BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

NZTDT 2019-109

IN THE MATTER	of the Education Act 1989
AND	
IN THE MATTER	of a charge referred by the Complaints Assessment Committee to the New Zealand Teachers Disciplinary Tribunal
BETWEEN	**COMPLAINTS ASSESSMENT COMMITTEE**
AND	[redacted]
	Respondent

TRIBUNAL DECISION DATED 7 SEPTEMBER 2020

HEARING: Held at Auckland on 8 July 2020

TRIBUNAL: Theo Baker (Chair)

Maria Johnson and Neta Sadlier (members)

REPRESENTATION: Ms Mok for the CAC

Ms Amaranathan for the respondent

1. In a Notice of Charge dated 1 October 2019, the Complaints Assessment Committee (**CAC**) alleged that on 14 December 2018 the respondent, while working at [redacted], used unjustified or unreasonable physical force to restrain a 2-year-old child on a bed.

2. The charge was originally framed as serious misconduct under section 378 of the Education Act 1989 (**the Act**) or conduct otherwise entitling the Tribunal to exercise its powers under section 404 of the Act. On 28 May 2020 the CAC sought leave to amend the charge to one of misconduct. Before the hearing on 8 July 2020 the charge was amended accordingly.

3. We must first decide if the CAC has proved the allegation in the charge. If we are satisfied on the balance of probabilities that the conduct occurred, we may then consider whether the conduct amounts to misconduct.

Summary of decision

4. We found that the respondent used two hands to lay Child A on the bed. We were mildly critical of the way in which the respondent tried to get Child A to lie down, but we did not find that the respondent had restrained the child by using unjustified or unreasonable force. The charge is therefore dismissed.

Preliminary matters

5. Before the hearing the parties filed a memorandum of agreed and disputed facts. There were originally three matters in dispute, but the CAC advised by memorandum on 28 May 2020 that it no longer sought to prove one of those matters. This was confirmed before the hearing on 8 July and so evidence of that matter was not led.

6. The CAC also noted that in the Agreed Summary of Facts (**ASF**) the respondent accepts that she held the child tightly to her chest when she was taking his shoes off. Therefore the remaining factual matter for us to determine was whether the respondent used her hand to apply force to hold the child down on the bed while he was trying to get up. The respondent accepted that she placed her hand on the child's back but disputed pressing down with her hand or using force.

7. The CAC had applied to exclude the email dated 23 March 2020 from the respondent's GP, Dr Peter Cameron, produced by the respondent as **CG6** on the basis that the evidence is hearsay. The doctor was not giving evidence at the hearing.

8. The parties agreed that the evidence is hearsay. Ms Amaranathan argued that the

hearsay was admissible under sections 18 and 19 of the Evidence Act 2006 on two grounds:

a) The report is a business record;

b) The maker of the statement is unavailable.

9. We do not agree that this is a business record. It is a report that was prepared for the respondent for the purposes of this hearing. A printout of appointments or clinical notes might be a business record (depending on what issues are in dispute), but an "expert" opinion cannot be a business record.

10. Ms Amaranathan argued that because the respondent could not afford to have the doctor attend a hearing for a day, the witness was therefore "unavailable". We do not accept that argument. For the purposes of section 18, section 16 of the Evidence Act defines "unavailable" as dead; or is outside New Zealand and it is not reasonably practicable for him or her to be a witness; or is unfit to be a witness because of age or physical or mental condition; or cannot with reasonable diligence be identified or found; or is not compellable to give evidence.

11. None of those exceptions apply here, and as we noted, with the advancements in the accessibility of audio visual links since the enactment of the Evidence Act 2006, even being out of New Zealand is unlikely to be a basis for unavailability.

12. We accept that there is a cost involved in calling an expert witness. There are ways to mitigate that, including applying to have the doctor available for videolink at a specified time.

13. In our opinion, Dr Cameron's evidence would not be admissible in a court.

14. Under rule 31 of the Teaching Council Rules 2016 the Tribunal

> *...may receive as evidence any document, record, or other information that may in its opinion assist it to deal with the matter before it, whether or not the document, record, or information would be admissible in a court of law.*

15. We decided to admit the evidence on the basis that it may be of some assistance to us and we would decide what weight to give it, bearing in mind that the doctor had provided an opinion without assessment of the respondent and was not available for cross-examination. In fact, we made our decision about the conduct without reference to this evidence.

Evidence at the hearing

16. We considered the following evidence:

    a) An agreed summary of facts;

    b) Oral evidence from [redacted] and [redacted] for the CAC;

    c) Oral evidence from the respondent and [redacted];

    d) Documents contained in the Agreed Bundle of Documents.

17. The statement from[redacted] had been filed late on 6 July, sometime outside the time tabling directions. The CAC did not object to the late filing of this evidence but required Ms [redacted] for cross examination. This was arranged by videolink. There was no objection to hearing her evidence not only before the respondent gave evidence but also in the middle of the CAC case.

