NZTDT 2022/15

BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

UNDER	the Education and Training Act 2020
IN THE MATTER	of a charge of serious misconduct referred by the Complaints Assessment Committee to the New Zealand Teachers Disciplinary Tribunal
BETWEEN	**THE COMPLAINTS ASSESSMENT COMMITTEE** Referrer
AND	[redacted] Respondent

DECISION OF THE TRIBUNAL

Tribunal:	Nicholas Chisnall KC (Deputy Chair), Nikki Parsons and Celeste Harrington
Hearing:	15 and 16 November 2022, with closing submissions received on 30 January 2023
Decision:	26 April 2023
Counsel:	C E Best for the referrer J Goddard for the respondent

Introduction

[1] The Complaints Assessment Committee (the CAC) referred to the Tribunal a charge against Ms [redacted], the respondent, alleging serious misconduct and/or conduct otherwise entitling us to exercise our powers under section 500 of the Education and Training Act 2020 (the Act). The CAC's notice of charge, which is dated 18 May 2022, alleges that Ms [redacted], on 18 September 2020, "inappropriately restrained a two-year-old child (Child A) in the sleep room by covering his face with a blanket while he slept" when employed at an early childhood centre (the Centre).

[2] We convened to hear the case in Auckland on 15 and 16 November 2022. At the conclusion of the hearing, the Tribunal invited the parties to file closing submissions addressing liability, which we have since received and considered.

The CAC's application to amend the charge

[3] At the hearing, the CAC applied to amend the way in which it had particularised the charge. The application was notified in the CAC's written opening submissions dated 8 November. Ms Best, for the CAC, applied to amend the charge to omit the words "while he slept" on the basis that none of the witnesses asserted that Child A was asleep when allegedly covered, which coincided with Ms [redacted] evidence. Ms [redacted] opposed that application. Mr Goddard objected on the basis that the late amendment prejudiced Ms [redacted] because it altered the case she had prepared to answer.[1] While not stemming from the CAC's application, Mr Goddard also challenged the use of the words "inappropriately restrained" in the notice. He submitted:

> The NOC should not contain the words "inappropriately restrained" because those words are not included in the mandatory report, they are not part of the Centre's sleep policy which was provided to the investigator and they are not referred

[1] Rule 26(2) of the Teaching Council Rules 2016 provides a remedy should the Tribunal allow the amendment, but accept that the respondent is prejudiced. It states that, "However, the Disciplinary Tribunal may, at the request of the teacher concerned, adjourn the hearing if it is of the opinion that the teacher would be disadvantaged in his or her defence by reason of an amendment made or proposed to be made under subclause (1)."

> to in the Ministry of Education's licensing criteria for Centre-based ECE services.[2]
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> It was incumbent on the CAC to express the NOC with sufficient accuracy such that no amendment was necessary prior to the witnesses for both sides providing their evidence. It is submitted that the proposed change does result in prejudice.

[4] We allowed the amendment, after exploring the bases for the opposition with Mr Goddard.[3] Importantly, we did not accept that Ms [redacted] was prejudiced by the change in wording. Nor did we accept the submission that the CAC is bound to frame its charge around the wording used in the mandatory report. Given Mr Goddard's complaint about the use of the words "inappropriately restrained", we assessed whether Ms [redacted] required further particulars to ensure the fairness of her hearing. However, we concluded that was not necessary (or being sought), and the CAC's use of those words, and proof thereof, raised a quintessential factual issue.

The evidence

The CAC's evidence

[5] The CAC filed called five witnesses, all of whom were required for cross-examination.

[6] The first person from whom we heard was [redacted], who in September 2020 was the teacher responsible for the children at the Centre aged under two. She had held this role for four or five years.

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[2] Citing the Ministry of Education's guidelines, "*Licencing Criteria for Early Childhood education and Care Services 2008 and Early Childhood Education Curriculum Framework*".

[3] The Chair asked Mr Goddard after he traversed the content of the Ministry of Education's sleep policy, "That's helpful, but if we narrow it down to the issue in terms of what's been proposed with the amendment which is to omit reference to the fact that the child was sleeping. The question from my perspective is really what prejudice do you say you'll suffer as a consequence of that proposed amendment? What you're talking about is a larger issue which is proof of the charge, what the elements are, what the particulars are that need to be proved and the CAC, of course, has nailed its colours to the mast in terms of what it says are the particulars that need to be proved. I'm certainly cognisant of the issue that you raise about whether the policy is in play and the issue about age, but in my view, that's really an issue in terms of the substantive proof of the charge, rather than one in relation to particularisation and what prejudice there would be to the Respondent if we were to make the amendment that's sought."

[7] Ms [redacted] said that at about midday on 20 September, she was in the "older children's sleep room" by herself. Ms [redacted] came in to help her, and asked what she could do. Ms [redacted] said, "I told her to comfort the children until they fell asleep", and Child A was one of the children that she asked Ms [redacted] to help with. As far as Ms [redacted] could recall, this was the first time that Ms [redacted] had assisted her in the sleep room. However, she subsequently clarified that Ms [redacted] had assisted other teachers.

[8] We interpolate that Child A, in September 2020, was two years' old. The reason this fact is relevant will become clear later in this decision, when we turn to the evidence of the Centre's manager, Ms [redacted].

[9] Ms [redacted] was asked in cross-examination whether Ms [redacted] was ever in charge of the sleep room. The witness responded:

> No. Not ever before that. She has been, she has gone in the sleep room in my class I have all the children who are sleeping. Then she just goes and assists with the five minute check.

[10] Ms [redacted] said that she entered the adjacent room where the babies slept, because a baby awoke and began to cry. The two rooms are connected by a door, which is "usually kept shut". Ms [redacted] said that she closed the door behind her on this occasion. Ms [redacted] said that while the door has a window, she had her back to it while she settled the baby.

[11] This left Ms [redacted] alone in the sleep room. Ms [redacted] said that, "The last thing I saw when I left to attend to the child in the baby room was [redacted] sitting between the children and patting them to sleep. I did not see whether or not Child A had already been covered when I left to attend to the baby".

[12] In response to a question from the Tribunal, Ms [redacted] said that she was in the babies' room for no more than five minutes.

[13] Ms [redacted] said that she was called back into the sleep room by [redacted], and that, "[redacted] had come into the older children's sleep room, and that's when she must have seen that Child A was covered from head to toe with a sheet". In response to a question from one of our members, Ms [redacted] said that Child A was sitting up on the bed being comforted by Ms [redacted] when she re-entered the room.

[14] Ms [redacted] said she told Ms [redacted], while Ms [redacted] was present, that she had not seen how Child A came to be covered. Ms [redacted] said that, "[redacted] was not responding to [redacted]". Ms [redacted] was explicit that:

> I did not cover Child A's face or wrap the sheet around him, and I did not instruct [redacted] to cover Child A with the sheet. [redacted] is a registered teacher. I did not instruct her to do anything like that.

[15] Ms [redacted] disputed that it was a common practice at the Centre to "tuck children in that way".

[16] The next witness, the Centre's director, [redacted], gave her evidence remotely. Ms [redacted] said in her brief that she was passing through the sleep room on 18 September and noticed Ms [redacted] sitting beside Child A, patting him to sleep.[4] Ms [redacted] said in cross-examination that:

> I went around 1, 1-ish. I can't probably remember the time but it was when all the children were almost going off to sleep. I had some papers that I needed to sign for [redacted]. I went straight into the sleep room, looking at my paperwork, realised that [redacted] was in the baby sleep room. That's the time when I noticed the child.

[17] The witness said that, "I also noticed that the child's face was covered by a sheet". Ms [redacted] said that:

> I quickly pulled the sheet off the child's face but it took me a bit of strength as the sheet and blanket were tucked in.

[18] In cross-examination, Ms [redacted] said that she had directly observed Ms [redacted] wrap Child A. However, her subsequent explanation about the chronology of events reinforced that she meant that she saw Child A after he had been wrapped; not that she saw how he came to be in that state. Later, there was the following exchange:

> Q. And then, but you didn't see which teacher wrapped [Child A] in the sheet did you?
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> A. No teacher should because it's not what we do at [redacted]. What I saw was [redacted] sitting with the child, one hand on it with the child wrapped from top, from head to toe.

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[4] In her brief, Ms [redacted] described "a child", but it is not in dispute that this was Child A.

[19] A member of the Tribunal asked Ms [redacted] to describe the way in which Child A was wrapped. Ms [redacted] said that Child A was lying face down, and provided the following description:

> Okay, when I entered the sleep room he was, it's like a blanket tucked in on his head. It's like a body wrapped and it's down straight to his legs all tucked in. Then we use the – the beds have sheets which sheets from the Ministry of Education from the resource so it's all tucked in at the sides of the feet so it won't move. So it's a fitted sheet with a plain sheet and then the blanket was on top first and then that sheet was there. So it went up because it was pulled from the other side of the bed. And then the leg part was tucked in the rest of the sheet in.

