

BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

NZTDT 2024/38

RARO TE MANA O TE the Education and Training Act 2020
UNDER THE **(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 **KAY MELYS LEGGE**
AND (Authorisation 333026)

Kaiurupare / Respondent

Nohoanga | Hearing 16 December 2024, AVL (Teams).
Hei Māngai | Appearance Toni Knipping, Teaching Council of Aotearoa for the
 CAC.
 Respondent, self-represented.

Tribunal C Garvey (Deputy Chair), G Ashworth and D
 Spraggs

DECISION ON LIABILITY, PENALTY and NON-PUBLICATION

23 JANUARY 2025

Introduction

- [1] Mrs Kay Legge faces a disciplinary charge in relation to administering prescription medicine to the wrong learner in the course of her work at an early childcare service, BestStart South Road, Hawera (the centre). Ms Legge accepted the charge. The matter proceeded as a hearing on the papers with an Agreed Summary of Facts and was further expedited by the parties filing a joint memorandum on liability, penalty and costs in lieu of an exchange of submissions¹.

The Notice of Charge

- [2] The conduct giving rise to the charge occurred on 4 April 2023 and a Mandatory Report was made by the centre to the Teaching Council dated 1 May 2023. The CAC issued a notice of charge dated 8 August 2024. The charge alleges that Mrs Legge's conduct amounts to serious misconduct or conduct otherwise entitling the Tribunal to exercise its powers under section 500 of the Education and Training Act 2020 (the Act) with a single particular, that Mrs Legge:

(a) Administered medication to the wrong learner.

- [3] The charge relies on s10 of the Act, and rules 9(1)(d) and/or (k) of the Teaching Council Rules 2016 (the Rules).

The Agreed Summary of Facts

- [4] The following outline is based on the Agreed Summary of Facts. Mrs Legge was first registered in 2011 and was employed by BestStart for over 13 years at various centres the company operates. Mrs Legge allowed her practising certificate to lapse in September 2023 and advised the Tribunal that she has no intention to return to teaching but wishes to maintain some contact at a professional level within the ECE sector.
- [5] The centre has a Medication Policy outlining medication categories and requirements for safe administration. Mrs Legge was familiar with the policy. A category 2 medication is defined as 'a prescribed or non-prescription medicine provided by the parent or caregiver, to treat a specific condition or symptom, and applies to a specific child.'² There are several mandatory steps to ensure that the appropriate medication is identified and administered in the appropriate dose to the

¹ Joint memorandum on liability, penalty, costs and non-publication orders, 6 December 2024.

² Agreed Summary of Facts at [6]. This definition in the Medication Policy reflects Centre Based ECE Licensing criterion HS28.

correct child. The policy requires that:

8. When administering a Category 2 or Category 3 prescription medication, the staff member administering the medication must show the label, measured dosage, and medication register to a second trained staff member at the time of administering medication to ensure that:
 - a. Medication is correct
 - b. Dosage is correct (a medicinal cup or syringe is used)
 - c. Method of administering is correct
 - d. Time of administration is correct
 - e. The correct child is receiving the medication.

[6] A child may only receive the medicine once these steps have been followed, and once the medication register is signed by the teacher administering the medicine and counter-signed by another person to verify the policy has been followed.

[7] The centre also has a First Aid Policy which includes steps to be taken in the case of illness or injury. It requires staff to seek medical advice (Healthline or dialling 111), to inform the parent/caregiver, and to contact the Centre Area Manager or Regional Manager.

[8] On the morning of 4 April 2023 Child A's mother explained to Mrs Legge that he had been prescribed erythromycin. She completed a medication form with Mrs Legge so that Child A could be administered a dose at the centre. The summary states:

13. During lunch, Mrs Legge was sitting next to Child B. Mrs Legge mistakenly recalled she was to administer medication to Child B, and advised her colleague she was about to do so. She measured 5ml of erythromycin onto a spoon, and showed her colleague. Neither Mrs Legge, nor her colleague, reviewed or signed the medication register prior to administration.
14. Mrs Legge then gave the medicine to Child B, who swallowed it.
15. Following this, Mrs Legge noticed that the name on the bottle was for Child A and realised she had administered medication to the wrong child. She advised her colleague of her error, and correctly administered the medication to Child A.
16. Mrs Legge then contacted Child B's mother, Ms B. She advised Ms B that she had accidentally given Child B erythromycin, and asked whether Child B was allergic to anything. Ms B confirmed that Child B had no allergies. Ms B then came to the centre and collected Child B. It is understood that Child B suffered no adverse effects from the erythromycin.

