

NON-PUBLICATION ORDERS

BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

NZTDT 2023-58

RARO TE MANA O TE
UNDER THE

the Education and Training Act 2020
(**the Act**)

MŌ TE TAKE
IN THE MATTER OF

of a charge referred to the Tribunal

I WAENGA I A
BETWEEN

**COMPLAINTS ASSESSMENT
COMMITTEE (CAC)**

Kaiwhiu | Prosecutor

ME
AND

MICHELE ANN PEPPER
(Authorisation 301448)

Kaiurupare / Respondent

Hei Māngai | Appearance

Milan Djurich Meredith Connell for the CAC
J Brown, NZEI for the Respondent

Tribunal

C Garvey (Deputy Chair), Maria Johnson and
David Spraggs (members)

Decision on liability, penalty and costs

5 August 2024

[1] The respondent, Michele Pepper is charged with serious misconduct or conduct otherwise entitling the Tribunal to exercise its powers in relation to a number of allegations arising during 2020 and 2021 when she was a head teacher at [REDACTED] (the kindergarten). The charge arises from a mandatory report made by Counties Manukau Kindergarten Association ("CMKA", referred to in the Agreed Summary and the charge and this decision as 'head office'). The hearing

proceeded on the papers on 1 July 2024, with an agreed summary of facts, submissions from the parties and a Reflective Statement from Ms Pepper.

[2] The CAC filed an amended notice of charge dated December 2023. While it is lengthy we have set out the particulars in full:

1. The CAC charges that MICHELE ANN PEPPER registered teacher, of Pukekohe, engaged in the following conduct between February 2020 and August 2021 while working as head teacher as [REDACTED] (Kindergarten):

- a. on at least two occasions (being 10 June 2021 and 12 July 2021),
 - i. was responsible for knowingly breaching ratios at the Kindergarten;
 - ii. did not take action to bring the Kindergarten back into ratio when she became aware of the ratio breaches;
 - iii. did not report the ratio breaches to CMKA head office;
 - iv. on or about 27 July 2021, retrospectively amended the staff roster records for 12 July 2021 to incorrectly record the times that staff had taken their breaks.
- b. On an occasion between February 2020 and May 2020, Ms Pepper:
 - i. chased [REDACTED] [Child B] (aged [REDACTED]) around the sandpit at the kindergarten;
 - ii. sat on [REDACTED] back for a few seconds when [REDACTED] fell face down in the sandpit;
 - iii. Following the incident, failed to:
 - A. Complete a Child Record of Accident form; and/or
 - B. Report the incident to [REDACTED] parents; and/or
 - C. Notify CMKA head office about the incident.

- c. On an occasion in or around June 2020, Ms Pepper:
 - i. used bleach to clean a drink bottle belonging to child [REDACTED] [Child C] (aged [REDACTED]); and/or
 - ii. Left the bottle, while it still contained bleach, unattended in the kitchen, which [REDACTED] subsequently drank from.
 - d. On an occasion in July 2020:
 - i. Ms Pepper's fingernail came into contact with the face of child [REDACTED] [Child N] (aged [REDACTED]), which cut [REDACTED] lip and caused it to bleed;
 - ii. Failed to make any record of the injury at the time, either on a Notifiable Incident Form or a Child Record of Accident Form; and/or
 - iii. Failed to notify CMKA head office about the incident.
 - e. On two occasions between June and August 2021, Ms Pepper failed to take appropriate action in response to two fallen trees in the playground, in that she did not comply with the Kindergarten's policies for notifying hazards and/or failed to take timely steps to remove remaining tree debris from the playground.
 - f. On multiple occasions failed to comply with the Kindergarten's incident reporting policy and/or Ministry of Education requirements when she classified incidents involving injuries to children's heads and/or faces as 'minor' and/or did not report these incidents to CMKA head office and/or the Ministry of Education.
2. The conduct alleged in paragraph 1, and its subparagraphs, separately or cumulatively, amounts to serious misconduct pursuant to section 10 of the Education and Training Act 2020 and any or all of rules 9(1)(a), (c), (d), (g) and/or (k) of the Teaching Council Rules 2016.
3. The conduct alleged in paragraph 1, and its subparagraphs, separately or cumulatively, amounts to misconduct otherwise entitling the Tribunal to exercise its powers pursuant to section 500 of the Education and Training Act

2020.