18. The panel also made a site visit immediately after the hearing commenced, and before any witness was heard.

Agreed facts

19. The accepted facts were contained in a document dated 17 March 2020 and signed by both parties. It was agreed that Ms [redacted] is a registered teacher who currently holds a provisional practising certificate. She is a teacher at [redacted], an early childhood service, in [redacted], Auckland (t**he Centre**) as a teacher. The Centre cares for children aged between 0 and 5 years old. At the time of the relevant conduct, Ms [redacted] had been a teacher of "[redacted]", a programme for children aged 2 and 3 years old, for around one week. Prior to that she was employed by the same Centre, with the 0-2 year olds.

Incident on 14 December 2018

20. Shortly after midday on 14 December 2018, the respondent and another teacher were putting about 20 children down to sleep in the sleep room. The other teacher began to help Ms [redacted] put some of the children to sleep by gently rubbing them on their backs and/or sides as they lay in their designated beds.

21. The other teacher informed Ms [redacted] as she left the room that one of the children at the Centre, a two-year-old male child (Child A), was not to be put to sleep because he was being picked up very soon, and then left the room.

22. Ms [redacted] said she did not hear the other teacher tell her that and forgot she had

been told that on an earlier occasion. Having only been with the [redacted] one week, Ms [redacted] says she was still getting to know the children and their routines. Ms [redacted] wears a hearing aide, and the room also had around 20 children in it at the time.

23. Child A's mother and grandmother arrived at the Centre around this time. Child A's mother and grandmother observed Child A.

24. Child A was jumping on the beds and Ms [redacted] says she pointed to a bed and told Child A it was time to stop jumping and lay down like his friends. Child A started walking away, so Ms [redacted] picked up Child A and laid him on the bed. Child A got up again, and Ms [redacted] held him against her chest while she took his shoes off. Ms [redacted] then took off the child's shoes and dropped them on the floor. Ms [redacted] suffers from arthritis and cannot easily bend her knees. She said that because her fingers were strapped at the time, she did not have much strength in her hand. She used the palm of her hand to flick the shoes off.

25. Ms [redacted] then told Child A it was time to sleep and laid him back down on the bed on his stomach. Child A went to get up, so Ms [redacted] pointed at the bed, again asking Child A to go to bed. Child A refused.

26. At one stage during the interaction between Ms [redacted] and Child A, Ms [redacted] placed her hand on Child A's back, while Child A was on his stomach on the bed. Whether any force was used by Ms [redacted] on the child's back during this interaction is in dispute.

27. At this point, Child A started crying, and Child A's mother and grandmother came over. Child A's mother told Ms [redacted] that she had been too rough with her son. Ms [redacted] said, "I'm sorry, I didn't know that he was getting picked up". Ms [redacted] says the reason for her apology was that she had been trying to put Child A to bed and had not realised he was not a "sleeper" because he was due to be picked up. Child A's mother and grandmother also informed two other teachers that Ms [redacted] had roughly handled Child A.

28. The other teacher (referred to at paragraphs 3 and 4 above) went and spoke with Ms [redacted], who told her that all she had done was place Child A on the bed and pat him to sleep.

Teacher responses

29. On 14 December 2018, Child A's mother lodged a complaint about Ms [redacted] conduct with the Centre. In her response to the Centre's investigation, Ms [redacted] said that she had placed her hand on Child A's back after laying him down on his stomach in order to "discourage him from getting up" and to reaffirm that it was time to sleep and "as a comfort for the child, so they know that we are still there, and also in this instance, to reaffirm him that it was time to finally settle down and go to sleep".

30. On 17 December 2018, the Centre Manager lodged a mandatory report with the Teaching Council regarding Ms [redacted] conduct.

31. On 20 December 2018[1] Ms [redacted] provided a response to the mandatory report to the Council's investigator. The respondent said she held Child A to her chest to take off his shoes because the stretcher pads on the bed were "quite bouncy", and "sometimes unstable to walk on", so she was holding the child as a "safety precaution".

32. The respondent denied that she used force to restrain Child A on the bed. She said that she placed her hand on his back as teachers often do as a comfort for the child, so the child knows that they are still there, and also in this instance, to reaffirm to him, that it was time to finally settle down and to go to sleep. She further said that she had used no physical force during the interaction, but rather had placed her hand on his back and used "encouragement and affirmation". Ms [redacted] also said this was standard practice in most childcare centres that she had worked in.

Police investigation

33. Police investigated a report dated 14 December 2018 of an allegation of an assault on Child A by Ms [redacted] and found that Ms [redacted] was "not criminally at fault". The Police decided to take no further action on the report.

The CAC's evidence

34. The CAC called Ms A, the mother of Child A and [redacted], a Teaching Council investigator.

[redacted] *(Ms A)*

35. Ms A is the mother of [redacted] (Child A) who started going to the Centre on 8

[1] Although the ASF read 2019, we assume this should be 2018, as a charge had already been laid by December 2019.

October 2018 when he was 2 years and 3 months.

36. On 14 December 2018 she and her mother, [Ms B] went to the Centre before 12.30 to collect Child A at his usual pick-up time of 12.30pm. She stood for a while outside her son's classroom, watching him. She saw the respondent speaking to her son and pointing at a bed in the sleeping area. Child A walked away.