[20] Ms [redacted] described Child A's demeanour when she unwrapped him in the following way:

> When I pulled the blanket he was half, he was very drowsy, he was like sleeping like kind of waking up when I pulled the blanket out. He was like half-opening his eyes but I reassured him, that he was breathing, he was okay. Yeah.

[21] Ms [redacted] asked Ms [redacted], "what she was doing?", and the respondent looked at her, but said nothing. The witness said she asked Ms [redacted] "multiple times" whether she realised Child A's face was covered, and nothing was said in response. According to Ms [redacted]:

> [redacted] finally responded and said to me yes, but that "it was a good strategy to put a child to sleep like this".

[22] Ms [redacted] said Ms [redacted] answer "shocked" her, as wrapping a child contravened the Centre's sleep policy and "our code of conduct as a registered teacher".

[23] Ms [redacted] rejected the proposition that Ms [redacted] had told her on 18 September that Ms [redacted] was the person who wrapped Child A, and that she had responded by telling Ms [redacted] not to blame another teacher.

[24] Ms [redacted] also rejected the truthfulness of Ms [redacted] assertion that covering children's faces was a sleep strategy used at the Centre. Ms [redacted] said:

> Not at all. I work on the floor every day. I'm on the floor every day and if I'm not there then the Centre – there's a chain of communication. There's a Centre Manager, then there's a Head Teacher, and then there's staff. Our two windows are quite visual to see what's going on. Most of the time I am on the floor working with children. This has not happened. These teachers have been

> here for ten years, seven years, eight years. It has not happened at all in our Centre and that's not our practice.

[25] Ms [redacted] was questioned about the Centre's sleep policy, and affirmed that the document included in the common bundle was the version that applied in September 2020. In response to a question asked by the Tribunal, Ms [redacted] said that the policy in the bundle was first created in 2012, and updated on 16 April 2020.

[26] Ms [redacted] stated that the Centre conducted an induction process with new members of staff. She said:

> Every time when a new staff member comes in, we do an induction process. That's the policies of health and safety. So that was discussed when she started but also we do sleep policy in our monthly staff meetings.

[27] Mr Goddard drew the witness's attention to the fact that the policy had a section titled, "Under two's procedure", which included the following requirement, "Each child's face will be visually checked every five minutes to ensure they are breathing comfortably and there are no restrictions of any kind such as blanket/pillow covering their face".

[28] Notwithstanding the wording of the policy, Ms [redacted] maintained that the highlighted requirement applied to *all* children; not just those aged under two. The witness said that, "We do not cover children who are three years up. That's not what we do here".

[29] Ms [redacted] said that she wrote an email to Ms [redacted] on 20 September advising her that the Centre wanted to meet with her the following Monday to discuss the events of 18 September. According to the witness, Ms [redacted] responded, "I thought when he settled down to sleep I will open the blanket. I promise this will not happen again". Ms [redacted] advised Ms [redacted] in a letter dated 20 September that her employment was suspended pending completion of the Centre's investigation.

[30] Ms [redacted] and the head teacher (who was not a witness) met with Ms [redacted] on 21 September and Ms [redacted], "reassured us that she did not cover the child's face".

[31] Ms [redacted] said that during the meeting held with Ms [redacted] and her support person on 24 September, the respondent:

> Was stating that it was [Ms [redacted]] who covered the child's face and not her. She brought a handout from the Ministry of Education and said it was ok to cover a child's face.

[32] Ms [redacted] did not keep a copy of the document provided by Ms [redacted] but it is not in dispute that it was the Ministry of Education's licensing criteria for early childhood education (ECE) services, to which Mr Goddard referred in his opening submissions. We add that the document, under the heading "Guidance", refers to the findings made by the "Child and Youth Mortality Review Committee", and provides that:

> Bedding should be arranged so that it does not cover the child's face – this is especially important for babies.

[33] The decision to terminate Ms [redacted] employment was made on the same day, and the respondent provided with a letter confirming that outcome.

[34] Ms [redacted] did not accept that the decision to dismiss Ms [redacted] was predetermined before the meeting held on 24 September. Nor did the witness accept that she apologised to Ms [redacted] for dismissing her when the latter returned her uniform on 9 October 2020. Nor did Ms [redacted] accept that she had told Ms [redacted] that she would employ her as a relief teacher. However, she accepted that she disclosed to Ms [redacted] that she had reported her conduct to the Teachers' Council, and that she had told the Council that the respondent was a "nice and lovely teacher".

[35] Ms [redacted] submitted a mandatory report to the Teaching Council on 28 September 2020.

[36] The Centre's manager, [redacted], was the third witness and she also gave her evidence remotely. Ms [redacted] said in her brief that she was in her office on 18 September 2020 and went to the sleep room because, "I heard [Ms [redacted]] talking to someone in the sleep room. Ms [redacted] sounded very worried". She went on:

> I quickly went to the sleep room to check what was happening and Ms [redacted] told me that [redacted] was sitting by a fully covered child from head to toe and that [redacted] hand was on the back of the child.

[37] Ms [redacted] said in her oral evidence that the incident happened between 12 and 1230pm.

[38] In her brief, Ms [redacted] said that she called Ms [redacted] into her office after the incident. She said that the respondent did not say anything, her head was down and she did not look at Ms [redacted]. Ms [redacted] stated:

> I asked her again and asked her how could she sit with a child that was fully covered and tucked with the blanket. [redacted] replied that she was sorry and that she thought it might help him to put him to sleep.
>
> I told [redacted] this was unacceptable behaviour and then asked if someone asked her to do this. She replied that she did not want to blame anyone and that she would be careful next time.

[39] Ms [redacted] accepted that she asked Ms [redacted] whether another teacher had told her to wrap Child A. Ms [redacted] said she asked the question, "Because there were two teachers in the sleep room so I was giving her the opportunity to tell me what exactly happened in the sleep room". Ms [redacted] confirmed that Ms [redacted] responded by saying she did not want to blame anyone else. Ms [redacted] said that further attempts to elicit information from Ms [redacted] were unsuccessful, as she did not engage.

[40] Ms [redacted] accepted that Ms [redacted] never admitted that she was the person who wrapped Child A in the blanket.

[41] Ms [redacted] rejected the suggestion that she had asked Ms [redacted] to cover Child S's face on an earlier occasion. The witness did not accept that this was a sleep strategy used at the Centre.

[42] Two CAC investigators, [redacted] and [redacted], gave evidence. Mr [redacted] was based in Canada at the time of the hearing, having resigned from the Teaching Council. While Mr [redacted] was not briefed to give evidence for the CAC, he appeared remotely to answer questions from Mr Goddard.

[43] It is not necessary, for the purposes of this decision, to set Messrs [redacted] and [redacted] evidence out in detail.[5]

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[5] Mr Goddard explored issues with the quality of the recording of Ms [redacted] interview held with the CAC, and the technical difficulties that she faced undertaking the meeting remotely. During this line of questioning, the Chair observed that Ms [redacted] explanation appeared consistent with what she said in her brief. We said that we would listen to the interview if the parties invited us to do so. The parties did not request that this happen.

The evidence for the respondent

[44] Ms [redacted] provided a brief of evidence and gave evidence with the assistance of an interpreter. Ms [redacted] said that she was born in China and settled in New Zealand in 1996. Ms [redacted] qualified as an ECE teacher in 2011, and was fully registered in 2017.

[45] Until 2015, Ms [redacted] worked as short-term reliever. Between 2015 and late 2018, Ms [redacted] was employed by [redacted]. She said, "My focus there was on curriculum-based programmes to support children and their educators". Ms [redacted] reverted to relief work after being dismissed by the Centre on 24 September 2020.

[46] Ms [redacted] was employed by the Centre in January 2019. She described an uneventful first year, and relevantly said that, "While working at The Centre, I seldom put children to sleep". She said that:

> I had assisted teachers in the sleep room only on very rare occasions. Because of my lack of experience and training for dealing with sleeping children, I followed the directions and instructions of the other experienced teachers, even though some of them were not registered.

[47] In cross-examination, Ms [redacted] said she worked in the sleep room two or three times during 2020, and "a few times" the previous year. Ms [redacted] estimated she worked in the sleep room "probably about 10 times".[6]

[48] Ms [redacted] also said that on an earlier occasion in 2020, Ms [redacted] asked her to sooth a child (Child S) to sleep, and Ms [redacted] asked the respondent "to cover the face of Child S to help him fall sleep more quickly". In response to a question asked by Mr Goddard, Ms [redacted] said that this was not a techniques she had ever deployed before working at the Centre.

[49] Ms [redacted] said that Ms [redacted] was "mainly in charge of the sleep rooms at the centre". Ms [redacted] said that she had witnessed teachers, including Ms

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[6] In a question from the Tribunal, Ms [redacted] said that her role at [redacted] did not require her to put children to sleep.