[3] Annexed to the summary of facts was a table of incidents in support of subparagraph 1(f), detailing incidents involving or appearing to involve a child's hand or face, and whether this was recorded and notified.

Agreed Summary of Facts

[4] The respondent signed the summary of facts on 14 February 2024. This is ten pages long and contains specific detail of all matters required to prove the charge. We do not need to set it out in full.

[5] The respondent was first registered in 2007. She commenced work at the kindergarten in 2012. Ms Pepper was employed at the kindergarten, and she resigned in September 2021 after a disciplinary investigation into the matters detailed in the charge.¹ Ms Pepper does not currently hold a practising certificate and is semi-retired but would like the option to teach in some capacity in the future.²

[6] The respondent had certain responsibilities as head teacher, including ensuring that the kindergarten complied with minimum adult-to-child ratio requirements, and kept correct records, as set out in Schedule 2 of the Education (Early Childhood Services) Regulations 2008 (the Regulations).

[7] The respondent allowed the centre to become out of ratio when she permitted a teacher to leave the kindergarten on 10 June 2021 and did not herself provide cover or take other steps to address that absence, and ratio breaches when other teachers took breaks. The respondent also did not make an accurate record of the staff member's leave, or the timing of breaks, and did not report the fact that ratio requirements had not been maintained to head office.³

[8] Similarly, the respondent allowed the kindergarten to become out of ratio on 12 July 2021 by not ensuring adequate numbers of staff were 'on the floor' at all times, including not herself providing cover or ensuring breaks were taken in a way that did not mean a breach. Further, in addition to not reporting this to head office, on this occasion the respondent retrospectively amended the staff roster records to incorrectly record

¹ ASOF at [1]-[3].

² Reflective Statement of Michele Pepper dated 6 March 2024 at [16].

³ ASOF at [8] – [13].

break times, to disguise the fact that the ratio requirements had not been maintained.⁴

[9] As head teacher, the respondent was also responsible for ensuring that appropriate procedures were followed for recording, reporting and investigating incidents and injuries that occurred at the kindergarten in accordance with a policy issued by head office. In addition to association policies, the Ministry of Education also requires reporting and record keeping as part of licensing for early childhood centres. This includes Health and Safety criteria, HS27 and HS34.⁵ The head office policy was not included in the bundle and was summarised in the summary of facts. The summary of facts states that a notifiable injury or illness must be immediately notified to head office using a prescribed form. The criteria for reporting include but are not limited to:

- (a) where there is an obvious mark, swelling or bruising;
- (b) there is profuse bleeding or bleeding that does not stop after minor first aid is applied;
- (c) a near miss incident occurs where the child could have been injured due to a hazard or event;
- (d) another staff member requests that an incident or concern is notified to Head Office.⁶

[10] It is not necessary to complete a Notifiable Incident Form for minor injuries to the head, face or mouth unless any of these symptoms or signs are present.⁷

[11] The charge and summary of facts refers to a specific incident involving a [REDACTED], Child B, when the respondent chased the child in the sandpit when they refused to follow instructions and then briefly sat on the child's back while they were face down in the sandpit. The incident was raised by another teacher who witnessed it, and the respondent agreed at the time that it was not "a good idea to be sitting" on the child. No incident or accident form was completed, and it was not reported to head office or Child B's parents.

[12] A second specific incident is detailed in the summary of facts involving a [REDACTED], Child C who inadvertently sipped from a bottle which the respondent had cleaned with bleach and left sitting on a kitchen bench. The bottle was handed to Child

⁴ ASOF at [15] to [20].

⁵ ASOF at [21]-[23].

