

NOTE: PERMANENT NON-PUBLICATION ORDERS

BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

NZTDT 2022/60

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

SIPU LEAU

(Registration 348619)

Kaiurupare / Respondent

Hearing | Nohoanga

6 June 2024 (on the papers)

Representation | Hei Māngai

E McCaughan for the CAC
Respondent in person

DECISION

23 June 2024

Tribunal Members: James Gurnick (Deputy Chair)
Ross Brown
Demian Shaver

Introduction

[1] The Complaints Assessment Committee (**CAC**), following a mandatory report provided by Rainbow Corner Early Learning Centre, Onehunga, about the conduct of Sipu Leau, has charged the respondent with serious misconduct and/or conduct otherwise entitling the Tribunal to exercise its powers. The CAC charged that on 22 December 2020, the respondent:

- (a) elbowed Child A (three years old) twice;
- (b) slapped Child A on the back of the neck;
- (c) pushed Child B (two years old) with his foot, causing Child B to fall over; and
- (d) placed his foot on Child B's back and pressed down.

[2] The CAC alleged that the conduct above separately or cumulatively amounts to serious misconduct pursuant to s 10 of the Education and Training Act 2020 (**the Act**) and any or all of rr 9(1)(a), (j) and/or (k) of the Teaching Council Rules 2016 (**the Rules**); or, alternatively, amounts to conduct which otherwise entitles the Tribunal to exercise its powers pursuant to s 500 of the Act.

The facts

[3] The parties reached agreement on the summary of facts:

1. Mr Leau was first registered and provisionally certified on 13 May 2015. His current provisional practising certificate expires on 24 November 2024.
2. In November 2020 Mr Leau was employed as an ECE teacher at Rainbow Corner Early Learning Centre (formerly Blossoms Educare), in Onehunga. He worked in the preschool room.
3. Rainbow Corner (the Centre) is an early childhood centre in Onehunga, Auckland. The Centre has two other teachers in the preschool room and 81 children are enrolled at the centre.

Background

4. On the morning of 22 December 2020, Mr Leau roughly handled two children while working at the Centre. This was witnessed and subsequently reported by another teacher at the Centre. The incidents were also recorded on CCTV.
Allegations (a) and (b) - On 22 December 2020 Mr Leau elbowed Child A (3 years old) twice and slapped Child A on the back of the neck.
5. The CCTV footage shows Mr Leau sitting on a couch at the Centre. Child A, who was 3 years old at the time, climbed onto the right side of the couch, behind Mr Leau to his right, and played with Mr Leau's Christmas hat. In response, Mr Leau elbowed Child A twice with his right elbow, making contact with Child A's chest and face. The level of force was low.
6. Child A was not visibly upset. Child A got down from the couch and moved away, [Child A's] path crossing in front of Mr Leau. As Child A moved past

Mr Leau, Mr Leau slapped the back of Child A's neck with his right hand. The level of force was low.

Allegations (c) and (d) - On 22 December 2020 Mr Leau pushed Child B (2 years old) with his foot, causing Child B to fall over, and placed his foot on Child B's back and pressed down.

7. A short time later Mr Leau was seen on CCTV pushing Child B on the bottom with his foot. Child B was 2 years old at the time. The push caused Child B to fall over. Child B was not visibly upset.
8. While Child B was lying on the ground, Mr Leau placed his foot on [Child B's] back and pressed down. The level of force was low. Child B was not visibly upset.
9. Mr Leau was subsequently dismissed from the Centre on 7 January 2021. The Centre filed a mandatory report on 8 January 2021, and also reported the matter to the Police.

Police actions

10. Police reviewed the CCTV footage and spoke with Mr Leau. According to Police, Mr Leau admitted his actions, and advised that the management of the Centre was not great, and he had become frustrated. He acknowledged what he had done was wrong, but said he had no intention to harm the children.
11. Mr Leau was given a formal written warning by Police for assaulting a child, but was not charged with any criminal offending.

Mr Leau's response

12. On 8 August 2021 Mr Leau provided a response to the mandatory report. He explained that he was contracted by the Centre, but there was little support or supervision from the Centre's management.
13. Mr Leau expressed remorse, and said that he never intended to harm the children. He stated he had worked with many children, and they have "a unique bond where we play and rough play is a part of that relationship".
14. Mr Leau also requested that the concept of "rough play" be considered from a Pasifika male's perspective. However, he agreed that further professional development in the area of child protection was critical to improving his practice.