37. Ms A said that the respondent then picked Child A up and put him on the bed. Child A tried to keep getting up. He was on his hands and knees. Ms [redacted] saw the respondent place her hand on his back and put pressure on his back with her hand. When Child A still struggled and got up successfully, she again picked him up again from the sides of his tummy.

38. Ms A said that she was traumatised (in shock) at what she was witnessing, and so she rushed into the classroom to intervene. Child A was crying. She picked him up and cuddled him. She said to the respondent, "You were very rough with him." The respondent replied, "I'm sorry. I didn't know he was getting picked up".

39. Ms A then left the sleeping room and spoke with two other teachers, Ms C and Ms D. She told them what she had seen. She then lodged a complaint with the Operations Manager and the Owner of [redacted]

40. Ms A took her son to a doctor who checked for a head and wrist injury as Child A had told her that he was sore in those places. Mr [redacted] produced a copy of a medical record (DR2) which confirms a contusion to wrist and hand. Included in the Bundle of Documents were photographs showing bruising on Child A's hand.

41. We were also provided with a copy of photograph taken at the Centre. Ms A said that she took the photo on 18 December 2018. It was a view through a glass door which has the lettering [redacted] on it. Below that is a "Please shut the door" sign stuck on the door. Above to the right is another sign. Through the door adults can be seen. One is sitting on the floor and one is standing leaning over.

42. Ms A explained that this was a view of the sleeping area from the main hallway. It is the door to the main classroom but immediately on the right is an open doorway that leads to the sleeping area.

43. In cross-examination, Ms A accepted that there is a coating on the glass of the door, but did not accept that the view was "semi-transparent", saying it was transparent for

her. She also accepted that you cannot see all corners of the room, but said it shows a view of where the respondent and Child A were.

44. Ms A did not accept that she had misinterpreted what she had seen.

45. In answer to questions from the Tribunal Ms A confirmed that the respondent applied pressure with one hand. It was her right hand, and Ms A could not see the left hand because the respondent was facing side on.

46. Ms A clarified that the respondent had her hand on Child A's back for 3 to 4 seconds. Child A was on his hands and knees and he went down on the bed and got back up twice.

47. Ms A explained that usually when she collected her son, she would stand observing him before she entered. She liked to see how he was behaving, whether on his own or with other children.

[redacted]

48. Mr [redacted] provided evidence of his investigation and produced copies of documents obtained during the Centre's investigation, and the photograph referred to above.

The respondent's evidence

The respondent

49. The respondent outlined her health issues, which include arthritis, [redacted], [redacted], [redacted] and impaired hearing. [redacted] [redacted] [redacted].

50. The respondent denied that she forced Child A down. She accepted that she placed her right hand on Child A's back to affirm to him that it was time to go to sleep, but she did not use force to hold him down. She said it would have hurt her to do so at the time because she had a crush injury to that hand and could not have used force to hold a child down. She had been moved into [redacted] because she could not hold the babies after her finger injury.

51. The respondent referred to the email dated 23 March 2020 from her GP (**CG6**) who confirmed that on 22 November 2018 the respondent had been seen by his senior nurse who recorded she had a crush injury to the nail bed of her right index finger, with bleeding at the nail base. He said that it was likely that this injury, which was apparently still being treated with strapping, would still have been affecting her ability

to grip on 14/12/2018, and it is likely it would have been difficult for her to flex sufficiently low to use force to push a child down onto a bed.

52. Ms [redacted] referred to the photo taken by Ms [redacted] and said you cannot see the right side of the sleep room from the classroom doorway.

53. The respondent said that the sleep room was busy. There were 22 children in it and only around half of them were settled. The other half required her attention. Child A had been bouncing on the beds. The respondent was putting him to sleep on the right side of the sleep room. She said you can see the right side of the sleep room from the doorway to the sleep room, but not from through the window of the outer doorway, where Ms A says she was watching.

54. The respondent said that when she placed Child A on the bed she lay him down onto his tummy. She put her right hand on his back as a comfort gesture and to affirm to him that it was time to go to sleep. She did not hold him down on the bed. He could get up if he wanted to and he did get up.

55. The respondent explained that it was her usual practice to place her hand on a child's back to help them to sleep and she has seen many other teachers do the same. Sometimes teachers rub the child's back. Other teachers will kneel down next to a child while they are patting a child's back, but the respondent cannot easily bend her knees due to arthritis, so she bent over the top of Child A while she placed her hand on his back. The beds are low, only about 20cm off the floor.

56. She said that Child A only began crying just before his mother reached him. The respondent had been about to comfort him because he was crying, when his mother arrived beside her and picked him up.

57. In cross-examination, the respondent accepted that she had picked Child A up but said that because her right hand was injured, she would have used her right wrist, rather than her hand. She had two fingers strapped. She did not accept that she could push down with any force.

58. The respondent acknowledged that it was a bit disruptive in the sleep room and that Child A was not co-operating, but she did not accept that she was frustrated with him. She agreed that she tried to put him down a couple of times because he kept getting up.

59. The respondent agreed that Child A got upset. She said he calmed down and then got upset again. In her mind it was a reaction to seeing his mother.

60. The respondent accepted that when Ms A spoke to her, she was concerned that the respondent had been rough with Child A.