⁶ ASOF at [25](e).

⁷ ASOF at [25](f).

C's mother by another teacher, then:

33. [Child C] sipped from the bottle and immediately cried out and spat the contents out.

34. Ms Pepper was nearby when this happened. She took the bottle from [Child C] and gave him a drink of water from another cup. [Child C] was upset and cried for a brief time.

35. After [Child C's] mother left, Ms Pepper exclaimed to another teacher, Ms Patel, "that was a near miss!"

36. Ms Pepper did not complete a Notifiable Incident form in relation to this incident. Nor did she complete a Child record of Accident form. Instead head Office became aware of the incident a few days later after a parent raised the incident...

[13] A third incident involving a named child, Child N, is outlined in the summary of facts, whereby the respondent reached out and accidentally caught the child's lip with a fingernail causing a small bleed. Another teacher asked Ms Pepper to complete an incident form, but she did not do so, or notify the child's parents. The child's mother attended the kindergarten within the next days or weeks and spoke to the respondent, and it was subsequently discussed with head office.⁸

[14] The remaining incidents said to be reportable are described briefly in the table annexed to the summary of facts. It is alleged that Ms Pepper largely failed to follow the head office guidelines for recording and reporting notifiable incidents. The table contains 62 incidents, with nine categorised as serious and notified per procedure. The remaining 53 were recorded as minor and with no incident form completed. The summary asserts that "some" of these 53 were incorrectly classified as minor. Not all of the incidents were seen by Ms Pepper, and some were recorded by other staff.

[15] Finally, the summary of facts addresses concerns with Ms Pepper's response to a hazard posed by fallen trees and tree debris on the kindergarten premises where children were able to and did play. Staff raised concerns about the trees, and Ms Pepper failed to take timely steps to address those concerns or to report the fallen trees to head office. The trees were removed when another teacher reported the matter to head

⁸ ASOF at [37] to [43].

office.⁹

[16] Ms Pepper participated in an internal disciplinary process, and resigned after her employer indicated a finding of serious misconduct. Following this the CMKA head office lodged a mandatory report with the Teaching Council, and Ms Pepper cooperated by responding to the investigation report, and with this disciplinary process.

Liability: Principles and Submissions

[17] The amended charge pleads serious misconduct, and in the alternative, misconduct. To find serious misconduct we need to be satisfied that one of the limbs under s 10(1)(a) is met, as well as conduct that is of a nature or severity to require reporting to the Teaching Council under r 9 of the Teaching Council Rules 2016. Misconduct does not require that we find a breach of the rules¹⁰ but are satisfied under s10 that the conduct:

- (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.

[18] The CAC submitted that all limbs of s10 are met. For s10(1)(a)(i) counsel referred to the incidents with Child B, Child C and Child N and the danger posed by the fallen trees and debris. With regard to s10(1)(a)(ii) it was submitted that the falsifying of records to hide the breach of student-staff ratios, the failure to report notifiable injuries to head office, and allowing a persistent hazard in failing to manage the fallen trees promptly, most significantly reflect on the respondent's fitness.

[19] With regard to s10(1)(a)(iii), counsel correctly refers to the question of disrepute requiring an objective assessment, with the question being whether reasonable members of the public informed of all factual circumstances could reasonably conclude that the reputation and good standing of the profession was lowered by the conduct; and relies on the *"breadth of Ms Pepper's breaches [which] span a range of obligations: breaching student: staff ratios, physical and emotional harm to learners, failure to keep accurate records (a system put in place to protect the wellbeing of learners), and*

⁹ ASOF at [49]-[51].

¹⁰ *Evans v Complaints Assessment Committee of the Teaching Council of Aotearoa New Zealand* [2021] NZCA 66.

dishonesty.”