CAC meeting

15. On 6 October 2022, at the CAC meeting, Mr Leau explained that his mother encouraged him to pursue a career in early childhood education. Mr Leau said he did not like studying at first, but from his second year when he was doing his practicum, he started to like teaching and felt it was his calling.
16. When asked about the events on 22 December 2020, Mr Leau explained that it was a good morning, as the kids had come in cheery, were running around and playing.
17. Regarding the incident with Child A, Mr Leau said he was playing with [Child A]. When asked whether he was annoyed at Child A, Mr Leau said he was not, but acknowledged that he may have overreacted.
18. When asked about the incident with Child B, Mr Leau said [Child B] had ran in front of him and lay down. They had previously play-wrestled, and [Child B] wanted to do this again. Mr Leau said that he did not stand on [Child B], he was just pretending.
19. When asked by the CAC out what rough play meant from a Pasifika perspective/lens, Mr Leau gave the examples of spinning children and

pretending to play rugby. When asked to explain how the incident with Child A (elbowing) fits into this, Mr Leau said he was playing jokes with the kids and that it was not intended to be serious.

20. Mr Leau advised that he had not yet done any further professional development due to Covid-19, however his practice had developed a lot. The CAC asked Mr Leau what he could have done if a child was annoying him. He responded that he understood that, when working with young children, they can have challenging behaviours and that it was necessary to have strategies to support them. He noted the importance of keeping the children engaged in play, which is safe and good for their wellbeing, and to encourage their curiosity.

[4] The Tribunal convened a papers hearing on 6 June 2024. The respondent and counsel for the CAC briefly appeared by audio-visual link. The respondent wished to convey in person his remorse for the conduct. The respondent had not filed submissions in response to the charge or any application for non-publication orders. We will discuss the issue of non-publication orders later in this decision.

The law – serious misconduct

[5] Section 10 of the Act defines “serious misconduct” as:

conduct by a teacher–

- (a) that–
- (i) adversely affects, or is likely to adversely affect, the well-being or learning of one 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;
- (b) that is of a character or severity that meets the Teaching Council’s criteria for reporting serious misconduct.

[6] The test is conjunctive. If any one of the matters under s 10(1)(a) are made out, the teacher’s conduct will amount to misconduct, whereas if the conduct also breaches s 10(1)(b), the conduct will amount to “serious misconduct”.

[7] The criteria for reporting serious misconduct are detailed in r 9 of the Rules, which states:

A teacher’s employer must immediately report to the Teaching Council in accordance with s 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) one or more of the following:

- (a) using unjustified or unreasonable physical force on a child or young person ...
- (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;
- (k) an act or omission that brings, or is likely to bring, the teaching profession into disrepute.

[8] Rule 9(2) states:

Misconduct described in any of paragraph (a) to (e) and (k) of subclause (1) may be:

- (a) a single act; or
- (b) a number of acts performing part of a pattern of behaviour, even if some of the acts when viewed in isolation are minor or trivial.

[9] The “disrepute” test under r 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.¹

[10] Relevant aspects of the Code of Professional Responsibility are:

- (a) Clause 1.3 – commitment to the teaching profession – “I will maintain public trust and confidence in the teaching profession by demonstrating a high standard of professional behaviour and integrity”.
- (b) Clause 2.1 – commitment to learners – “I will work in the best interests of learners by promoting the well-being of learners and protecting them from harm”.

[11] Section 24 of the Act states that a person must not “use force, by way of correction or punishment, toward a child enrolled at or attending an early childhood service”.

[12] In *CAC v Teacher*,² the Tribunal made the following comment regarding the use of physical force to any degree in the school environment:

We repeat as we have said in a number of cases in the past that the use of physical force – even at a lower level such as evident in this case – is unacceptable in New Zealand schools, and that any teacher who uses physical force contrary to s 139A puts his or her status as a teacher in peril.

Case law

[13] The following cases have been referred to us by the CAC:

[14] In *Complaints Assessment Committee v Kaufusi*,³ the teacher taught at an early childhood education centre. On two separate occasions, the teacher pulled the ears of two different children. The Tribunal considered that the conduct amounted to “serious misconduct”. In particular, the Tribunal was satisfied that the conduct met all three limbs of the definition of “serious misconduct” and fell within the category of “physical abuse” (being

¹ *Complaints Assessment Committee v Collins* NZTDT 2016/43, 24 March 2017 at [40].

² *Complaints Assessment Committee v Teacher* NZTDT 2014/49.