[redacted], "support children to sleep by covering their heads and faces with thin, breathable sheets or thin blankets". Ms [redacted] explained:

> [My] understanding is that they believed that this helped the children to feel more secure and that the sheets were removed from their faces when they were sleeping. The teachers used this strategy to sooth the children to sleep".

[50] Ms [redacted] said that Ms [redacted] told her to cover a child's face in this way several days before the incident. As we recorded earlier, Ms [redacted] denied that this was a strategy that she practiced, or that she instructed Ms [redacted] to cover any child's face in the way alleged.

[51] In her oral evidence, Ms [redacted] emphasised that Child S was a toddler, as were the children whose faces were covered by other teachers.

[52] Ms [redacted] asserted that the Centre altered its sleep policy after the incident in September 2020, and that she had observed a version that, "did not contain any comments about not covering children's faces with blankets or pillows". Ms [redacted] said that she received no training on the "policy and procedures as they are currently worded". If she had, then she would have known it was not acceptable to cover children's faces.

[53] Ms [redacted] affirmed that she was asked to help Ms [redacted] in the "over two's" sleep room on 18 September 2020, and that Ms [redacted] asked her to comfort the children who had not yet fallen asleep, including Child A.

[54] Child A was reluctant to remain on his bed, but Ms [redacted] persuaded him to lie down. According to Ms [redacted]:

> [Ms [redacted]] suggested I cover his face with the blanket. After I put a blanket on Child A, he was still unsettled. At that point, [Ms [redacted]] came over and wrapped him completely including his face and legs. Ms [redacted] only went to the baby's room [sic] after she had wrapped A.
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> All I did was sit next to A and rub his neck and back. Then [Ms [redacted] came into the sleep room and said that it was unacceptable to wrap a child in the manner that [Ms [redacted]] had wrapped Child A for health and safety reasons. At that moment, Ms [redacted] said to me "don't blame another teacher" so I didn't feel safe to say that Ms [redacted] had wrapped Child A.

[55] Ms [redacted] said that the blanket used to cover Child A's face was made from very thin and breathable material.

[56] Ms [redacted] said that she had not challenged Ms [redacted] suggestion that she cover Child A's face because she had been requested to use the same technique by Ms [redacted] previously. She said that, "In that environment, covering children's faces seemed to be a common practice". She candidly acknowledged that, at the time, she thought this was a good way in which to encourage children to sleep.

[57] In her oral evidence, Ms [redacted] said that she told Ms [redacted] that, "it was the other teacher that suggested to me to cover his face with something", and that she disclosed it was Ms [redacted] who had wrapped Child A. Ms [redacted] said that this elicited a comment from Ms [redacted] not to blame another teacher, which is why she did not say anything else.

[58] Ms [redacted] said:

> At the time, I was very upset and did not know what to say to [redacted] or [redacted] I was very disappointed that [redacted] had blamed the incident on me. Because of my Buddhist beliefs, I did not want to blame her. Because of my close relationship with [redacted] I wanted to protect her. I took all the responsibility because I did not realise how serious the consequences would be. In addition, I intended to explain what had happened when the Teaching Council asked me. Furthermore, based on the Chinese perspective, I believed that I did not need to explain as God knew what had happened (the fact).
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> But my support person, [redacted] said that I should tell the truth because in New Zealand, people respect the facts. This is not the case in China where I was taught to prioritise the welfare of others because being considerate to others is seen as a virtue.
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> So I told the truth to Ms [redacted] I said that [redacted] did it. Ms [redacted] replied, "don't blame another teacher!" [redacted] did not listen to me and did not believe me when I said that I did not wrap Child A.

[59] During cross-examination, Ms [redacted] clarified that she told Ms [redacted] that Ms [redacted] had told her to cover Child A's face with a blanket, but she had not told her that Ms [redacted] was the person who wrapped Child A. Ms [redacted] response, "[stopped] me from telling her the whole story". Ms [redacted] rejected Ms Best's proposition that her statement that she had told Ms [redacted] on 18 September that another teacher was responsible was concocted, and that she had remained silent when asked why Child A was wrapped, which was a tacit acceptance she had been the person responsible.

[60] Ms [redacted] explained that her reluctance to tell Ms [redacted] that Ms [redacted] was the one who wrapped Child A stemmed from the fact they were friends. In

cross-examination, she said that was one of the reasons why she deferred disclosing this information until 24 September:

> No, so I told my bosses in the meeting on the 24th, and I said so. Also, the reason that I didn't say that for a long time, it was because at that time the relationship between me and Arti was quite good. So, and also because I said just now that I thought that it wasn't a really serious matter, so I could take this up for myself and that would be okay. And also, the third point is that I thought I could explain to the Teaching Council's investigator when the time comes. And also, because us Chinese people think that God will watch everything that you're doing, and he'll know that everything that you're doing, so you'll have to explain that to yourself.

[61] Ms [redacted] rejected the proposition that she had falsely accused Ms [redacted] on 24 September because she was aggrieved about being suspended.

[62] Ms [redacted] responded to Ms [redacted] evidence that she was apologetic and "acknowledged her mistake" during the meeting on 24 September, and in correspondence. Ms [redacted] emphasised that she never admitted wrapping Child A. Rather, she was apologetic about not unwrapping Child A, because at the time she did not appreciate it was "inappropriate". In her oral evidence, Ms [redacted] said:

> It was Arti that wrapped him. Because when I was taking care of the kids, including my own, I've never wrapped anyone like this. And on that day, the reason that I did not stop her was because that normally I had seen teachers covering kid's face, and I thought that it was okay to cover their face. She wrapped him like that and then I did not know that it was a mistake. I did not know that it was wrong and that's why I did not stop her. So, I think that's why I've been telling the Teaching Council that I'm very sorry because I've been making the wrong judgement. I made the wrong judgement and I did not stop her at that time, and I did not unwrap him immediately at that time. So, at that time I was thinking that I would unwrap him as soon as he falls asleep.

[63] Ms [redacted] addressed the assertion contained in [redacted] mandatory report dated 28 September 2020 that Child A exhibited "difficulty in breathing" as a consequence of the way that he had been wrapped. She said the statement is not true for two reasons. First, he did not have any breathing difficulties. Second, Child A did not go to sleep.

[64] Ms [redacted] addressed what she considered to be procedural flaws in the CAC's approach to her, and the findings that disciplinary body reached. We do not consider it necessary to ventilate that evidence in detail, given that the Tribunal, not the CAC, is the decisionmaker.

[65] We heard from [redacted], who employed Ms [redacted] at the end of 2019 as a relief teacher at an ECE centre, and who reemployed Ms [redacted] in February 2021 following her employment with the Centre ending. Ms [redacted] acknowledged that she was aware of the allegation, and remained supportive of Ms [redacted]. She was very complementary of her attributes as a teacher. Ms [redacted] described Ms [redacted] as "very open" about the disciplinary proceedings.

[66] We also heard from another of Ms [redacted] former employers, [redacted], who managed the home-based childcare service for whom the respondent worked for over three years. Like Ms [redacted], Ms [redacted] described Ms [redacted] qualities as a teacher in very positive terms. Latterly, she has employed Ms [redacted] as a reliever at the ECE centre she manages, notwithstanding the current proceedings.

[67] [redacted], who accompanied Ms [redacted] to the disciplinary meeting held at the Centre on 24 September 2020, gave evidence. Ms [redacted] is a retired teacher and academic and has known Ms [redacted] since 2008, having taught her at Auckland University. Ms [redacted] described Ms [redacted] as a very conscientious student, "anxious to understand and interpret lecture content and readings which were all in English". In subsequent years, Ms [redacted] mentored Ms [redacted], and had a small degree of social contact with her.[7]

[68] Ms [redacted] conducted research before the meeting on 24 September, and located the Ministry of Education's guidelines that were discussed with Ms [redacted]. Ms [redacted]n said in her brief that, "I understand that this guidance resulted form an investigation into Sudden Death Syndrome which had concluded that covers high enough to entangle faces posed a risk for babies". Ms [redacted] told us that the reason she provided this information to Ms [redacted] was because Child A was not a baby.

[69] Ms [redacted] asserted that Ms [redacted] handed Ms [redacted] a pre-prepared termination letter at the end of the meeting.

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[7] Ms [redacted] provided an opinion on Ms [redacted] veracity. We did not consider that this met the substantial helpfulness test for admission under s 37 of the Evidence Act 2006 and put the evidence to one side.

[70] Ms [redacted] also attended the meeting the CAC held with Ms [redacted], which she described as "fraught with technical problems". We have put Ms [redacted] criticisms of the investigative process to one side, given the Tribunal, not the CAC, is the ultimate decisionmaker.

The relevant legal principles

[71] Section 10 of the Act is drafted in identical terms to its predecessor, s 389 of the Education Act 1989.[8] The Act defines "serious misconduct" as behaviour by a teacher that:

> (a) Adversely affects, or is likely to adversely affect, the well-being or learning of one or more children; and/or
>
> (b) Reflects adversely on the teacher's fitness to be a teacher; and/or
>
> (c) May bring the teaching profession into disrepute.