61. The Tribunal sought clarification of some issues. The respondent agreed that she had used the heel of her right hand to flick Child A's shoes off, and that it might be possible to apply some pressure with the heel or palm of her hand without engaging her fingers.

62. The respondent said that Child A was on his hands and knees when she was trying to resettle him after he got up the first time. She said she had her left hand on his back and she was trying to flick his knees out with her right hand to get him to lie down. She was moving his legs down to get him to flatten rather than having to lift him up again. She clarified that she was trying to guide his knees to get him to lie on his stomach. He then lay down for about 5 or 6 seconds, during which time the respondent's left hand was on his back while she patted him with her fingers two or three times. Child A was not distressed at this time. The respondent said that she also had her right hand on him at times.

63. The respondent was asked about the length of time between her hand injury and being moved to the [redacted]' room. She had thought that she had left the Babies' room a day or two after her injury but then said she must have gone back to the Babies' room for a while.

64. In further cross-examination on issues arising out of the Tribunal's questions, Ms Mok explored the respondent's evidence of trying to flick Child A's legs out, which had not appeared in any of her earlier statements. The respondent said that she used her right arm to do this.

65. The respondent did not accept that she had just made this up. She said that when she had previously said that she had laid Child A down on the bed again, this is what she had meant, that this was how she had laid him down. She went on to say, that by "flicking" she had meant that she had straightened his legs out. In re-examination the respondent confirmed that she had not previously been asked how she had laid Child A down.

[redacted]

66. [redacted] gave evidence that in December 2018 she was the Head Teacher of the

[redacted] Room but at the time was filling in as Head Teacher for the [redacted] Room. On December 14th, 2018 at approximately 12:25pm they were gathering all the children in the [redacted] room to put them to bed in the sleep room. The respondent was the person responsible for putting children to bed and supervising the sleep room while the children slept.

67. Ms [redacted] said that she was supporting the respondent in putting some children to sleep also by rubbing their back/side/tummy in a circular motion as they laid in their designated sleeping beds.

68. Another teacher had been helping in the sleep room but was no longer needed and was attending to other tasks.

69. Ms [redacted] was aware that Child A was only enrolled at the centre between the times of 8-12noon from Monday to Friday. At 12:28pm when all the children were drifting off to sleep, Ms [redacted] told the respondent to help the other staff member to take down documentation from the walls. She also informed her that Child A was not to be put to bed as he would be picked up soon.

70. Ms [redacted] said she stepped out of the sleep room and made her way to the shelves. As she turned around from the shelves, she saw Ms A had just come into the room. After picking Child A up, Ms A asked who the respondent was and said she had been rough with Child A.

71. Ms [redacted] confirmed that Ms A does stand outside of the room for a bit before collecting Child every day as she would like to see how he is getting on in the room without him knowing that she is there. Ms [redacted] was aware of Ms A standing outside the door. She said it was for approximately three to five seconds before she made her way into the room with Child A's grandmother following shortly behind.

72. Ms [redacted] said that looking at the two photos that were taken from the entrance door of the [redacted] room, you can only see a part of the sleep room, you cannot see where the respondent was trying to put Child A to sleep until you walk into the room from the entrance door. In the photograph taken, you can clearly only see approximately four beds, however the sleep room can have up to sixteen or seventeen beds.

The issues

73. We did not allow extensive questioning about the Council's investigation process. Ms

Amaranathan did not challenge to the accuracy of any record of statement made by the respondent in that process. The onus is on the CAC to prove its case based on the evidence produced at the hearing.

74. After hearing the evidence, the parties made submissions. We invited the parties to comment on the proposition that the Tribunal needed to consider the following questions:

a) Did the respondent place her right hand on the back of Child A for 3 to 4 seconds and twice apply pressure? (And if the answer is 'No', that is the end of the matter.)

b) If yes, does that amount to holding Child A down on a bed.

c) If yes, is that restraint?

d) If yes, is that misconduct?

e) If yes, what is an appropriate penalty?

Submissions

75. For the CAC, Ms Mok submitted that the key issues are:

a) Was Child A pushed down in the manner described by his mother?

b) Does that conduct amount to misconduct?

76. Ms Mok invited us to consider the ordinary meaning of restraint. She referred us to the section 139AC of the Act, noting that although the section does not apply to early childhood education centres, the definition of restraint in that section should be used.

77. Section 139AC provides:

139AC Limits on use of physical restraint in schools

(1) A teacher or authorised staff member must not physically restrain a student unless—

(a) the teacher or staff member reasonably believes that the safety of the student or of any other person is at serious and imminent risk; and

(b) the physical restraint is reasonable and proportionate in the circumstances.

78. The term *"physically restrain"*, is defined in subsection (2) as "to use physical force to prevent, restrict, or subdue the movement of the student's body or part of the student's body."

79. Ms Mok submitted that what Ms A described meets the ordinary definition restraint. She submitted that Ms A has been consistent in her account and given the similarities between her account and that of the respondent, it is clear that she did observe the interaction. Further, the fact that Ms A went to intervene in the sleep room supports the notion that she had witnessed something she considered was inappropriate, and it was accepted that she referred to rough treatment.

80. Ms Mok also noted that the respondent's evidence of a flicking motion to get Child A to lie flat had not been mentioned in any earlier statements.