[20] For the second part of the test for serious misconduct the CAC submits that the conduct is in breach of several of the rules as follows:

- (a) the use of unjustified or unreasonable force in relation to Child B: r 9(1)(a).
- (b) neglect of a child or young person, in relation to the failure to maintain staff ratios, and to comply with incident reporting requirements: r 9(1)(c).
- (c) failing to protect a child or young person due to negligence or misconduct in relation to Child C, and allowing the hazard of the fallen trees to persist: r 9(1)(d).
- (d) acting dishonestly in relation to a teacher’s professional role, in reliance on the falsified staff records in June 2021: r 9(1)(g).
- (e) an act or omission that brings or is likely to bring the profession into disrepute, based on the cumulative conduct described in the charge: r 9(1)(k).

[21] On behalf of Ms Pepper several mitigating factors were put forward including the disruption and difficulty caused by the COVID-19 pandemic, her lack of comfort in a leadership position and changes from sessional kindergarten to a full day service. Nonetheless the respondent accepted that cumulatively her conduct amounts to serious misconduct. Because of this admission, counsel did not explore each of the particulars in the same manner as the submissions for the CAC but did address penalty in more detail.

Liability: Discussion

[22] We find the conduct cumulatively amounts to serious misconduct. We outline our key findings, focussing on those that are most important to our penalty decision.

[23] Accurate ratios and recording are important for child wellbeing and learning and reflect a minimum standard rather than optimal levels with built-in flexibility. Maintenance of required ratios, and records, are necessary for funding purposes. Centres know the number of students of each age group they are entitled to enrol, and how many are in fact enrolled and expected to attend each day or session. While Ms Pepper would have administrative tasks, it was her responsibility to prioritise that correct ratios were maintained when allowing teachers to be absent or take breaks.

[24] We found the seriousness with which the incident with Child B was presented to be at odds with the fact that no immediate report was made, particularly given there

appeared to be a reasonably free exchange between other staff and Ms Pepper, and with head office reflected in the summary of facts. Ms Pepper should have reported the incident to head office and to the child's parents.

[25] We concluded that the incident with Child C, whose bottle was cleaned with bleach, was a genuine accident however there were several obvious ways this could have been avoided, whether by use of another non-toxic cleaning agent, washing and rinsing the bottle, or leaving a clear note so no mistake was made. This incident should have been reported as the "near-miss" that Ms Pepper herself described it as.

[26] The incident in relation to Child N was accidental and would not of its own have been a matter warranting disciplinary consideration in our view. However, again, Ms Pepper made an error of judgment in not reporting it and the involvement of the child's parent and another teacher in reporting to head office suggests there was dissatisfaction with Ms Pepper's response when the matter was discussed with her.

[27] With regard to the fallen trees and the delay in taking steps to remove this hazard, there is a basic expectation that at the commencement of each day or session at an early childhood centre, a health and safety check will be conducted on the physical environment. If anything is deemed unsafe then this ought to be addressed immediately. In this case it seems the potential risk to children, who were able to play on and around the trees and debris was not taken particularly seriously by the respondent, who delayed in addressing the hazard and it was ultimately dealt with by others in her absence.

[28] Finally, we found it difficult to address just how many of the 53 incidents in the table supplied warranted reporting as notifiable incidents. It is important that incidents are properly categorised and collated, including to ensure that appropriate steps are taken, and any patterns are identified, and that was the respondent's role as head teacher. The information as presented did not provide sufficient detail in the majority of cases for us to feel confident in concluding that they were notifiable. Not all of the incidents were those observed by the respondent, and there may be some difficulty in assessing incidents reported by other staff depending on the level of detail provided.

[29] We find that all three limbs of s10 are met, for the reasons outlined by the CAC and acknowledged by counsel for the respondent. We also find that the threshold for serious misconduct is met as the respondent's conduct was in breach of r 9(1)(k), reflecting the scope of conduct that is contained in the charge and that has the potential for harm, as well as the need for open communication with the whānau of young children

attending kindergarten or other early child centre. The act of falsifying a record also means r 9(1)(g) is engaged. We do not consider it necessary to address the other alleged breaches other than to note that we do not consider that the evidence warrants a finding that that the respondent acted negligently.