[72] The test under s 10 is conjunctive, as s 10(1)(b) of the Act makes clear.[9] Therefore, as well as having one or more of the three adverse professional effects or consequences described, the act or omission concerned must also be of a character and severity that meets the Council's criteria for reporting serious misconduct. The Teaching Council Rules 2016 (the Rules) describe the types of acts or omissions that are of a prima facie character and severity to constitute serious misconduct.[10] The CAC's notice of charge referred to r 9(1)(a), which describes "using unjustified or unreasonable physical force on a child or young person".

[73] The burden rests on the CAC to prove the charge. While the standard to which it must be proved is the balance of probabilities, we must keep in mind the consequences for the respondent that will result should we find she committed serious professional misconduct.[11]

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[8] The Act came into force on 1 August 2020, which was before the CAC referred its notice of charge.
[9] See *Teacher Y v Education Council of Aotearoa New Zealand* [2018] NZCA 637.
[10] Which came into force as the Education Council Rules on 1 July 2016 and had a name change to the Teaching Council Rules 2016 in September 2018.
[11] *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1 (SC).

[74] We have applied what was said by the Supreme Court about the need for disciplinary tribunals to ensure their qualitative assessment of evidence reflects "the seriousness of matters to be proved and the [professional] consequences [for the practitioner] of proving them".[12]

[75] In a relatively recent High Court decision, *Cole v Professional Conduct Committee of the Nursing Council of New Zealand*,[13] his Honour Gendall J said that while the burden rests on the prosecution throughout, in disciplinary proceedings there is an expectation that the practitioner "must be prepared to answer the charge once a prima facie case has been made out".[14] Ms [redacted] met this expectation by giving and calling evidence.

[76] Another point requires elucidation. The High Court has cautioned against finding that a departure from a profession's code of ethics or practice will automatically constitute professional misconduct. Rather, such codes and standards should be regarded as a guide to be considered by the Tribunal when determining whether, in the particular circumstances of the case, there has been serious misconduct (or misconduct, for that matter).[15]

Our factual findings

[77] The CAC's charge alleged that Ms [redacted] "inappropriately restrained" Child A by "covering his face with a blanket". Based on Ms [redacted] evidence, there were two distinct acts. First, Ms [redacted] candidly accepted that she placed a blanket over Child A's face; albeit she asserted that this was something that another teacher, Ms [redacted] encouraged her to do. Second, the respondent alleged that Ms [redacted] tightly wrapped Child A, before she went into the adjacent room to sooth a baby. Focusing on what Ms [redacted] told us, it was not tolerably clear whether she was saying that the blanket that she had placed over Child A's face remained in situ when Ms [redacted] wrapped Child A, or whether Ms [redacted] covered the child's face. For the reasons we go on to explain, that distinction is not material.

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[12] *Z*, above, at [112].
[13] *Cole v Professional Conduct Committee of the Nursing Council of New Zealand* [2017] NZHC 1178, 31 May 2017, referring to *Auckland District Law Society v Leary* HC Auck, M1471/84, 12 November 1985.
[14] At [36].
[15] *Staite v Psychologists Board* (1998) 18 FRNZ 18 (HC) at 34, Young J.

[78] At the end of the hearing on 16 November 2022, we chose to make a factual finding that we conveyed to the parties. We will set out what we said in full:

> [We've] had an opportunity to have a brief discussion. What we want to do is to give you some guidance about what it is that we need some assistance with, and also to make a factual finding today just to provide a little bit of certainty in terms of where we're heading. Now, while it's not particularised with such precision, the charge of course, and I don't think there's any dispute about this, is really particularised to include two discrete acts that are alleged to constitute an appropriate restraint, through the covering of [Child A's] face. The first, of course, is the allegation of placing the blanket over Child A's face, and the second is wrapping Child A. We've concluded that we're not satisfied that is more probable than not that Ms [redacted] wrapped Child A. Okay? So that's our conclusion on that element or that aspect of the charge. So, what we're going to invite you to do is to address the first aspect, the covering of the face with the blanket, and you'll be, I'm sure, having already canvassed the issues, Mr Goddard, with us at the beginning of the hearing. Mindful of what we need assistance with, I mean I think submissions need to address both the facts and the law. We're not making a definitive factual finding in relation to that aspect. I mean obviously there's been an admission that it happened, but we still ask you to address the evidence because we will, of course, want to make a factual finding which addresses the evidence we've heard on that aspect. But what we would be greatly assisted with is submissions that address the term 'inappropriate restraint', and how that engages the powers under the Act, the test for serious misconduct. Is it serious misconduct if we conclude that it's inappropriate or is it misconduct or is it neither? And of course, we would be assisted by some further consideration about what the policy at the day care centre is, the under and over two aspects to it which you have, of course, emphasised Mr Goddard, and what implications that may have in relation to proof of the charge. So that's your homework. We will, of course, in the decision, explain the reasons why we've reached the conclusion in relation to the wrapping. I'm not going to do that now because I want to do it justice in terms of the evidence we've heard. But I do want to give Ms [redacted] some reassurance where we're heading.

[79] Notwithstanding what we said at the end of the hearing, the CAC in its written submissions, said, "whilst acknowledging the Tribunal's preliminary finding, the CAC's position remains that the Tribunal can be satisfied on the balance of probabilities that it was the Respondent who wrapped Child A".

[80] We decline to take up the CAC's invitation. We made a finding, and that finding must stand. We will explain why we reached the conclusion that we did.

[81] Ms Best submitted that:

> As discussed below the key issue in this case is whether the Tribunal is satisfied that it is more likely that Ms [redacted] is telling the truth, rather than the Respondent. General evidence of a person's honesty is inadmissible under the Evidence Act 2006. The reasons for this are obvious. Most teachers (if not all) would be able to provide evidence that they are otherwise honest people. It cannot be the case that the Tribunal is obliged to accept the Respondent's version of events simply because she produces general opinion evidence from other people that she is otherwise an honest person. It is submitted that such general evidence adds nothing to the Tribunal's deliberations as to which teacher is telling the truth in this particular incident.

[82] As our conclusion in relation to the opinion on Ms [redacted] veracity proffered by Ms [redacted] demonstrates,[16] we agree with Ms Best that the exclusory rule in s 37 of the Evidence Act 2006, with its heightened test for the admission of evidence addressing "the disposition of a person to refrain from lying" (which is the definition of "veracity"), prohibits general opinions on truthfulness. We have put all such opinions to one side.

[83] It is not possible to reconcile the diametrically opposed narratives provided by the parties. Given this clash, a principled approach to the assessment of the veracity and reliability of witnesses is required. We have kept in mind the limitations associated with a demeanour-based assessment of truthfulness, and that demeanour is "best not" considered in isolation.[17] What is required is a broader assessment of a witness's evidence. The following factors may, depending on the particular circumstances of the case, be relevant: Whether the witness's evidence is consistent with the evidence of other witnesses who we have accepted are truthful and reliable; whether the witness's evidence is consistent with objective evidence such as documents or text messages, and if it is not, what explanation is offered for any inconsistencies; whether the witness's account is inherently plausible (does it make sense, is it likely that people would have acted in the way

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[16] That reasoning applies in respect to the other witnesses called by [redacted] too.
[17] *Taniwha v R* [2016] NZSC 123, [2017] 1 NZLR 116.

suggested?); and whether the witness has been consistent in his or her account over time and, if not, why not?[18]

[84] Ms [redacted] directly confronted the allegation in her evidence. We are satisfied that the respondent told us the truth, or, at the very least, there is a reasonable possibility that she did so. That is not to say that we found the CAC's witnesses to be dishonest. Rather, Ms [redacted] left us in a position where we were unable to prefer the evidence of Ms [redacted] that she was not the person who wrapped Child A, over Ms [redacted]. That conclusion was required to enable the CAC to satisfy us that the particular is proved on the balance of probabilities. Therein lies the rub in this case – there was not a principled basis for concluding that the CAC had discharged its burden because we could prefer its witnesses' evidence over that from the respondent.

[85] We will address several themes that emerged in the evidence. First, we did not consider the potential motivation explored in evidence for Ms [redacted] to fabricate an allegation against Ms [redacted] (and the other teachers who allegedly covered children's faces) – a grievance over the fact she had been suspended – to be compelling.

[86] Second, we did not consider that the delay between when Ms [redacted] was alleged to have wrapped Child A – 18 September - and when she ultimately accused Ms [redacted] (at the latest) – at the meeting on 24 September - to be a determinative factor in our assessment of the respondent's reliability and credibility. As Ms [redacted] accepted, Ms [redacted] never admitted to wrapping Child A, whereas she told her that she had placed a blanket over his face. That reinforces the conclusion that Ms [redacted] took responsibility for her actions at the time. Ms [redacted] reference to the use of a blanket as a "good strategy" supports the idea that it was a practice used by others in the Centre.