81. For the respondent, Ms Amaranathan agreed the issues were as we had outlined. She submitted that a restraint is not an attempt to subdue but involves actual prevention of movement. She also set out further detail provided at the hearing, which Ms A had not previously provided.

82. Ms Amaranathan also challenged Ms A's evidence of pressure applied on Child A's back, saying pressure is something you cannot see.

83. It was further submitted that Ms A would not have been able to see the respondent because of the location of the bed.

84. She also submitted that there was an inconsistency in Ms A's evidence that the respondent's hand was continuously on Child A's back the whole time as an example, and then at another point she said her hand was also on his back for 3 to 4 seconds.

Findings

85. The CAC must prove the charge on the balance of probabilities. The central fact that we must decide is whether on 14 December 2018 the respondent placed her right hand on the back of Child A for 3 to 4 seconds and twice applied pressure, forcing him down to the bed.

86. We found Ms [redacted] evidence was consistent. On questioning she was precise and clear in the details of what she observed.

87. Having viewed the premises, we find that the view through the door was clearer than in the photo provided. We observe that the human brain probably allows a better focus on the objects in the distance (the people), whereas the camera perhaps focused more on the mesh that covered the class. Standing at the outside door, the view might be a bit more expansive than captured in the photograph, but it was still limited to part of the

sleeping room.

88. The respondent argued that Ms A would not have been able to see her and Child A at the bed. It would have been helpful to have had some other visual aids, such as a layout of the premises and some photographs of exactly where the respondent and Child A were. We accept the CAC submission that there was sufficient similarity between the two parties' accounts for us to be satisfied that Ms A could see the respondent and did see an interaction. As Ms Mok noted, there is no dispute that Ms A immediately said that the respondent had handled Child A roughly. We find that Ms A could see the respondent and Child A and that she was not happy with what she saw.

89. During the hearing both Ms A and the respondent provided more detail of events in response to questioning. We acknowledge Ms Mok's submission that the respondent's description of "flicking" or "sweeping" Child A's legs is new, rather than further detail. However, the respondent's evidence was that is what she meant in her prior statement that she had laid him down on his bed again and placed her hand on his back.

90. We accept that the process of laying a child on a bed may involve moving the child's legs with one hand or arm and that is not an unreasonable action. The respondent said that her right hand was on Child A's back and she moved his legs with her left arm. The respondent did not strike us as someone who would have the inclination or mindset to fabricate at the hearing, (in response to Ms A's evidence that she could not see the respondent's left hand), that she was using her left hand to move Child A's legs. We accept the respondent's explanation that the action she described in her evidence before us was what she meant when she had previously said that she lay Child A on the bed.

91. Ms A's evidence is that the respondent applied pressure to Child A's back twice using her right hand in a 4 second period and that he was pushed down on to the bed on both occasions. In our view, pushing a child aged 2 years and 3 months from being on his hands and knees down on to a bed with one hand would require a reasonable amount of force. We consider it unlikely the respondent did this with one hand, and accept her evidence that she was using her left hand to straighten out Child A's legs. We accept that action of using two hands would not have required a significant application of force with her right hand to get Child A down on to the bed.

92. There was insufficient evidence to establish that the respondent's finger injury would

have prevented her from using any force. The opinion of her doctor who had not examined her was not persuasive. That said, the respondent has other health issues including arthritis which limit her agility and strength.

93. During cross-examination, it was put to the respondent that she became frustrated with Child A. The respondent presented as a mild-mannered person. She did not become flustered under cross-examination, and answered questions in a calm way. When it was pointed out to her that she had previously agreed that she had picked up Child A, she accepted she must have picked him up. We do not find it likely that she would have become frustrated with Child A and used excessive force.

94. We find that the respondent lay Child A down using two hands, one hand on his back and one hand sweeping his legs out. We agree that such an action involves a degree of force, and add that each time a child is lifted up, placed in a chair, has a nappy change, shoes removed or put on, the adult uses a degree of force. We find that she probably used a bit more force than was necessary.

95. The respondent has been charged with restraining the child. In the care of children and adults, there are some types of restraint that are required by law, for example safety belts and child seats in cars. There are other types of restraint that enable children or adults, for example a child seat with a tray for eating, or a mechanism that helps a disabled adult to sit up in a chair. And there are other types of restraint that are prohibited. Section 139AC of the Education Act 1989 provides that a teacher in a school must not physically restrain a student unless the teacher believes the safety of the student or of any other person is at serious and imminent risk.

96. Unlike section 139A which prohibits the use of force for correction or punishment, and section 139AB which prohibits seclusion, both in registered schools and early childhood services, section 139AC applies to schools only. That does not mean that there is a blanket acceptance of restraint in early childhood centres, but we note that in *CAC v Tregurtha* NZTDT 2017-39[2] before the hearing, the charge was amended from "immobilising and/or restraining" to "applying force to". In that case the teacher admitted using force to hold children down on their stomachs with their hands behind their backs, and/or preventing them from moving from that position when they resisted, for up to 30 minutes and/or until the children fell asleep.