³ *Complaints Assessment Committee v Kaufusi* NZTDT 2019/58, 15 October 2019.

the relevant term used in r 9(1)(a) at the time). The teacher was able to show some insight and remorse into his conduct. The Tribunal censured the teacher with an annotation for two years and imposed conditions.

[15] In *Complaints Assessment Committee v Martin*,⁴ the teacher was working as a relief teacher in an early childhood education centre. An incident occurred where the teacher hit a two-year-old child on the head with an open palm. She also called the child an “little shit”. The incident was witnessed by the centre cook and was immediately reported to the team leader. While the Tribunal accepted that the force used was at the lower end of the spectrum and that it was a spontaneous reaction to Child A headbutting the teacher, it found that it amounted to serious misconduct. Again, the Tribunal censured the teacher, annotated the Register and put in place conditions for two years.

[16] In *Complaints Assessment Committee v Duval-Smith*,⁵ the teacher was working in a kindergarten. He was responsible for supervising a five-year-old child who demonstrated challenging behaviour from time to time. During circle time, the child was repeatedly lunging into the centre, despite the teacher asking him to stay in his place. The teacher reached forward to move the child back and put his hand on the child's hand. The child spat at the teacher. The teacher took the child to the bathroom and asked him to wash the spit off his hand. When the child said no, the teacher admitted that he lost control and became frustrated, hitting the child firmly on the back of the head with an open-handed hit. The child cried as a result.

[17] The Tribunal agreed with the CAC that the conduct amounted to serious misconduct. In considering penalty, the Tribunal noted the use of physical force, even at a lower end, is unacceptable in New Zealand schools, and the use of such force by teachers would bring discredit to the profession.

[18] The Tribunal considered the seriousness of the conduct, being force against the head of the child, and the age of the child. This was balanced against the teacher's steps after the incident, which included immediately self-reporting to his colleague, employer and the child's parents, and then reporting to the Education Council. The teacher's attitude following the incident persuaded the Tribunal that cancellation was not necessary and the Tribunal was satisfied that a rehabilitative penalty short of cancellation was appropriate. It censured the teacher, requiring him to show any prospective employer the Tribunal's decision and required

⁴ *Complaints Assessment Committee v Martin* NZTDT 2019/110, 10 December 2020.

⁵ *Complaints Assessment Committee v Duval-Smith* NZTDT 2017/31, 18 April 2018.

him to have a mentor and provide reflective reports to the Education Council once he had started a teaching role.

CAC submissions

[19] The CAC submits that despite the low level of force used by the respondent, his conduct was likely to adversely affect the learning of both children:

- (a) Child A climbed onto the right side of the couch and reached out to play with the respondent's Christmas hat. In response, the respondent elbowed Child A twice with his right elbow, making contact with Child A's chest and face. When Child A tried to move away and walk past the respondent, he slapped at the back of Child A's neck with his right hand.
- (b) The respondent pushed Child B on the bottom with his foot. Child B fell over and while Child B was lying on the ground the respondent placed his foot on their back and pressed down.

[20] The CAC acknowledges that neither child appeared to be upset as a result of the respondent's actions. Nevertheless, it submitted that such conduct was likely to adversely affect either their learning or well-being. The Act expressly prohibits the use of force for the purpose of correction, on the basis of a belief that such force has the potential to adversely affect the child's learning or well-being.

[21] The CAC submitted that the combined conduct reflected adversely on the respondent's fitness to be a teacher. When questioned about the incidents, he said he was frustrated with Child A, but that he had no intention of harming the children.

[22] The CAC submits that teachers who are fit to teach are capable of exercising a level of self-control which avoids a reactive use of force in this way, and members of the public would expect that to be the case. It submitted that the incident with Child A was particularly concerning. The child was clearly attempting to get the respondent's attention by playing with his Christmas hat. Rather than engaging with the child, the respondent elbowed the child in the chest and face (albeit with low force). When the child moved away, the respondent slapped the back of the child's neck with his right hand. This, the CAC submits, reflects adversely on the respondent's fitness to be a teacher.

[23] In relation to Child B, the CAC submits that there was nothing in the CCTV footage to suggest Child B invited the respondent to push the child over, by pushing the child on their bottom with his foot causing her to fall over. The respondent placed his foot on the child's

back and pushed down (the CAC admits in a “playful” way). The CAC expressed concern about the respondent’s belief that both incidents could be categorised as appropriate “playfighting” as raising concerns about his fitness to teach.