[87] There is a superficially attractive argument that Ms [redacted], if genuinely falsely accused, would have immediately and strongly resisted the accusation on 18 September. However, we accept the plausibility of Ms [redacted] explanation that she did not want to accuse a fellow teacher and friend of misconduct. That she did so only when she appreciated the full jeopardy of her situation makes sense. It was not in dispute that Ms [redacted], when she met

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[18] *Taniwha* at [38] and [45].

with Ms [redacted] in her office on 18 September, asked the respondent whether another teacher suggested she cover Child A. The fact this question was asked suggests that Ms [redacted] was perceived as lacking experience in the sleep room, and there was a possibility that she may have taken guidance from a more senior practitioner. Moreover, we were convinced by Ms [redacted] evidence that she, in fact, told Ms [redacted] on 18 September that she had placed the blanket over Child A's face at the behest of Ms [redacted]. Her evidence that Ms [redacted] responded by telling her not to blame a colleague has the ring of truth, and explains why Ms [redacted] remained silent for the remainder of the meeting.

[88] We found Ms [redacted] evidence that she deferred to Ms [redacted] as the experienced teacher working in the sleep room on 18 September to be inherently plausible. We also found there to be a degree of symmetry between the terms of the Centre's sleep policy's "Under two's procedure", and Ms [redacted] evidence that other teachers recommended the use of a blanket to settle children aged two and older.

[89] Next, we turn to the undisputed evidence that Ms [redacted] covered Child A's face. To state the obvious, we find it more probable than not that Ms [redacted] placed a blanket over Child A's face. That means that a key factual assertion in the CAC's notice of charge – that Ms [redacted] covered Child A's face with a blanket – is proved.

[90] For the reasons traversed, we cannot exclude the reasonable possibility that another teacher asked her to do so. However, that is not the end of the matter. A teacher is expected to exercise independent judgement, and to be conversant with the relevant professional guidelines that inform best practice. Ms [redacted] decision to cover Child A's face – whether encouraged by another teacher or not – was poorly conceived.

[91] Given the way the charge was framed, the nub of the issue is whether Ms [redacted] "inappropriately restrained" Child A when she placed a blanket over his face. As Ms Best properly acknowledged, whereas the term "restrained" aptly described the way in which Child A was wrapped, "merely placing a blanket over a child's face would be unlikely to fall within the natural or ordinary meaning of "inappropriate restraint", whatever that term means". This also constitutes a tacit acknowledgement that Ms [redacted] by placing a lightweight blanket over Child A's face, did not use "unjustified or

unreasonable physical force", which are the key requirements in r 9(1)(a) of the Rules.[19]

[92] Ms Best submitted that there was an alternate pathway to a finding that Ms [redacted] misconducted herself, which hinged on determining:

(a) The particular circumstances in which the respondent covered Child A's face; and

(b) Whether those facts amount to serious misconduct as that term is defined in the Act?

[93] We have answered Ms Best's question (a). That leaves no room to incorporate Ms Best's analysis of a decision in which the Tribunal held that "swaddling" is a practice that invites a finding of serious misconduct because it risks adversely affecting children's wellbeing.[20] Looked at through r 9(1)(a)'s lens, swaddling may constitute "unjustified or unreasonable physical force".[21] That analysis would have had a bearing if we had concluded that Ms [redacted] was the person who wrapped Child A, but we did not.

[94] We acknowledge Mr Goddard's careful submissions addressing "immobilisation", which, in the ECE setting, is a more apt term than "restraint". While not addressed in the CAC's submissions, Mr Goddard drew our attention to r 56(2) of the Education (Early Childhood Services) Regulations 2008, which requires operators of ECE centres to exclude a person "from coming into contact with the child participating in the service or, as the case requires, the children being educated by the educator" if satisfied it is necessary to do so to ensure that no child is ill-treated. This obligation is engaged, inter alia, if a person has "in guiding or controlling a child, [subjected] the child to solitary confinement, *immobilisation*, or deprivation of food, drink, warmth, shelter, or protection".

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[19] The meaning of "physical abuse" , which was the term used in the iteration of r 9(1)(a) that applied until May 2018, was considered in some detail in *CAC v Teacher* NZTDT 2016/50, 6 October 2016 and *CAC v Teacher* NZTDT 2016/26, 10 November 2016. That analysis has shaped the approach taken to the version of r 9(1)(a) that applied in September 2020. Given our factual finding, we need not say more on the topic.

[20] *CAC v Costello* NZTDT 2020/29, at [116](d) and [127]-[128].

[21] We acknowledge Mr Goddard's submission that s 24 of the Act addresses the use of force in ECE centres.

[95] We add that in *CAC v Teacher*[22] we found an ECE teacher guilty of serious misconduct on the basis that she had immobilised a toddler by holding her tightly to try and coax her to sleep. As such, the circumstances were different to those in the instant case. We observe that the CAC in *Teacher* relied upon r 9(1)(o) (now r 9(1)(k)), which is a catchall provision that encompasses any act or omission that brings, or is likely to bring, discredit to the profession. We said:[23]

> [We] agree that behaviour amounting to "immobilisation" is a prima facie harmful practice, which explains its inclusion in the EC Regulations. We observe that the term is not defined in the EC Regulations and, therefore, a context-specific enquiry into the nature and degree of the conduct concerned will be required in each case to determine if there has been [immobilisation].

[96] We mention *Teacher*, as Ms Best invited the Tribunal to apply r 9(1)(k) of the Rules to Ms [redacted] behaviour, notwithstanding its absence in the notice of charge. Mr Goddard opposed us doing so, on the basis that the CAC was making a post-hearing application to amend the charge. Ms Best's principal submission was that it was not necessary to amend the charge to rely upon r 9(1)(k), because "the fundamental nature of the CAC's case has not changed". In the alternative, Ms Best submitted that we could amend the charge by including a reference to r 9(1)(k) in reliance upon the Tribunal's power in r 26 of the Rules to regulate its own procedure (assumedly in conjunction with the power to amend contained in r 24). Ms Best referred us to a recent High Court judgment in which his Honour Downs J addressed r 26's equivalent in the Lawyers and Conveyancers (Disciplinary Tribunal) Regulations 2008.[24]

[97] We need not decide the point, given our conclusions regarding the first stage of the test for serious misconduct, and, in particular, s 10(1)(a)(iii) of the Act. That analysis is contained in the following paragraphs.[25]

[98] Ms Best submitted that Ms [redacted] behaviour engaged both ss 10(1)(a)(ii) and 10(1)(a)(iii) of the Act. The submission was that, "Any pre-school teacher would be aware that placing a cover over a 2 year old's face is an

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[22] *CAC v Teacher* NZTDT 2016/67, 20 March 2017.
[23] At [20].
[24] *Brill v Auckland Standards Committee 2* [2022] NZHC 3036.
[25] See [101], below.

inappropriate technique to get a child to sleep, let alone wrapping that child tightly enough that another teacher had difficulty removing the blanket". While the latter proposition falls away, we will analyse the first.

[99] Ms Best emphasised that the Ministry of Education's licencing criteria do not condone covering the faces of children who have reached a specified age. Rather, the criteria emphasise that it is "especially important" that the faces of babies are not covered with bedding. Nonetheless, that emphasis tends to reinforce that it is babies, not children like Child A who have reached two, who are particularly vulnerable. While we did not receive evidence on the point, we take notice of the fact that the licencing criteria were drafted by reference to the recommendations made by the Child and Youth Mortality Review Committee (CYMRC). It is safe to infer that the CYMRC distinguished between the risk posed to babies vis-à-vis older children for a reason.

[100] Regardless of our sense of disquiet about Ms [redacted] decisions to cover Child A's face (and to leave him wrapped), we are not satisfied that the respondent's conduct reflects adversely on her fitness to be a teacher, or risks bringing the teaching profession into disrepute.[26] We do not consider that it is reasonable to find that either criteria is met in the absence of evidence that covering the faces of children who are two and above poses a real risk, and which explains the apparent distinction made in the Ministry's licencing criteria between babies and older children.

[101] Our reasoning regarding s 10(1)(a)(iii) of the Act also applies to the almost identically worded r 9(1)(k) of the Rules, which only comes into play under the second part of the test for misconduct (which we have not had to reach).

[102] While the CAC did not dwell on s 10(1)(a)(i) of the Act, we will briefly address it. Section 10(1)(a)(i) of the Act does not require actual proof of harm to a student; only that the behaviour is of a type "likely" to have that effect. The undisputed evidence was that Ms [redacted] covered Child A with a lightweight blanket, which undermined the notion that there was a genuine risk to his

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[26] When considered against the objective yardstick that applies under s 10(1)(a)(iii) of the Act, which was described in *Collie v Nursing Council of New Zealand* [2001] NZAR 74, at [28].

wellbeing. Ms [redacted] remained by Child A's side while the blanket was over him. If it had caused any difficulties, Ms [redacted] was well-placed to remove the blanket (and to unwrap him), and we are confident she would have done so in exigent circumstances. Ms [redacted] evidence that Child A was not distressed when she unwrapped him reinforces our conclusion that there was no real risk of harm in the particular circumstances.