[2] *CAC v Tregurtha* NZTDT 2017-39, 21 June 2019

97. That is in marked contrast to the present case, where any application of pressure was momentary. In the ordinary meaning of the word, we do not see that application of force for one or two seconds twice within four seconds can be described as “restraint”. It is no more than the level of force that may be used to change a nappy or dress a child. Even if such conduct does fit within a definition of restraint, we do not make an adverse finding and we do not find it is misconduct. The charge of restraint is therefore dismissed.

98. That said, we are mildly critical of the respondent’s use of physical means to try to get a two-year-old to bed. We would have thought that talking and encouragement would have been more appropriate, and that the respondent’s physical attempts to get Child A to bed were not best practice, but in this instance, we are not prepared to find that two attempts to lay a child on a bed amount to misconduct. We note that the respondent’s recent experience had been with babies. She might benefit from some refresher courses in dealing with older children.

Other comment

99. We note that this conduct occurred when the respondent was the only teacher in the sleep room. We queried why the other teacher was attending to other tasks when there were still unsettled children.

Non-publication

100. The interim order for non-publication of the name of the respondent continues. Any application for permanent suppression of the respondent’s name, evidence and submissions should be filed by **30 September 2020**.

101. The CAC may reply by **21 October 2020**. The Tribunal will then make a decision.

102. Unless either party objects, there will be a permanent order for non-publication of the names of Ms A and Child A.

Costs

103. We do not intend to make any orders for costs.

Theo Baker, Chair

NOTICE - Right of Appeal under Section 409 of the Education Act 1989

1. This decision may be appealed by teacher who is the subject of a decision by the Disciplinary Tribunal or by the Complaints Assessment Committee.

2. An appeal must be made within 28 days after receipt of written notice of the decision, or any longer period that the court allows.

3. Section 356(3) to (6) applies to every appeal under this section as if it were an appeal under section 356(1).

NOTE: NON-PUBLICATION ORDERS

BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

NZTDT 2019-109

KEI RARO I TE MANA O *UNDER*	the Education Act 1989
I TE TAKE O *IN THE MATTER OF*	a charge referred by the Complaints Assessment Committee to the New Zealand Teachers Disciplinary Tribunal
ME *AND*	an application for non-publication orders
KO *BETWEEN*	[redacted] **[Registration** [redacted] Kaitono | Applicant
ME	**COMPLAINTS ASSESSMENT COMMITTEE**
AND	Kaiurupare | Respondent

DECISION OF THE TRIBUNAL

NON-PUBLICATION ORDERS

Tribunal:	J O'Sullivan (Chair), M Johnson and N Sadlier (Members)
Hearing:	17 January 2023 (on papers)
Decision:	25 January 2023
Representation**:**	Ms Mok for the CAC
	Ms Amaranathan for the Respondent

Whakatakinga - Introduction

[1] This decision addresses the outstanding application by the teacher (**the applicant**) to the Tribunal for a permanent non-publication order to suppress her name. The procedural history of this matter is addressed in the Chair's minute of 9 January 2023. That history includes that the Tribunal has dismissed a charge of serious misconduct against the applicant, holding that:

> We found that the respondent used two hands to lay Child A on the bed. We were mildly critical of the way in which the respondent tried to get Child A to lie down, but we did not find that the respondent had restrained the child by using unjustified or unreasonable force. The charge is therefore dismissed.

The teacher's application for non-publication

[2] The applicant seeks a permanent non-publication order prohibiting:[1]

(a) The publication of her name, her family, her current address, her current employer and any other identifying information.

(b) The publication of medical evidence supplied by her General Practitioner and the use or disclosure to any third party other than the complainant and the Tribunal of that medical evidence.

CAC submissions

[3] The CAC is neutral to the application for non-publication orders and submits:[2]

> Although, as the Committee noted in its opening submissions, the medical evidence filed by [the applicant] is not detailed regarding the conditions she presently suffers from, the likely duration of these conditions, or the associated risks, [the applicant] provided further information regarding her present state of health at the charges hearing. Having regard to this, the Committee is neutral to [the applicant's] application for permanent name suppression and abides the Tribunal's decision on the application.

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1 Amended application 12 June 2020.
2 CAC submissions dated 20 October 2020 (footnotes omitted).

Non-publication of children's names

[4] The Tribunal earlier directed that "Unless either party objects, there will be a permanent order for non-publication of the names of Ms A and Child A".[3] We have considered the application and consider it appropriate for the interim orders in respect of Ms A and Child A to be made permanent.

Ngā Whakahau Whakaputanga-Kore Pūmau - Non-publication applications

Principles

[5] Consistent with the principle of open justice, section 405(3) provides that hearings of this Tribunal are in public. Section 405(3) is subject to subsections (4) to (6) which provide:

> (4) If the Disciplinary Tribunal is of the opinion that it is proper to do so, having regard to the interest of any person (including (without limitation) the privacy of the complainant (if any)) and to the public interest, it may hold a hearing or part of a hearing in private.
>
> (5) The Disciplinary Tribunal may, in any case, deliberate in private as to its decision or as to any question arising in the course of a hearing.
>
> (6) If the Disciplinary Tribunal is of the opinion that it is proper to do so, having regard to the interest of any person (including (without limitation) the privacy of the complainant (if any)) and to the public interest, it may make any 1 or more of the following orders:
>
> (a) an order prohibiting the publication of any report or account of any part of any proceedings before it, whether held in public or in private:
>
> (b) an order prohibiting the publication of the whole or any part of any books, papers, or documents produced at any hearing:
>
> (c) an order prohibiting the publication of the name, or any particulars of the affairs, of the person charged or any other person.