[24] In terms of whether the respondent’s conduct may bring the teaching profession into disrepute, the CAC submits that using force against very young children in the way the respondent has done satisfies the criteria under s 10(1)(a)(iii) in that, at the very least, it “may” bring the teaching profession into disrepute.

[25] In terms of whether the conduct satisfies the second limb under s 10(1)(b), the CAC submits it was of a character or severity that met the Teaching Council’s criteria for reporting serious misconduct under r 9 of the Rules for several reasons:

- (a) Rule 1(a) – the conduct amounted to “using unjustified or unreasonable physical force on a child”.
- (b) Rule 9(1)(k) – the conduct amounted to an act that brought, or was likely to bring, discredit to the teaching profession in that 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.
- (c) Rule 9(1)(j) – Police investigated the incident and issued a formal written warning to the respondent for assaulting a child. Such an offence carries a maximum penalty above three months’ imprisonment.

[26] The CAC submits that a finding of serious misconduct would be consistent with the Tribunal’s previous decisions referred to above.

Respondent’s submissions

[27] As indicated above, the respondent did not file any submissions in response to those received by the CAC. At the papers hearing, he briefly addressed us in relation to the summary of facts. He submitted that the wording contained in the summary of facts overstated the level of force that was applied to the children. English appeared to be the respondent’s second language. We did not infer from the respondent’s submission that he was attempting to minimise his actions. He accepted responsibility for his conduct and was remorseful.

[28] Counsel for the CAC acknowledged what the respondent submitted but highlighted that the summary of facts expressly stated that “the level of force was low”. He also submitted that had the level of force been greater, the CAC is likely to have sought a more significant penalty.

[29] We have had the benefit of watching the CCTV footage. We accept the respondent’s submission that the summary of facts could be interpreted to be more serious than what actually occurred and what we saw in the footage itself.

[30] On that basis, we acknowledge the responsible submission by the CAC and the inclusion of the wording “the level of force was low” in the summary of facts. We note that neither child appeared visibly upset following the respondent’s conduct. That, in our view, is consistent with the low-level force that was used and was seen in the CCTV footage.

Liability

[31] Notwithstanding the low level of force used, we accept the CAC’s submissions that the respondent’s actions meet the threshold of serious misconduct. The use of physical force, even at a lower level as in this case, is not acceptable. Section 139A of the Act makes that plain.

[32] We do, however, accept that this is not a case which warrants cancellation. The respondent has accepted full responsibility for his actions and is remorseful. The respondent is in current employment in early childhood education and is supported by his current employer. He expressed a number of frustrations with the early childhood centre at which he was working at the time of the incident. We note the centre has now permanently closed, which may reflect some of the problems expressed by the respondent when he was employed there.

[33] For the above reasons, we impose the following orders:

- (a) the respondent is censured;
- (b) the Teaching Council is directed to impose the following conditions on the respondent’s current or any future practising certificate for a period of two years:
 - (i) provide a copy of the Tribunal’s decision to his 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.

[34] Given the respondent's provisional practising certificate expires on 24 November 2024, the conditions will extend beyond the expiry of the respondent's provisional practising certificate and should be conditions of any new practising certificate for a period of two years from the date of this decision.

Non-publication orders

[35] The Tribunal, by minute dated 27 March 2024, made a permanent non-publication order in relation to the names of any learners referred to in the charge or the summary of facts, as sought by the CAC.

[36] The respondent did not file an application for name suppression. He made a last-minute plea at the papers hearing for name suppression which we considered. Essentially, the respondent indicated that he was a member of community groups, and that publication of his name may prejudice him. Based on his brief submission, we declined to grant him further time to file a more substantive application for name suppression and on that basis, we make no order in that regard in respect of the respondent.

Costs

[37] The CAC seeks a contribution from the respondent towards its actual and reasonable costs. The respondent has admitted the conduct and has been co-operative in bringing this matter to an end. It has been dealt with on the papers. On that basis, we direct costs be paid by the respondent in accordance with the Tribunal's Practice Note 1: Costs, 1 April 2022, totalling 40 per cent of the CAC's costs in the amount of \$1,869.58.⁶

[38] It is also appropriate that the respondent contribute to the Tribunal's costs. We make an order on the same terms and direct the respondent to pay 40 per cent of the Tribunal's costs in the amount of \$582.⁷



J S Gurnick
Deputy Chair, New Zealand Teachers
Disciplinary Tribunal

⁶ The CAC's costs totalled \$4,673.94.

⁷ The Tribunal's total costs are estimated to be \$1,455.