Penalty – Submissions and discussion

[30] The principles of penalty in disciplinary proceedings are well established. As both parties summarised in their submissions, penalty is intended to protect the public, maintain standards and should be fair, reasonable and proportionate in the circumstances. The Tribunal should seek to ensure that the penalty imposed is comparable to other similar cases. Counsel for the CAC referred us to *CAC v Paewai*¹¹, and *CAC v Sharma*¹², both of which resulted in cancellation.

[31] The CAC submit that cancellation is the appropriate starting point, taking in account the cumulative effect of the misconduct, but submitted that if the Tribunal does not consider cancellation is necessary then the penalty should be:

- (a) censure;
- (b) annotation of the register;
- (c) conditions on any future practising certificate for 24 months including:
 - (i) ongoing supervision with an approved supervisor/mentor who will provide quarterly updates to the Teaching Council;
 - (ii) that Ms Pepper is not to hold a management position; and
 - (iii) to provide a copy of the Tribunal's decision to any prospective employer.

[32] On behalf of the respondent, it was not accepted that cancellation is appropriate, noting as mitigating factors the stressors Ms Pepper faced in her role as head teacher (as outlined in her Reflective Statement), her previous successful practise as a teacher in a non-management role, her engagement with the disciplinary process, and steps taken to reflect on and address the behaviour that led to her misconduct. Ms Brown submitted that the alternative penalties proposed by the CAC and set out at [31] above meet the purposes of discipline, by ensuring that standards are set, and the public are protected.

¹¹ *Complaints Assessment Committee v Paewai* NZTDT 2019/107 and 108.

¹² *Complaints Assessment Committee v Sharma* NZTDT 2018/51, 25 March 2019.

[33] Neither party referred to suspension, given Ms Pepper does not hold a current practising certificate.

[34] We are satisfied that a penalty short of cancellation is appropriate in this case and consider that while the alteration of ratio records was very serious, some of the particulars in the charge would not have led to discipline on their own. We also take into account the matters outlined in Ms Pepper's Reflective Statement including her acknowledgment that she is not suited to a leadership role. It is important to be practical with the nature of conditions imposed so that they are workable and not a de facto cancellation. Ms Pepper states that if she returns to some teaching work it is likely to be in a limited role or relief teaching. This will mean supervision or mentoring is difficult, and such a condition may effectively preclude her from teaching (unless she does find a long term or permanent role).

[35] We will impose a censure, and conditions including a disclosure requirement, and that Ms Pepper not work in a management position, together with annotation of the register.

Costs

[36] The CAC sought a 40% contribution towards costs. This reflects the guidance in the Practice Note on Costs and the usual award made by the Tribunal in cases where a party has cooperated to bring a matter to hearing expeditiously. The respondent did not in principle dispute paying a contribution but reserved the position to make further submissions once the CAC filed its schedule of costs. The schedule dated 14 June 2024 sets out costs in the sum of \$16,250.70 (40% being \$6,500.28). The respondent did object to the reasonableness of this figure, filing further submissions on 18 June 2024.

[37] In challenging the reasonableness of the CAC's costs, the respondent points to other cases dealt with on the papers in which substantially lower costs have been incurred and describes the costs in the present case as "*a significant outlier*", even taking into account the number of particulars involved. The respondent suggests that a reasonable figure is \$2550-\$2700. No submissions are made regarding Ms Pepper's capacity to pay a costs award.

[38] Counsel for the CAC filed a memorandum in reply on 21 June 2024, submitting that the key consideration for the Tribunal in assessing the quantum of costs for which the respondent should be liable (leaving aside other factors that may be specific to a

respondent's ability to meet costs) is the reasonableness of the costs sought. It is submitted:

The question of what is reasonable insofar as costs are concerned must turn on the circumstances of each case. It is trite that no two matters that are the subject of a prosecution before the Tribunal are the same. The cases referred to in Ms Pepper's submissions cannot purport to be a comprehensive examination of costs orders across all cases, nor can they be seen as a guide as to what costs are reasonable; the cases form part of a selective sample.