[103] We are not satisfied that the CAC has discharged its burden. We find that the charge is not proved. For completeness, we make clear that we are not satisfied that Ms [redacted] behaviour amounts to misconduct, either. As such, we do not consider that the discretion to exercise our powers under s 500 of the Act is engaged.[27]

Name suppression

[104] We order permanent suppression of Child A's name and identifying particulars.[28]

[105] We have not received a name suppression application from Ms [redacted]. If she wishes to apply for suppression, then we invite the parties to confer about timetabling the filing of evidence and submissions.

Costs

[106] We have not addressed costs.

[107] We direct that an updated schedule of the Tribunal's costs be prepared and provided to the respondent. The CAC is to file and serve a schedule of its costs on the respondent. Ms [redacted] can file a response, along with any evidence she wants us to consider.

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[27] The test for which was described by the Court of Appeal in *Evans v A Complaints Assessment Committee of the Teaching Council of Aotearoa New Zealand* [2021] NZCA 66.

[28] Pursuant to s 501(6)(c) of the Education and Training Act 2020 and r 34 of the Teaching Council Rules 2016.

Nicholas Chisnall KC
Deputy Chair

NOTICE

1 A person who is dissatisfied with all or any part of a decision of the Disciplinary Tribunal under sections 498(2) or 500 of the Education and Training Act 2020 may appeal to a District Court under section 504 of the said Act.

2 An appeal must be made within 28 days of receipt of written notice of the decision, or within such further time as the District Court allows.

3 Section 356(3) to (6) of the Education Act 1989 apply to every appeal as if it were an appeal under section 356(1).

NZTDT 2022/15

BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

UNDER	the Education and Training Act 2020
IN THE MATTER	of applications for name suppression pursuant to section 501(6)(c) and an application for costs pursuant to section 500(1)(h)
BETWEEN	[redacted]
	Applicant
AND	**THE COMPLAINTS ASSESSMENT COMMITTEE**
	Respondent

DECISION OF THE TRIBUNAL ON NAME SUPPRESSION AND COSTS

Tribunal:	Nicholas Chisnall KC, Nikki Parsons and Celeste Harrington
Hearing:	15 and 16 November 2022, with closing submissions received on 30 January 2023
Decision:	Substantive decision on 26 April 2023 and this decision on 5 September 2023
Counsel:	C E Best for the referrer J Goddard for the respondent

Introduction

[1] The Tribunal disposed of this matter in a substantive decision dated 26 April 2023. We held that the Complaints Assessment Committee (the CAC) had not made out its charge of serious misconduct against the applicant, Ms [redacted]

[2] Ms [redacted] has applied for permanent name suppression, as has the early childhood centre that employed her, [redacted] (the Centre), which provided the mandatory report to the Teaching Council of Aotearoa New Zealand that initiated these proceedings.

[3] While the CAC submits that costs should lie where they fall, Ms [redacted] has applied for reimbursement of her costs under s 500(1)(h) of the Education and Training Act 2020 (the Act). Mr Goddard submits that the Tribunal's discretion is enlivened and that we should make an order for "indemnity costs or increased costs against the CAC".

Name suppression

The relevant principles

[4] Before turning to the grounds, we will describe the relevant principles that the Tribunal must apply when deciding whether to make a non-publication order under s 501(6) of the Act. The default position is for Tribunal hearings to be conducted in public and the names of teachers who are the subject of proceedings to be published. We can only make one or more of the orders for non-publication specified in the section if we are 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.

[5] The purposes underlying the principle of open justice are well enumerated. It forms a fundamental tenet of our legal system. We said in *CAC v McMillan*[1] that the presumption of open reporting, "exists regardless of any need to protect the public".[2] Nonetheless, that is an important

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[1] *CAC v McMillan* NZTDT 2016/52. See, too, *CAC v Teacher I* NZTDT 2017/12, where we summarised the relevant legal principles at [41].
[2] *McMillan*, at [45].

purpose behind open publication in disciplinary proceedings in respect to practitioners whose profession brings them into close contact with the public. In NZTDT 2016/27,[3] we described the fact that the transparent administration of the law also serves the important purpose of maintaining the public's confidence in the profession.[4]

[6] The Tribunal has in recent times tended to adopt a two-step approach to name suppression that mirrors that used in other disciplinary contexts.[5] The first step, which is a threshold question, requires deliberative judgement on the part of the Tribunal whether it is satisfied that the consequence(s) relied upon would be "likely" to follow if no order is made. In the context of s 501(6) of the Act, this simply means that there must be an "appreciable" or "real" risk.[6] While we must come to a decision on the evidence regarding whether there is a real risk, this does not impose a persuasive burden on the party seeking suppression. The Tribunal's discretion to forbid publication is engaged if the consequence relied upon is likely to eventuate. This is not the end of the matter, however. At this point, the Tribunal must determine whether it is proper for the presumption in favour of open justice to yield. This requires the Tribunal to consider, "the more general need to strike a balance between open justice considerations and the interests of the party who seeks suppression".[7]

Ms [redacted] application

[7] Ms [redacted] naturally places emphasis on the fact that we did not find the charge proved. We will address this first, before turning to the respondent's other grounds.

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[3] *CAC v Teacher* NZTDT 2016/27.
[4] See, too, *CAC v Teacher S* NZTDT 2016/69, at [85], where we recorded what was said by the High Court in *Dentice v Valuers Registration Board* [1992] NZLR 720, at 724-725.
[5] See *CAC v Jenkinson* NZTDT 2018/14 at [36].
[6] We have adopted the meaning of "likely" described by the Court of Appeal in *R v W* [1998] 1 NZLR 35 (CA). It said that "real", "appreciable", "substantial" and "serious" are qualifying adjectives for "likely" and bring out that the risk or possibility is one that must not be fanciful and cannot be discounted.
[7] *Hart v Standards Committee (No 1) of the New Zealand Law Society* [2012] NZSC 4, at [3].

[8] In *CAC v King*,[8] we acknowledged the fact that the charge was not proved needed to be taken into account during the evaluative exercise, but said that is not dispositive. We said that:[9]

> Although the acquittal is a factor to be taken into account, it is not determinative. "Public interest" is not the same as "public protection". As we have said previously, the principle of open justice is also part of the public interest.[10]

[9] In the criminal context, it has been said the fact that an applicant has been acquitted of the charge will be relevant at both stages of the suppression test. This is because the relevant hardship threshold will be more readily reached when there has been an acquittal. However, the High Court also observed that, "Suppression will be more readily granted where the prosecution has offered no evidence or withdrawn the charge than where there has been a trial or significant judicial involvement in the determination of the outcome".[11] This describes Ms [redacted] position.

[10] The principle of open justice presumes that the media will report proceedings "fairly and accurately as 'surrogates of the public'".[12] Similarly, we must assume that members of the public who read our substantive decision will comprehend the reasons we concluded that the CAC had not discharged its burden, and not assume that "where there's smoke, there's fire".

[11] We now turn to Ms [redacted] grounds, of which there are eight. Given the degree of overlap, the adverse effects of publication relied upon fall into two broad categories, which are that:

> (a) There is a real risk that publishing Ms [redacted] name will adversely affect her physical and mental wellbeing. Mr Goddard's submissions provide that Ms [redacted] has been "constantly worrying about this matter" and has been prone to "sleeplessness, low energy levels, emotional harm and depression". Mr Goddard submits that Ms [redacted] was admitted to

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[8] *CAC v King* NZTDT 2019/21.
[9] At [58].
[10] Citing *CAC v McMillan*, above n 1.
[11] *Donga v R* [2021] NZHC 1927 at [18].
[12] *R v Liddell* [1995] 1 NZLR 538 (CA) at 546.

hospital with "a suspected stroke or brain tumour after suffering numbness which lasted for 30 minutes"; and

(b) The risk of ongoing adverse financial implications. Mr Goddard's submission is that "it is expected that Ms [redacted] will continue to struggle to find permanent fulltime work if the decision is published". He describes the fact that Ms [redacted] is having difficulty servicing her mortgage "after working as a reliever in ECE", because of the variability of her work hours.

[12] Ms Best submitted that Ms [redacted] has not substantiated her assertion that she will be unable to secure fulltime employment in the ECE sector. Ms Best submitted that Ms [redacted] concern is incompatible with the evidence the Tribunal heard that the applicant secured work as a relief teacher after her employment was terminated by the Centre.

