

**NOTE: NON-PUBLICATION ORDERS**

**BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL**

**NZTDT 2023/22**

**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**

**CLAIRE HUTTON**  
(Authorisation216680)  
Kaiurupare / Respondent

Hearing | Nohoanga

14 March 2024 (on the papers)

Tribunal:

James Gurnick (Deputy Chair), Maria Johnson,  
Nikki Parsons

Representation | Hei Māngai

R G Buckman for the CAC  
W van Harselaar for the Respondent

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**DECISION**

**23 May 2024**

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## Introduction | Whakataki

[1] The Complaints Assessment Committee (**CAC**) charged the respondent with serious misconduct pursuant to s 378 of the Education Act 1989 (**the Act**) and r 9.1(a), (b), (j) and/or (k) of the Teaching Council Rules 2016 (**the Rules**) in that the respondent:

- (a) used unreasonable force on a learner, Child A, when she:
  - (i) during the week of 1 or 8 June 2020, snatched a dropper from Child A's mouth making it hit the back of her mouth and move her head backwards; and/or
  - (ii) on 18 June 2020, grabbed Child A by the wrists so that both of her feet left the ground and placed her on the ground, making her cry; and/or
  - (iii) on 19 June 2020, thrust her hand in Child A's face and pulled Child A away from a table by her wrist and marched her around the room; and/or
- (b) used an inappropriate tone to a learner, Child A, when she:
  - (i) during the week of 1 or 8 June 2020, used an inappropriate tone to say "that is not how we use that work" to Child A;
  - (ii) on 18 June 2020, shouted "no [child's name]" to Child A; and
  - (iii) on 19 June 2020, used an unacceptable tone and demeanour to Child A; and
- (c) by virtue of the allegations contained in paragraphs 1(a) and 1(b), failed to promote the well-being of the learner.

[2] The parties agreed a summary of facts. The relevant facts are:

- (a) During the week of either 1 June 2020 or 8 June 2020, Child A was using a large eye dropper in a "Practical Life" exercise at the centre. Child A took the dropper and put it in her mouth. The respondent told Child A "that it is not how we use that work" in a gruff tone.
- (b) The respondent snatched the dropper out of the mouth of Child A. In the process, the dropper went further into Child A's mouth, making her head go back.
- (c) On 18 June 2020, Child A was using a piece of Practical Life. She started throwing it on the ground. While standing next to Child A, the respondent shouted "no [Child A]". Child A was sitting on a chair. The respondent held Child A by the

wrists and lifted her off the chair so both her feet left the ground. The respondent placed her on the ground. This upset Child A and made her cry.

- (d) On 19 June 2020, Child A was eating her lunch in a room with other children. Child A pulled at the hair of another child. The respondent yelled out at Child A in a gruff and loud tone. The respondent leaned over the table and thrust her hand towards Child A's face in a "stop" gesture. The respondent told Child A to use gentle hands.
- (e) The respondent then grabbed Child A by the wrist and pulled her away from the table. Holding on to Child A's wrist, the respondent took her around the room. Child A had no choice but to follow the respondent around. When another teacher asked if Child A would like some fruit, the respondent responded that she could not have anything else unless a teacher supervised her.

[3] During the centre's internal investigation, the respondent provided a written response. She added to her response at the centre's in-person meetings. The respondent acknowledged that she had been suffering from stress and had made mistakes regarding volume and communications with staff.

[4] In her written response to the CAC, and during the meeting, the respondent explained the stress she was under at the time of the allegations and that the centre was a toxic work environment at the time. She said the allegations were at odds with her normal practice. If the allegations did happen, she said she was horrified the culture at the centre affected her standards.

## **Legal principles**

### **The test for misconduct**

[5] Section 378(1)(a) of the Act provides "three initial gateways into a conduct finding",<sup>1</sup> being behaviour by a teacher that:

- (a) adversely affects, or is likely to adversely affect, the well-being or learning of one or more students; or
- (b) reflects adversely on the teacher's fitness to be a teacher; or

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<sup>1</sup> *Complaints Assessment Committee v Teacher S* [2020] NZTDT 45 at [6].

(c) may bring the teaching profession into disrepute.

[6] In relation to the impact on the well-being or learning of a student, the Tribunal has stated:<sup>2</sup>

... “real”, appreciable”, “substantial” and “serious” are qualifying adjectives for “likely” and bring out that the risk or possibility is one that must not be fanciful and cannot be discounted.