[39] The CAC goes on to refer to a small sample of cases in which greater costs orders were made in favour of the CAC. While this may also be described as a selective sample, the point is well made and the essential point is (as the CAC submit) that what amounts to reasonable costs may vary significantly from case to case, and the number of particulars in a charge will not always accurately reflect the degree of complexity involved.

[40] We are assisted by the recent exposition on costs in disciplinary proceedings in the High Court decision of *A Professional Conduct Committee v Brown*.¹³, an appeal against a decision of the Health Practitioners Disciplinary Tribunal (HPDT). To summarise the principles confirmed in *Brown*, which specifically refers to the Practice Note in this Tribunal as well as the HPDT's similar guidance the general principle is that costs in disciplinary proceedings should not be wholly borne by the profession, and people who come before disciplinary bodies must be expected to make a proper contribution to costs. Further:

- (a) costs are not intended to be part of a penalty, and as such, factors pleaded in mitigation on penalty are not relevant to costs.
- (b) the usual starting point for a contribution is 50%.
- (c) care needs to be taken to avoid "*double accounting*" as the level of cooperation will be reflected in the quantum of costs against which the 50% starting point is taken. If a practitioner has admitted a charge and fully cooperated in bringing the matter to an expedient end the appropriate reduction is in the region of 10% in most cases.
- (d) costs are discretionary and not suited to a "*granular comparison*" between cases.¹⁴

¹³ *A Professional Conduct Committee v Brown* [2024] NZHC 990.

¹⁴ Above n13, summarising the costs discussion at [86]-[94].

[41] It is apparent from the charge and the summary of facts that the case involved familiarity with a number of source documents and relevant regulations and policies, and the summary of facts itself is detailed and clearly took time to prepare. Counsel also provided detailed written submissions. The absence of an application for non-publication orders reduced the costs involved but does not mean the costs incurred are unreasonable and we note that both parties were invited to file memoranda in relation to interim non-publication, which they did, with the CAC supporting the interim orders.

[42] Taking these matters into account, we do not consider there is a basis to reduce the level of costs contribution sought by the CAC.

[43] The Teaching Council is also entitled pursuant to s 500(1)(i) to a contribution towards the cost of conducting the hearing. This amount is based on a standard fee and does not reflect the actual costs incurred in preparation for the hearing, the hearing itself or preparation of the decision.

Non-Publication

[44] The Tribunal may make orders for non-publication pursuant to s 501 of the Act, if it considers that it is proper to do so taking into account the public interest, and the private interests of any person.

[45] Prior to the hearing interim non-publication orders were made with respect to the learners identified in the charge and the kindergarten, for the protection of those learners. We consider it is proper to make the orders permanent and this is not opposed by the CAC or respondent.¹⁵

[46] Ms Pepper does not seek a permanent order for non-publication of her name but supports the orders in favour of the learners and the kindergarten.

Orders

[47] Accordingly, the Tribunal orders as follows pursuant to section 500 of the Act:

- (a) Ms Pepper is censured pursuant to s500(1)(b).
- (b) The following conditions are to be imposed on a future practising certificate for 24 months pursuant to s500(1)(j):

¹⁵ The CAC notes that the kindergarten has not made an application but submits that to the extent that the name of the kindergarten may lead to identification of any of the learners, the order is appropriate.

- (i) that Ms Pepper is not to hold a management position; and
 - (ii) to provide a copy of the Tribunal's decision to any prospective employer.
- (c) Annotation of the register pursuant to s500(1)(e).
- (d) Ms Pepper is to pay costs to the CAC in the sum of \$6,500 pursuant to s500(1)(h) and in the sum of \$582 to the Teaching Council pursuant to s500(1)(i).

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

- (a) The names and identifying particulars of the learners referred to in the amended notice of charge and Agreed Summary of Facts.
- (b) The names and identifying particulars of staff members referred to in the amended charge and Agreed Summary of Facts.
- (c) The name of [REDACTED]



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