[3] No objections were received.

[6] Therefore, if we are to make an order for non-publication, we must first have regard to the interest of any person, the privacy of the complainant, and the public interest. Open justice forms a fundamental tenet of our legal system and "exists regardless of any need to protect the public,"[4] but the public interest in publication of a teacher's name may include the need to protect the public. This is an important consideration where a profession is brought into close contact with the public. Conversely, in certain instances, the public interest may include the suppression of information such as witness names (usually alleged victims of conduct) to ensure that they are prepared to come forward and give evidence in court proceedings.[5] In *CAC v Jenkinson* NZTDT 2018-14 we summarised the principles on non-publication in this Tribunal.[6] We referred to *CAC v Teacher* (NZTDT 2016-27), where we acknowledged the Court of Appeal's comments in *Y v Attorney-General*: [7]

> While a balance must be struck between open justice considerations and the interests of a party who seeks suppression, "[A] professional person facing a disciplinary charge is likely to find it difficult to advance anything that displaces the presumption in favour of disclosure".

[7] Where a person argues that harm would be caused by publication of a name, we must be satisfied that the consequence(s) relied upon would be "likely" to follow if no order was made. In the context of s 405(6), this simply means that there must be an "appreciable" or "real" risk.[8]

Applicant submissions

[8] The application was originally made on the following grounds:[9]

> (a) The evidence against the [applicant] is not strong, given the [applicant]'s medical issues, that is no evidence from witnesses to the allegations, apart from the [applicant] and the complainant, who each given different accounts and the charge is not one of serious misconduct.

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4 *CAC v MacMillan* NZTDT 2016/52, 23 January 2017.
5 *Y v Attorney-General* [2016] NZCA 474.
6 *CAC v Jenkinson* NZTDT 2018-14.
7 *CAC v Teacher* NZTDT 2016-27 and *Y v Attorney-General* [2016] NZCA 474 at [32].
8 See C*AC v Jenkinson,* above, n 6 at [34]; *CAC v Teacher* NZTDT 2016/68, at [46]; *R v W* [1998] 1 NZLR 35 (CA).
9 Amended application for permanent name suppression dated June 2020.

(b) The [applicant] does not pose a threat which requires publicity to ensure it is minimised.

(c) The [applicant] has already suffered significantly from the sequence of events, including unreasonable and unexplained delays.

(d) There is medical evidence which constitutes exceptional circumstances.

(e) Any alleged public interest in publication of the respondent's name is outweighed by the high degree of risk to the [applicant's] physical and mental health if her identity or medical information is published or identifiable;

(f) Publication would cause undue hardship to the [applicant], causing professional, personal and familial embarrassment and anguish to someone to whom their career is everything;

(g) Appearing in the Brief of Evidence of the [applicant] filed in the Tribunal and in particular, the medical evidence annexed to that brief.

[9] Following the dismissal of the charges the applicant filed further submissions augmenting the grounds relied upon and submitting that: [10]

(a) In relation to the dismissal of the charge:[11]

4. The charges were not proven. [The applicant] was entirely successful in defending the charges against her. Counsel submits this is a factor which weighs in favour of non-publication of her name.

5. The principle of open justice is outweighed here because the charges were not proven. There can be little or no public interest now in knowing [the applicant's] identity. She does not pose a threat which requires publicity of her name, to ensure the threat is minimised.

6. The interests of [the applicant] therefore outweigh the public interest.

(b) As to financial impact:[12]

The process has caused her financial hardship (para 39). The Tribunal has not ordered costs in her favour. [The applicant] is waiting to hear whether or not her employer will indemnify her for her costs, but so far there is no response and in the meantime, her financial hardship continues.

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10 Applicant's submissions on permanent name suppression dated 30 September 2020, at [4]-[6].

11 Above, at [4]-[6].

12 Above, at [11](d).

[10] The key grounds relied upon by the applicant are in summary: the dismissal of the charge, medical grounds, impact on family members and financial/employment impact. She also refers to the stress of the proceeding.

[11] In support the applicant has provided material including:

(a) Evidence given by the applicant during the substantive hearing. We have considered the evidence given by the applicant during the hearing which is contained in a brief of evidence read into the record, and further questions during the hearing (recorded in the hearing transcript). The content of that brief in relation to medical matters is summarised in the submissions of counsel as follows:[13]

[redacted]

"…publication of my name, regardless of the outcome of this proceeding, will be detrimental to my health" (para 21)

"…to have other people read about these allegations against me would be terrible and soul destroying" (para 25)

(b) A report from Dr Cameron dated 23 March 2020 stating that the applicant has [redacted]. He gives the

[13] Brief of evidence of applicant, hearing bundle pp 68-80 and annexures CG1 to CG10.

following opinion:

> "My professional opinion is that it would be highly detrimental to [the applicant's] psychological and emotional health if she is not granted name suppression. I have looked after [the applicant] through times of significant stress due to her health as you can imagine by reading her problem list above; and this has required medical and psychological management. [redacted]. For medical reasons I request that [the applicant] is granted name suppression."