[9] Mrs Legge did not contact Healthline to seek advice in relation to wrongly administering the medication to Child B. She did contact the Head Teacher, who in

turn notified the Centre Manager of the incident.

- [10] During the centre's investigation Mrs Legge advised that her mother-in-law had passed away the day prior to the incident, and she had attended work as she did not want to let anyone down. She was remorseful and accepted her failure to follow procedure. When responding to the CAC, Mrs Legge further explained that her workload played a part in her making an error.

Liability – Principles and the agreed position of the parties

- [11] The charge is pleaded in the alternative, meaning the Tribunal is to consider whether the conduct described amounts to misconduct or serious misconduct. The parties took an agreed position on liability, namely that Mrs Legge's conduct constitutes serious misconduct at the lower end of the spectrum.

- [12] Section 10 of the Act sets out the test for serious misconduct as follows:

- (1) 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 practise as 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.

- [13] The test is conjunctive, meaning both limbs must be met. If the second limb is not met (a breach of r9 of the Rules requiring a report to the Teaching Council), a finding of misconduct simpliciter may still be made.³ The charge relies on rules 9(1)(d) and (k) which respectively read:

- (a) failing to protect a child due to negligence or misconduct, not including accidental harm.
- (b) an act or omission that brings, or is likely to bring, the teaching profession

³ *Evans v Complaints Assessment Committee of the Teaching Council of Aotearoa New Zealand* [2021] NZCA 66.

into disrepute.

- [14] The joint memorandum submits that Mrs Legge's conduct is in breach of each limb of s10(1)(a). The parties accept that the wellbeing of Child B (who was wrongly administered medication)⁴ was adversely impacted by virtue of the error posing a "*high risk*" to the child. The memorandum states further that:

Mrs Legge's negligence was compounded by her failure to call Healthline or 111, in accordance with the Centre's First Aid policy, which would have been a reasonable step for Mrs Legge to take to ensure the wellbeing of Child [B].

- [15] The parties also agree that the conduct reflects adversely on Mrs Legge's fitness to be a teacher given "*the failure to follow important and clear policies designed to protect learners, and which brought harm to a learner.*" Reference is made to the Code of Professional Responsibility| Ngā Tikanga Matatika, which sets clear standards of conduct for teachers. The parties rely on the following:

- (a) Clause 1.3 – the expectation that teachers will maintain public trust and confidence in the profession by demonstrating a high standard of professional behaviour and integrity.
- (b) Clause 2.1 which requires teachers to work in the best interests of learners by promoting the wellbeing of learners and protecting them from harm. The parties observe that compliance with centre policies was a reasonable step that Mrs Legge ought to have taken in order to protect the children under her care from harm.

- [16] With respect to the third limb, whether conduct may bring the teaching profession into disrepute is an objective test, assessing whether reasonable members of the public informed of the relevant facts and circumstances could reasonably conclude that the reputation and standing of the profession was lowered by the conduct.⁵ In submitting that this objective test is met, the parties acknowledge Mrs Legge's very recent bereavement, that she had recently moved to the centre and it was a busy day but say that notwithstanding these factors, Mrs Legge had a responsibility to follow (important) policies and did not.

- [17] Addressing the Rules, the parties categorise Mrs Legge's conduct as negligent, engaging r9(1)(d) and for the reasons already discussed, submit that it is likely to

⁴ The joint memorandum refers in error in this discussion at [13] to Child A, but it is clear that reference to Child B is intended.

⁵ This test relies on *Collie v Nursing Council of New Zealand* [2001] NZAR 74 at [28].

bring the profession into disrepute for the purposes of r9(1)(k).

- [18] The joint memorandum discusses several cases for comparative purposes, which we have considered, and refer to below.

