submissions did not outline any position on non-publication. At the initial prehearing conference however, the CAC sought an order suppressing the name of Child A, which is clearly proper (per s501(6)). We consider it is also appropriate to order that the video footage not be published. This footage shows persons other than the respondent, including several young children, whose privacy interests outweigh any value that publication of the footage might bring in this case.

[27] Interim orders were also made at the initial prehearing conference with respect to the respondent and the early learning centre on application by the respondent, who was concerned that she and her family, who share her surname, would suffer extreme hardship. The nature of this was not outlined, but directions were given as to the need to make an application for any permanent orders. No application was made by the centre, but the interim order was made to both protect Child A, and because the centre shares its name with a number of centres.

[28] In the absence of evidence to support that a permanent non publication order in favour of the respondent would be proper, no order will be made.

Orders

[29] Accordingly, the Tribunal makes the following orders:

- (a) The respondent is censured pursuant to s500(1)(b) of the Act.
- (b) The respondent is to pay a contribution to the costs of the CAC in the sum of \$2000 pursuant to s500(1)(h) of the Act. The respondent is invited to communicate with the Council as to the manner of payment of these costs.
- (c) The following conditions are to be imposed on the respondent's practising certificate pursuant to s500(1)(c) of the Act:
 - (i) The decision of the Tribunal is to be notified to the respondent's current employer and confirmation of this provided to the Teaching Council within 14 days of the decision.
 - (ii) The respondent to undertake mentoring with a mentor approved by the Teaching Council for a period of 12 months, and to include content on positive behavioural management and knowledge of the Code of Professional Responsibility.
- (d) Annotation of the register for a period of 12 months pursuant to s500(1)(e) of the Act.

[30] Pursuant to s501, the following orders for non-publication are made:

- (a) The name and identifying particulars of Child A referred to in the notice of charge.
- (b) Any part of the CCTV footage produced to the Tribunal as part of the agreed bundle of documents.
- (c) The name of the respondent's employer at the relevant time, Rainbow Corner Educational Trust Onehunga Ltd.

[31] The interim non publication orders will remain in place for the duration of the statutory appeal period.



C Garvey
Deputy Chair of the New Zealand Teacher's
Disciplinary Tribunal