[7] When considering whether the conduct “reflects adversely on the teacher’s fitness to be a teacher”, the Tribunal has focused on:<sup>3</sup>

... whether the teacher’s conduct departs from the standards expected of a teacher. Those standards might include pedagogical, professional, ethical and legal. The departure from those standards might be viewed with disapproval by a teacher’s peers or by the community. The views of the teachers on the panel inform the view taken by the Tribunal.

[8] The standard must be an objective standard with the question to be asked by the Tribunal being whether reasonable members of the public, informed and with knowledge of all the factual circumstances, could reasonably conclude that the reputation and good standing of the teaching profession is lowered by the behaviour of the teacher concerned. If the conduct meets one of the above limbs of s 378(1)(a) of the Act, the conduct will be misconduct.

### **The test for serious misconduct**

[9] The test for serious misconduct must first meet the criteria for misconduct set out above. It must also be “of a character or severity that meets the Teaching Council’s criteria for reporting serious misconduct”.<sup>4</sup> The criteria for reporting serious misconduct are set out in Part 3 of the Rules. The relevant version of those rules is dated 29 September 2018 and was in force until 1 August 2020.

[10] The Teachers Council criteria for reporting serious misconduct are set out in r 9. Criteria for reporting serious misconduct will be engaged where there is “a serious breach of the Code of Professional Responsibility” (**the Code**) and includes specific examples of conduct that will amount to a serious breach of the Code.<sup>5</sup>

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<sup>2</sup> *Complaints Assessment Committee v Marsom* [2018] NZTDT 25.

<sup>3</sup> *Complaints Assessment Committee v Crump* [2019] NZTDT 12.

<sup>4</sup> Education Act 1989, s 378(1)(b).

<sup>5</sup> Teaching Council Rules 2016, r 9(1).

[11] The relevant kinds of serious misconduct listed in r 9(1) are:

- (a) *rule 9(1)(a)*: using unjustified or unreasonable physical force on a child or young person or encouraging another person to do so;
- (b) *rule 9(1)(b)*: emotional abuse that causes harm or is likely to cause harm to a child or young person;
- (c) *rule 9(1)(j)*: an act or omission that may be the subject of a prosecution for an offence punishable by imprisonment for a term of three months or more; and
- (d) *rule 9(1)(k)*: an act or omission that brings, or is likely to bring, the teaching profession into disrepute.

[12] The Code sets out the high standards for ethical behaviour that are expected of every teacher, and states that teachers must “respect [their] trusted position in society”. Learners, families and whanau, and the wider community, place a significant amount of trust in teachers to guide their children and young people on their learning journey and to keep them safe. By acting with integrity and professionalism, teachers and the teaching profession maintain this trust and confidence.

[13] The Code was issued with examples in practice which provide positive examples of what the principles look like in practice and include behaviours that are unacceptable and breach the Code.<sup>6</sup>

[14] Relevantly, an example of demonstrating a high standard of professional behaviour and integrity as required by clause 1.3 is “behaving in ways that promote a culture of trust, respect and confidence in me as a teacher and in the profession as a whole”. Conduct that damages this trust and confidence breaches clause 1.3.

[15] Examples of promoting the well-being of learners and protecting them from harm, as required by clause 2.1 are:

Creating learning environments (including online spaces) that are safe and inclusive, and that promote the dignity and emotional well-being of all learners.

Fostering trust, respect and co-operation with and among learners.

Showing respect, for example, using a respectful tone of voice.

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<sup>6</sup> *The Code of Professional Responsibility, Examples in Practice* (Education Council, Wellington, June 2017).

[16] An example of behaviour that does not promote learners' well-being and may cause harm is:

Inappropriate handling such as physically grabbing, shoving or pushing, or using physical force to manage a learner's behaviour.

[17] In addition, s 139A of the Act prohibits a teacher using force, by way of correction or punishment, towards any student.

### **Discussion**

[18] In our view, the summary of facts in relation to the incident during the week of either 1 June 2020 or 8 June 2020 involving a large eye dropper does not provide sufficient context for us to make a particular finding.

[19] Child A was approximately two years and eight months old. We consider it entirely proper for the respondent to have physically removed the eye dropper from the mouth of the child if the child was not listening to the respondent. The respondent may well have considered the child to be in danger as a result of the dropper being in the child's mouth and so acted quickly. In circumstances where the child was reluctant to release the dropper out of her mouth, we consider the child's head going back to be a natural response. While the teacher's tone is described as gruff, we do not consider that that incident, on its own or in combination with the other allegations, constitutes misconduct or serious misconduct. On that basis, we put that incident to one side.