[13] We agree with Ms Best. To recapitulate, Ms [redacted] called evidence from two employers, who were very complementary of her attributes as a teacher. Ms [redacted] secured relief work notwithstanding she faced a disciplinary charge. That evidence undermines the assertion that there is a real risk that Ms [redacted] will fail to secure fulltime employment if her name is published. As we said earlier, we must approach name suppression on the basis that a reasonable prospective employer will familiarise itself with the reasons why the charge was not provided, and not summarily dismiss an application for employment from Ms [redacted]

[14] While Ms Best did not dispute that these proceedings have been very stressful for Ms [redacted], she submits that the applicant has not evidentially substantiated the alleged health implications that she says will arise if her name is made public.

[15] We accept that it may be proper to order suppression where there is a real risk that publication will either exacerbate an existing condition, or adversely affect a practitioner's rehabilitation and recovery from an illness or disorder. However, in NZTDT 2016/27 we said that:[13]

> [Without] wishing to sound unsympathetic to its sufferers, anxiety (and associated mental conditions) is not an unexpected

[13] *CAC v Teacher* NZTDT 2016/27 at [63].

> consequence of a proceeding involving allegations of serious professional misconduct. It is important that the nature and effects of any such condition are carefully scrutinised when it is put forward as a ground for name suppression. A bare assertion that a condition exists, or that it may render an applicant seeking suppression more vulnerable to harm, will not suffice.

[16] We conclude that there is insufficient evidence to satisfy us that publication is likely to have the effects described in Mr Goddard's submissions. We are not satisfied that it is proper to order suppression for the reasons advanced by Ms [redacted].

The Centre's application

[17] That is not the end of the matter, however, as the Centre's director applied on its behalf for name suppression in a letter dated 19 June 2023. The letter asserted that it is proper to suppress the name of the Centre, as well as the names of all its staff, to prevent:

> "- Adverse association with [the Centre], from communities
>
> - Adverse effects on staff mental health and wellbeing
>
> - Adverse hiring and recruiting staff in future
>
> - Protection of child's privacy."

[18] Neither the CAC nor Mr Goddard wished to be heard in relation to the Centre's application.

[19] Addressing the Centre's final ground, we assume that it is alluding to the risk that Child A, whose name we suppressed in our substantive decision, will be identified if we do not make a non-publication order in its favour.

[20] At the forefront of the Tribunal's mind in every case is whether naming a teacher and/or the learning institution at which he or she taught, carries an appreciable risk of identifying the child or young person who was affected by the behaviour concerned. In the usual course of events, where serious misconduct involved behaviour directed at a student or students, naming the teacher and school will tend to result in suspicion falling on a cohort of learners. However, as we said in NZTDT 2016/68:[14]

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[14] At [50].

> [It] is unlikely that this possibility escaped the attention of Parliament when it opened the Tribunal's proceedings to the public and, had this degree of connection between the teacher and affected student been enough of a concern to require blanket suppression in every case, it would have legislated for that.

[21] We are not satisfied that naming the Centre or Ms [redacted] will undermine the efficacy of our order protecting Child A.

[22] We turn to the Centre's remaining grounds. The regularity with which we address applications for non-publication from learning institutions led us to say in NZTDT 2016/27 that:[15]

> [When] a teacher commits serious misconduct in the course of his or her duties, it is inevitable that there will be a degree of fallout for the school concerned. However, in light of the central role that schools have in disciplinary proceedings, it is safe to assume that their potential to suffer detrimental reputational (and potentially financial) impact through open publication was factored in when Parliament introduced the presumption of open justice. We do not rule out the possibility that in rare cases suppression may be required to protect a learning institution's interests. In the majority of cases, however, the principle of open justice places the interests of the educational community at large ahead of those of an individual school.

[23] In *CAC v Teacher*[16] we said that the open justice principle must tolerate a degree of hardship to the student body of a school that has its name published because of a teacher's misconduct. Whether that hardship progresses beyond the "ordinary" must be considered on a case-by-case basis.

[24] We have decided, by a narrow margin, to suppress the Centre's name and the names of its employees who gave evidence before the Tribunal. It follows that it is proper to suppress Ms [redacted] name, too. We have turned our minds to the potential implications for the Centre associated with the factual findings we made.[17] To be clear, our findings were made in the context of deciding whether the CAC had met its burden of proof in relation to the charge against Ms [redacted]. We did not have to decide whether the Centre's sleep policy is (or was) defective, or whether another teacher immobilised Child A,

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[15] *CAC v Teacher* NZTDT 2016/27, at [69]. See, too, what we said in *McMillan* above, at [56].
[16] *CAC v Teacher* NZTDT 2016/68, at [67].
[17] In particular, paragraphs [88]-[90].

or encouraged Ms [redacted] to cover his face with a blanket. However, the point that Ms [redacted] was on trial, not the Centre and its witnesses, may be too subtle for an uninitiated reader of our decision to appreciate. We are therefore sympathetic to the potential natural justice implications for the Centre and its employees stemming from the findings we made in our decision. For that reason, we are satisfied that this is one of those rare cases in which it is proper to order suppression to ameliorate the risks described in the Centre's letter.

[25] To be clear, the fact of suppression does not impede a copy of our decision being provided to the Ministry of Education or Education Review Office, which may wish to review the Centre's practices and procedures, and its sleep policy in particular. We invite the Council to take that step.

Costs

The relevant principles

[26] The Tribunal's power to order costs is found in s 500(1)(h) of the Act, which confers a discretion. It states:

> Following a hearing of a charge of serious misconduct, or a hearing into any matter referred to it by the Complaints Assessment Committee, the Disciplinary Tribunal may do 1 or more of the following:
>
> …
>
> (h) require any party to the hearing to pay costs to any other party.
>
> …

[27] The Tribunal issued an updated practice note on costs on 1 April 2022 (the Practice Note). Unlike its predecessor, it expressly addresses the circumstances in which a costs order against the CAC might be made. It incorporates the settled rule that, unlike in other types of proceedings, costs will not presumptively follow the event when the unsuccessful party is a regulator. The Practice Note relevantly states:

> **Costs against the Complaints Assessment Committee**
>
> 10. Where a teacher has successfully defended a charge, the Tribunal will consider any application for costs against the CAC in light of the following principles:

> a. A costs order should only be made against a regulator if there is good reason for doing so. "Good reasons" include that the prosecution was misconceived, without foundation, or borne of malice or some other improper motive.
>
> b. Success by the practitioner in defending a matter is not, on its own, a good reason for ordering costs against a regulator.
>
> c. A regulator should not be unduly exposed to the risk of financial prejudice if unsuccessful, when exercising its public function.
>
> d. The Tribunal is still required to exercise its evaluative, discretionary jurisdiction.[18]

[28] The Practice Note cites the decision of the English and Wales Court of Appeal in *Baxendale-Walker v Law Society*,[19] which described the relevant principles that apply when a law practitioner brings a costs application against the Law Society. The Practice Note also refers to the decision of the New Zealand Lawyers and Conveyancers Disciplinary Tribunal in *Westland District Standards Committee v Simes,*[20] which adopted the reasoning in *Baxendale-Walker*. Paragraphs 10(a) to (d) of the Practice Note lift the relevant principles from *Baxendale-Walker.*

[29] This Tribunal cited *Baxendale-Walker* with approval in *CAC v Beilby*,[21] which considered an application for costs brought by the practitioner after the Tribunal found that the CAC had not proved the more serious particulars in its notice of charge. We said in *Beilby* that those principles are equally relevant to other professional regulators that perform a disciplinary function, and that we intended to adopt them in future cases. The principles were expressly applied in the more recent decision of *CAC v McClutchie-Mita,* in 2017.[22] Thus, the Practice Note does not reflect a sea change in approach; albeit there have been few decisions in which the Tribunal has had to apply the relevant principles.

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[18] Citing *Lagolago v Wellington Standards Committee 2* [2017] NZHC 3038, 8 December 2017.
[19] *Baxendale-Walker v Law Society* [2007] EWCA Civ 233.
[20] *Westland District Standards Committee v Simes* [2012] NZLCDT 28.
[21] *CAC v Beilby* NZTDT 2014/53C, 19 September 2014.
[22] *CAC v McClutchie-Mita* NZTDT 2017/3C, 4 December 2017.