Stress of the proceeding

[12] We accept that these proceedings have been very stressful for the applicant, but that is not the basis for a non-publication order. If it were, then most, if not all teachers would have their names suppressed. Nor is delay a basis for non-publication in this case.

Impact on family members

[13] There is no evidence to support the submission made regarding the health of the sibling of the applicant, other than the applicant's own brief assertion about this, which lacks detail. As for the applicant's family, and the potential for reputational harm although they work in another field entirely, we repeat what we said in *CAC v Teacher* 2016-27:[14]

> It is almost inevitable that a degree of hardship will be caused to the innocent family members of a teacher found guilty of serious misconduct. Such "ordinary hardships are not sufficient to justify suppression. However more acute forms of professional and familial embarrassment can make suppression the proper outcome.

Financial impacts

[14] We understand the submission about financial impact to be made on the basis that publicity is likely to have an adverse effect on the applicant's employability if she were to seek alternative employment at any stage in the

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[14] *CAC v Teacher* 2016-27, 25 October 2016, at para [65].

future. There is no supporting material submitted in aid of this submission other than an assertion by the respondent in a statement that:[15]

> … Although it is causing me financial hardship, I have now instructed a lawyer.

[15] This ground is not sufficient to make out the application for non-publication and is speculative.

Charge not upheld

[16] Although the acquittal is a factor to take into account, it is not determinative. "Public interest" is not the same as "Public protection".[16] As we have said previously, the principle of open justice is also part of the public interest.[17]

[17] As a useful comparison, we also considered the test as applied in criminal proceedings. The authors of Adams on Criminal Law provide a useful summary of the relevant of acquittals in relation to applications for non-publication orders under s 200 of the Criminal Procedure Act 2011:

> Acquittals in themselves are not a sufficient basis for an order. They can give rise to legitimate public interest, debate and scrutiny which the principles of open justice and freedom of expression foster... However, the grounds made out in subs (2), particularly extreme or undue hardship, may be more readily made out following an acquittal. In this respect, the circumstances leading to the acquittal ought to be taken into account in the overall evaluative exercise.

[18] Any reader of the substantive decision is informed that we were not satisfied on the balance of probabilities that either particular of the charge was established and that the charge was dismissed. In this case, the fact of the dismissal of the charge is, of itself, an insufficient basis upon which to grant a non-publication order. However, we have taken this aspect of the matter into consideration in weighing the application as a whole including public interest considerations.

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15 Brief of evidence of the applicant at [39] (undated).
16 *CAC v King* NZTDT 2019-21, 11 December 2020.
17 *CAC v MacMillan* NZTDT 2016/52, 23 January 2017

Medical grounds

[19] Counsel for the applicant submitted there is sufficiently detailed medical information for name suppression to be granted on the following basis:

(a) The applicant has numerous and serious medical conditions and has had to deal with for a long period. Dr Cameron has provided a report identifying the nature of those conditions, including [redacted] and that the applicant has required psychological management.

(b) Dr Cameron has provided an opinion on the risks of publication on the applicant's health including [redacted] He says it would be "highly detrimental to the applicant's psychological and emotional health if she is not granted name suppression."

(c) Given Dr Cameron's opinion, it cannot be said that the risk to the applicant's health is remote or fanciful. There is a real risk to her health if her name is published.

(d) The applicant has also given evidence about the nature of her present medical conditions and the effect of publication on her health.

[20] By a fine margin we are persuaded that a non-publication order in relation to the name and identifying particulars of the respondent is justified in this case, having regard to the likely risks to her health identified, and when weighing as part of the public interest consideration that the charge was dismissed.

[21] We will make permanent non-publication orders in relation to the detail of the applicant's medical concerns referred to in support of the likely impact of publication on her (which will be identified by the provision of a redacted version of this decision by the Tribunal). However, we do not order non-publication in respect of the hand injury and arthritis referred to in the substantive hearing, as this is of a less sensitive nature and is important to understand the substantive decision.

Utu Whakaea – Costs

[22] Costs orders were already made following the decision on liability, with the Tribunal exercising its discretion to make no costs awards. The Tribunal has decided to exercise its discretion against the award of costs.

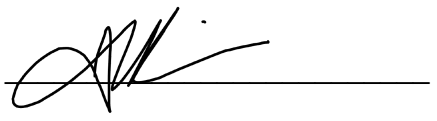
Kupu Whakatau – Decision

[23] The Tribunal's formal orders under the Act are as follows:

(a) Permanent non-publication orders are made in relation the respondent's name, any other identifying information as to her identity.

(b) Permanent non-publication orders are made in relation to the names of Ms A and Child A, and any identifying particulars.

(c) Permanent non-publication orders are made in relation to the detail of the applicant's medical concerns as identified by the provision of a redacted version of this decision by the Tribunal. We note as per [21] above that this order does not extend to the hand injury and arthritis referred to in the substantive decision.



J M O'Sullivan
Chair