[20] The incident on 18 June 2020 again provides insufficient context. The respondent is said to have shouted "no [Child A]". In our view, there is a fine line between someone shouting and raising their voice. Depending on the level of danger being caused by the child in throwing a piece of Practical Life, raising your voice to prevent a child from doing so does not raise sufficient concern. Alternative strategies could have been employed such as leaving the child and removing the equipment, however, without further context, we do not factor in the respondent shouting "no [Child A]".

[21] In respect of the respondent holding Child A by the wrists and lifting her off the chair so both her feet left the ground, we do not consider it was justified and we consider that those actions do constitute unjustified or unreasonable physical force in terms of the Code. It clearly upset the child, causing her to cry.

[22] On 19 June 2020, Child A pulled the hair of another child. The respondent yelled at Child A in a gruff and loud tone, leaning over the table and thrusting her hand towards Child A's

face in a “stop” gesture. Again, where one child is putting another child’s safety in danger, we do not consider that raising your voice and signalling to that child to stop is inappropriate. It was followed up by the respondent telling Child A to use gentle hands, which we consider was appropriate in the circumstances. What followed was unacceptable.

[23] The respondent grabbing Child A by the wrists and pulling her away from the table and holding on to her wrist while she took the child around the room signals to us that the respondent was frustrated and had lost control. Those actions constitute a form of reprimand in response to the child’s behaviour. That, in our view, also breaches the Code in terms of unjustified or unreasonable physical force on a child. It also offends against the examples in practice set out in the Code as behaviour that does not promote learners’ well-being and may cause harm.<sup>7</sup>

[24] We also consider it breaches s 139A of the Act which prohibits a teacher using force, by way of correction or punishment, towards any student.

[25] We consider that the respondent could have asked for help if struggling with the child’s behaviour. There was clearly another teacher in the vicinity as another teacher asked if the child would like some fruit, and the respondent responded that she could not have anything unless a teacher supervised her.

### **Case law**

[26] The CAC has cited a number of authorities including *CAC v Billingsley*,<sup>8</sup> *CAC v Chen*,<sup>9</sup> *CAC v Teacher C*,<sup>10</sup> and *CAC v Riza*.<sup>11</sup>

[27] Of most relevance, in *Chen* there were two incidents. First, Ms Chen pulled/dragged a three-year-old student away from a set of drawers, the student stumbling behind her. The second incident involved grabbing a 20-month-old student by the hand forcefully and moving him inside the centre. The Tribunal was satisfied that the conduct amounted to serious misconduct. It was accepted that Ms Chen was pregnant at the time and suffering from stress, fatigue and exhaustion, but that it was part of professional behaviour for teachers to recognise when they were not coping.

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<sup>7</sup> Inappropriate handling such as physical grabbing, shoving or pushing, or using physical force to manage a learner’s behaviour.

<sup>8</sup> *Complaints Assessment Committee v Billingsley* NZTDT 2021/21.

<sup>9</sup> *Complaints Assessment Committee v Chen* NZTDT 2020/54.

<sup>10</sup> *Complaints Assessment Committee v Teacher C* NZTDT 2020/32.

<sup>11</sup> *Complaints Assessment Committee v Riza* NZTDT 2019/33.

[28] In *Riza*, the teacher had (among other matters) mishandled two one-year-olds on separate occasions. On the first occasion, she dragged one child by the arm up off the ground and separately dragged the other child towards her by pulling the child's leg. Later, the teacher had also roughly removed the second child from her seat at a table. The Tribunal found that each incident of mishandling separately amounted to serious misconduct.

### **CAC's submissions**

[29] Given we do not consider the eye dropper incident to constitute misconduct or serious misconduct, we refer only to the submissions made by the CAC in relation to the use of physical force by the respondent on 18 and 19 June 2020. We also repeat what we said about the respondent shouting "no [Child A]" at [20 above].

[30] The CAC submits that the respondent's use of force is a clear departure from the standards expected of a teacher, it is in clear breach of s 139A of the Act and that acting in breach of that prohibition impacts on the respondent's fitness to teach. It submits that early childhood education teachers are expected to face challenging behaviour from children and stressful situations within the workplace. Their position requires that they are capable of maintaining composure, employing appropriate strategies, and acting professionally when they face those stresses in the workplace. The CAC submits that members of the public must be taken to think less of a profession that tolerates a teacher's resort to the use of force in that way to moderate the behaviour of a child.

### **Respondent's submissions**

[31] Save for the second incident involving the lifting of Child A by the wrists, the respondent accepts but does not recall all of her actions.

[32] In relation to the second incident, the respondent submits that there was a health and safety reason for immediate action because Child A needed to be immediately removed to prevent any continued throwing of objects. She considered the health and safety considerations of other children in close proximity to Child A to be important. She accepts that the child could have been lifted from the armpits, which would have achieved the same result of preventing the child from using her throwing arm. The respondent accepts responsibility for lifting Child A by the wrists and acknowledges that it was unacceptable.