Liability - Discussion

- [19] The Tribunal largely agrees with the position as set out in the joint memorandum. We agree that the matter reaches the threshold for serious misconduct, in particular with regard to s10(1)(a)(ii) and (iii) and r9(1)(k). Where we take a slightly different approach is in relation to harm to Child B and the interpretation of r9(1)(d).
- [20] Fortunately, on the information contained in the summary of facts Child B did not experience any adverse symptoms as a consequence of the administration of medication. There was of course some disruption to their session at the centre when they were required to go home for observation, but there is no submission from the parties that this in itself adversely affected the child.
- [21] We accept that there was a clear risk of harm to Child B which was avoidable had Mrs Legge followed the requirements of the Medicine Policy. A review of this Tribunal's decisions where a breach of r9(1)(d) is alleged shows that it has been interpreted broadly to include circumstances where no harm has been caused, but the fact of failing to protect a child giving rise to potential harm may suffice.⁶ However, negligence requires damage, and the rider to 9(1)(d) to exclude "*accidental harm*" suggests that for this rule to apply requires harm to have been caused by the teacher's failure to protect a child through negligence or misconduct.
- [22] We do consider that the failure to follow a critical health and safety policy is misconduct and led to a failure to protect Child B from a potential adverse outcome and following the broad interpretation, this would engage r9(1)(d). We do not ultimately need to determine this however as we are satisfied that r9(1)(k) is engaged by the failure to follow a critical policy with an attendant risk of serious harm, and therefore the threshold for serious misconduct is met.
- [23] For completeness, we record that we have not made an adverse finding in respect of the fact that Mrs Legge did not personally contact Healthline for medical advice as

⁶ For example *CAC v Aiavao* NZTDT 2018-24, 16 April 2019; *CAC v Lam-Sam-Tai* NZTDT 2017-18, 24 October 2017. Compare *CAC v Teacher* [2022] NZTDT 10, 4 November 2022, where a failure to follow health and safety procedures and use a travel safe mug for hot beverage, a child suffered burns when a teacher left hot water in an open cup, accessible to the child. The Tribunal declined to find negligence, however.

the First Aid Policy outlines. She notified her manager and made appropriate arrangements for Child B to go home to be under observation. The Agreed Summary of Facts does not say, but it is likely that Mrs Legge was required to remain on the floor with children under her care, meaning a reasonable expectation that further medical advice be sought by a manager.

Penalty

- [24] Having found the charge proved, the Tribunal may impose penalties under s500 of the Act. The principles of penalty are well established, being to provide for the protection of the public, and the maintenance of professional standards and public confidence in the teaching profession. The penalty imposed should be fair, reasonable and proportionate, and comparable to those imposed in similar cases. The Tribunal should impose the least restrictive penalty that is available in the circumstances.
- [25] Mrs Legge filed a brief statement in which she further discussed the factors that influenced her conduct. This outlines that after nearly 25 years in early childcare Mrs Legge was nearing retirement and seeking to reduce her hours and responsibilities but did not feel able to do so because of the demands of work. She was new to the centre where the incident occurred and therefore unfamiliar with the space, the team and the children and their families, and met the child involved for the first time on 4 April 2023. Mrs Legge acknowledges that because of her bereavement she should not have gone to work that day.
- [26] The parties seek penalty as follows:
- (a) Censure.
 - (b) Annotation of the Register for a period of two years.
 - (c) A condition on any future practising certificate that Mrs Legge holds requiring her to provide any current employer or prospective employer in the teaching profession with a copy of the Tribunal's decision, for a period of two years.
- [27] Because Mrs Legge does not hold a current practising certificate any conditions are only effective if imposed on a future practising certificate⁷. The indication that Mrs

⁷ Section 500(1)(j) empowers the Tribunal to impose conditions on a subsequent practising certificate.

Legge does not intend to return to practice is noted, but we are mindful that circumstances change and intend to impose a penalty that takes this into account.

[28] The penalty proposed by the parties is consistent with similar cases involving a lapse of care and attention, including a failure to follow clear policies. For example, two cases involving young children being left unattended in a vehicle by early childcare teachers failing to follow procedures reached similar findings:

(a) In *CAC v Lam-Sam-Ta⁸* the teacher left a child in a van parked in her driveway after dropping off other children at their homes and then going out in another vehicle. The child was left unnoticed for around five hours before the Police were notified and the child was found. The Police issued a formal warning for neglect. The child fortunately suffered no significant harm but the Tribunal observed that there could have been “*tragic consequences*”. The teacher failed to complete the centre’s sign in and sign out form which would have ensured she was aware the child had not been dropped at home. The Tribunal imposed censure, annotation and a disclosure condition.

(b) In *CAC v Teacher & Teacher⁹* two teachers took a group of young learners on a field trip from their centre and on return both failed to ensure that all of the children were taken out of the van and one was left buckled in and sleeping. The roll was not taken on return to the centre. The child was found by a parent, upset but otherwise unharmed. The Tribunal imposed censure, and a condition requiring that the decision be disclosed for 12 months.