[33] In relation to the incident of holding Child A's wrist and taking her around the room, the respondent minimises her actions and submits that it is unclear how walking Child A across



the room to settle her down constitutes misconduct but accepts that the Tribunal is dealing with questions of degree.

### **Liability**

[34] In our view, r 9(1)(a) (using unjustified or unreasonable physical force on a child or young person) and r 9(1)(k) (doing an act that brings, or is likely to bring, the teaching profession into disrepute) are engaged.

[35] For the reasons discussed above, we do not consider r 9(1)(b) and (j) are engaged.

[36] We agree that the respondent's conduct was unprofessional and exposed Child A to a risk of harm, detracted from the profession's culture of trust, and was altogether inappropriate.

[37] Having considered both sets of submissions, the respondent's actions clearly adversely affected the well-being and learning of Child A, they reflected adversely on the respondent's fitness to be a teacher and, in our view, may bring the teaching profession into disrepute.

[38] In our view, each incident separately constitutes serious misconduct.

### **Penalty**

[39] The CAC does not seek cancellation of the respondent's teaching registration.

[40] The CAC acknowledges that the respondent has some 20 years' experience and that the respondent has now accepted the conduct in the agreed summary of facts. It acknowledges that she has completed further professional development and counselling since the incident.

[41] The CAC points out that the respondent has previously been referred to the CAC in 2013. The respondent was referred for a competency review and completed all conditions imposed as part of the competency review that followed.

[42] On that basis, it submits that the Tribunal should impose conditions on the respondent's practising certificate, namely:

- (a) to attend a programme designed to assist with the management of difficult behaviours;
- (b) attend a programme designed to assist with stress management; and

- (c) inform any new employer of the Tribunal's decision for two years after the decision is issued.

[43] The respondent's practising certificate expires on 24 June 2024. The CAC also seeks an order that the above conditions will attach to the respondent's future practising certificate (if she applies to renew).

[44] The respondent in essence accepts the proposed conditions submitted by the CAC. She expresses remorse and does not want her actions to be considered as intentional acts carried out to harm a student. The respondent submitted that she finds it extremely difficult to explain the context of her trying to deal with a safety situation without appearing arrogant or insensitive.

[45] We accept the submissions of the CAC. Having found the respondent's conduct constitutes serious misconduct, we make the following orders:

- (a) the respondent is censured for her conduct;
- (b) an annotation is to be recorded on the public register for a period of two years; and
- (c) the Teaching Council is directed to impose the following conditions on the respondent's current or any future practising certificate until the conditions have been complied with, namely:
  - (i) to notify any current or future employer of the Tribunal's decision for a period of two years; and
  - (ii) to undertake the Ministry of Education's 'Incredible Years' teaching programme.

### **Costs**

[46] The matter has been dealt with on the papers. The CAC accepts that the respondent has admitted the conduct and has been co-operative in bringing this matter to an end in an expedient way. The CAC seeks 40 per cent of its costs in accordance with the Tribunal's Practice Note 1: Costs, 1 April 2022.

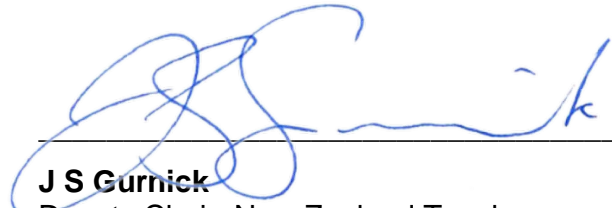
[47] The CAC's costs total \$11,731.94, being made up of \$1,618.94 being costs of the CAC (GST exclusive) and \$10,113 of legal costs and disbursements for Tribunal proceedings (GST exclusive).

[48] We consider that the legal costs and disbursements for the Tribunal proceedings are high, particularly given this matter proceeded on the papers. On that basis, we order 30 per cent of the CAC's costs, being \$3,519.58.

[49] In addition, it is appropriate that a contribution to the Tribunal's costs is made. A contribution of \$500 is ordered to be paid for such costs.

### **Non-publication orders**

[50] There were no applications for non-publication orders. However, we consider it appropriate to make a permanent non-publication order in relation to the child referred to in the proceeding as Child A, having regard to their privacy and their likely age, the nature of the conduct, and their role as a learner.<sup>12</sup>



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**J S Gurnick**  
Deputy Chair, New Zealand Teachers  
Disciplinary Tribunal

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<sup>12</sup> Education and Training Act 2020, s 501(6)(c).