[29] In a similar scenario, in *CAC v Aiavao¹⁰*, the teacher was distracted and failed to check that all children had been collected before locking up and leaving work, leaving a two-year old child sleeping inside. The child was found 15 minutes later, unharmed and unaware. The Tribunal found serious misconduct including a breach of r9(1)(c) (negligence) and imposed censure, annotation of the register for 18 months, and costs.

[30] Taking into account the circumstances of this case, Mrs Legge’s current situation and the similar cases including those we have referred to, we consider it appropriate to impose a censure and a disclosure condition as proposed by the parties.

⁸ Above n6.

⁹ *Complaints Assessment Committee v Teacher and Teacher* NZTDT 2023-71 and 2023-72, 3 September 2024 (not yet published).

¹⁰ Above n6.

Costs

- [31] The CAC seeks a contribution representing 40% of the costs incurred in prosecuting this charge, and the joint memorandum records that the parties agree that Mrs Legge should contribute at this level to the CAC's actual and reasonable costs. This is in reliance on the Practice Note on Costs dated 1 April 2022, and the common practice adopted by the Tribunal to award costs in this vicinity in cases where the teacher has cooperated to enable the charge to be dealt with expeditiously. That has been the case here, with the filing of the Agreed Summary of Facts and Joint Memorandum. The CAC's schedule of costs dated 13 December 2024 shows a total of \$4,804.70 of which 40% is \$1,921.88. We see no basis to depart from the order sought.
- [32] The Tribunal may also, pursuant to s500(1)(i) of the Act, make an order towards the costs incurred by the Teaching Council in the proceedings. This is calculated on the basis of a fee, currently \$1455.00 of which 40% is \$582.00.

Non-Publication

- [33] The starting point is that hearings of the Tribunal are conducted in public. Section 501 of the Act provides that the Tribunal may order non-publication including of names or evidence or documents (in whole or part) if it is of the opinion that it is 'proper' to do so, taking into account the interests of any person and the public interest. The Tribunal will have regard to the evidence before it, and whether any adverse risk asserted to follow from publication is "likely" to occur, such that it may consider it proper to suppress names or other evidence.
- [34] Mrs Legge has applied for an order for permanent non-publication of her name. The CAC is neutral as to this application and further seeks an order suppressing the identities of Child A and Child B out of an abundance of caution (they are not named in the charge or summary of facts). We agree that a permanent order should be made in favour of the children. No application was received on behalf of the centre.
- [35] The grounds for Mrs Legge's application are set out in a brief statement which reads:

I would like to apply for permanent non-publication, considering the following:

I have been in education for nearly 25 years in many capacities. I have been an associate teacher, tutor, mentor, teacher, head teacher and learner. I have been

involved in research, regional and national associations, government agencies, and I have worked alongside a great many people in kindergartens, Playcentres and early childhood care and education settings, many of which I still have contact with and still mentor.

- [36] The Tribunal recognises that publication of an adverse disciplinary finding is likely to cause some concern for reputational harm, and some embarrassment or distress. These are considered to be ordinary consequences and not sufficient in themselves to warrant an order being made. We accept that there were mitigating circumstances that led to Mrs Legge's lapse, as discussed, and Mrs Legge's cooperative approach to the proceedings and concessions in the joint memorandum speak to her professionalism. However, in order to consider that an order is 'proper', the Tribunal typically requires evidence establishing that harm or some other adverse outcome is likely to follow publication for the person seeking the order, not simply a bare assertion. Nothing specific has been provided to the Tribunal to enable us to reach the view that an order is proper in the circumstances, and accordingly no order for permanent non-publication for Mrs Legge will be made.

Orders

- [37] Accordingly, the Tribunal orders:

- (a) Censure, pursuant to s500(1)(b).
- (b) A condition pursuant to s500(1)(j) on any future practising certificate issued to Mrs Legge, for a period of two years:
 - (i) That she is to provide any current employer or prospective employer in the teaching profession with a copy of the Tribunal's decision.
- (c) Annotation of the register for a period of two years pursuant to s500(1)(e).

- [38] Pursuant to s 501(6), the Tribunal makes a permanent order for non-publication of the names of Child A and Child B referred to in the notice of charge and Agreed Summary of Facts.

A handwritten signature in blue ink, reading 'C Garvey'. The signature is fluid and cursive, with the first name 'Catherine' abbreviated to 'C' and the last name 'Garvey' written in full.

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