[30] It is helpful to refer to what the English Court said in *Baxendale-Walker* when explaining why there is not a uniform approach to costs. It said:[23]

> Our analysis must begin with the Solicitor's Disciplinary Tribunal itself. This statutory tribunal is entrusted with wide and important disciplinary responsibilities for the profession, and when deciding any application or complaint made to it, section 47(2) of the Solicitors Act 1974 undoubtedly vests it with a very wide costs discretion. An order that the Law Society itself should pay the costs of another party to disciplinary proceedings is neither prohibited nor expressly discouraged by s47(2)(i). That said, however, it is self-evident that when the Law Society is addressing the question whether to investigate possible professional misconduct, or whether there is sufficient evidence to justify a formal complaint to the Tribunal, the ambit of its responsibility is far greater than it would be for a litigant deciding whether to bring civil proceedings. Disciplinary proceedings supervise the proper discharge by solicitors of their professional obligations, and guard the public interest, as the judgment in *Bolton* makes clear, by ensuring that high professional standards are maintained, and, when necessary, vindicated. Although, as Mr Stewart maintained, it is true that the Law Society is not obliged to bring disciplinary proceedings, if it is to perform these functions and safeguard standards, the Tribunal is dependent on the Law Society to bring properly justified complaints of professional misconduct to its attention. Accordingly, the Law Society has an independent obligation of its own to ensure that the Tribunal is enabled to fulfil its statutory responsibilities. The exercise of this regulatory function places the Law Society in a wholly different position to that of a party to ordinary civil litigation. The normal approach to costs decisions in such litigation – dealing with it very broadly, that properly incurred costs should follow the "event" and be paid by the unsuccessful party – would appear to have no direct application to disciplinary proceedings against a solicitor.

[31] This rationale holds true in respect to the nature of the power to award costs contained in s 500(1)(h) of the Act, and the statutory responsibilities to maintain professional standards and “guard the public interest” that this Tribunal carries.

[32] The Court in *Baxendale-Walker* went on to state that, where a disciplinary tribunal is advancing the public interest to ensure that cases of possible professional misconduct are properly investigated and, if appropriate, made the subject of formal complaint, then:[24]

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[23] At [34].
[24] At [40].

> [Unless] the complaint is improperly brought, or, for example, proceeds … as a "shambles from start to finish", when the Law Society is discharging its responsibilities as a regulator of the profession, an order for costs should not ordinarily be made against it on the basis that costs follow the event. The "event" is simply one factor for consideration. It is not a starting point. There is no assumption that an order for costs in favour of a solicitor who has successfully defeated an allegation of professional misconduct will automatically follow. One crucial feature which should inform the Tribunal's costs decision is that the proceedings were brought by the Law Society in exercise of its regulatory responsibility, in the public interest and the maintenance of proper professional standards. For the Law Society to be exposed to the risk of an adverse costs order simply because properly brought proceedings were unsuccessful might have a chilling effect on the exercise of its regulatory obligations, to the public disadvantage.

[33] We turn to another important feature of this case. Ms [redacted] is legally aided. The relevance of Ms [redacted] status was not something addressed by the parties in their submissions, but engages another section of the Practice Note, which provides:

> **The effect of a legal aid grant**
>
> 11. Where a teacher has been granted legal aid under the Legal Services Act 2011, section 45 of that statute says that no costs can be made unless the Tribunal is satisfied that there are exceptional circumstances, which may include:
>
> a. any conduct that causes the CAC to incur unnecessary cost:
>
> b. any failure by the teacher to comply with the procedural rules and orders of the court
>
> c. any misleading or deceitful conduct:
>
> d. any unreasonable pursuit of 1 or more issues on which the teacher fails:
>
> e. any unreasonable refusal to negotiate a settlement or participate in alternative dispute resolution:
>
> f. any other conduct that abuses the processes of the Tribunal.

Our decision

[34] The CAC does not seek a contribution from Ms [redacted] towards its costs. For completeness, we confirm that we are not satisfied that there are exceptional circumstances justifying an order of costs against Ms [redacted] pursuant to s 45(2) of the Legal Services Act 2011.

[35] We turn to Ms [redacted] application. She seeks reimbursement of her full costs. According to the information provided, Ms [redacted] owes a debt for legal services to the Ministry of Justice in the GST inclusive amount of $17,280.73.[25] Mr Goddard submitted that Ms [redacted] total costs are "$19,000". It is not precisely clear why the amount paid pursuant to Ms [redacted] legal aid grant and the sum described by Mr Goddard differ. However, Mr Goddard submitted that he spent two hours drafting supplementary submissions addressing a Tribunal decision that counsel brought to our attention after closing arguments were presented, but which were not ultimately filed because we released our decision in the interim.[26] It is unsatisfactory that Ms [redacted] did not provide a precise breakdown of her legal costs, but nothing ultimately turns on that.

[36] Ms [redacted] sought "indemnity" costs. As Ms Best submitted, the complete recovery of costs is inconsistent with the Practice Note, which reflects the long-settled position in disciplinary proceedings that, "the starting point for a reasonable order of costs is 50 per cent of reasonable costs, and that in some circumstances downwards or upwards adjustment will be appropriate". Further, the Tribunal when "assessing the reasonableness of costs incurred … may compare the amounts claimed with other cases to ensure consistency across cases".

[37] Ms [redacted] advanced eight grounds in support of her application for costs, which mirrored those advanced in support of name suppression. Again, there is significant overlap amongst the grounds. It suffices to say that Ms [redacted] relied upon:

(a) The fact the CAC failed to prove its charge as entitling her to costs;[27]

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[25] The letter is dated 22 December 2022.
[26] *CAC v S* NZTDT 2022/37.
[27] Mr Goddard also relied upon the follow-on effects of our conclusion on proof of the charge, which are subsumed by that we have described. Mr Goddard relied upon the fact that we did not find that Child A's wellbeing was adversely affected; Ms [redacted] conduct did not adversely reflect adversely on her fitness to teach, or bring the profession into disrepute; none of the criteria in r 9 of the Teaching Council Rules 2016 were met; and we did not impose a penalty.

(b) The fact that she was put to unnecessary expense because the Tribunal issued its decision before Mr Goddard could file his supplementary submissions; and

(c) The financial hardship that will ensue if an order of costs is made against her. Our finding under s 45(2) of the Legal Services Act 2011 addresses this concern.

[38] Ground (a) engages 10(b) of the Practice Note, which provides that, "Success by the practitioner in defending a matter is not, on its own, a good reason for ordering costs against a regulator". Something more is required.

[39] We turn to (b). We accept that it is unsatisfactory that Ms [redacted] was put to unnecessary expense. However, Mr Goddard fairly acknowledged that, "There was a delay in obtaining instructions [about whether to file supplementary submissions, which an offer extended by the Tribunal on 6 April 2023] from Ms [redacted] because counsel was on leave". It appears that we were not advised of Ms [redacted] proposed timetabling for the filing of further submissions, which Mr Goddard addressed in an email on 27 April. Our decision, which favoured Ms [redacted], was released on 2 May. While the wastage of costs (and Mr Goddard's time) is unfortunate, we do not accept that this a "good reason" to reimburse Ms [redacted].

[40] Mr Goddard endeavoured to satisfy us that there are "good reasons" under 10(a) of the Practice Note to make a costs order against the CAC. His submissions focused on the proposition that the CAC's prosecution of Ms [redacted] was "misconceived" and/or "without foundation". He submitted that:

> In this case, given the findings made by the Tribunal in relation to restraint in both the decisions of *S* and [this decision], it was never going to be possible to prove the initial charge that she "inappropriately restrained a two-year-old child while he slept".

[41] Mr Goddard also submitted that, "… there was no evidence from any witness that the child in question actually slept. Therefore, the evidential test has not been met". Mr Goddard referred to the evidence we heard during the hearing, and what he submitted were gaps in the CAC's investigation following receipt of the Centre's mandatory report.

[42] We do not accept that the assertion that Child A was asleep formed a fact that had to be proved on the balance of probabilities in its own right. At the commencement of the hearing, we permitted the CAC to file an amended

charge that omitted the words "while he slept".[28] We held that, "Importantly, we did not accept that Ms [redacted] was prejudiced by the change in wording. Nor did we accept the submission that the CAC is bound to frame its charge around the wording used in the mandatory report". Moreover, the alleged investigative shortcomings upon which Mr Goddard relied do not provide a good reason to order costs against the CAC. The information that Mr Goddard submits was absent could not have had a dispositive effect on the proceedings.

[43] Next, Mr Goddard submitted that, "The charge should have been framed as a charge of immobilising while guiding or controlling a child. The charging as framed could not have resulted in a finding of serious misconduct". He referred to the comments we made at [94] of our decision in support of that submission. Mr Goddard also submitted that, "It is critical that consideration of physical contact requires a different lens. It is submitted that the CAC's failure to do so resulted in charges being laid which could not be proved".

[44] We received fulsome submissions from both counsel addressing the words "inappropriate restraint" adopted by the CAC in its notice of charge. However, it is important to repeat *why* we found that the prosecution had not met its burden of proof. We said:[29]

> It is not possible to reconcile the diametrically opposed narratives provided by the parties. Given this clash, a principled approach to the assessment of the veracity and reliability of witnesses is required. We have kept in mind the limitations associated with a demeanour-based assessment of truthfulness, and that demeanour is "best not" considered in isolation.[30] What is required is a broader assessment of a witness's evidence. The following factors may, depending on the particular circumstances of the case, be relevant: Whether the witness's evidence is consistent with the evidence of other witnesses who we have accepted are truthful and reliable; whether the witness's evidence is consistent with objective evidence such as documents or text messages, and if it is not, what explanation is offered for any inconsistencies; whether the witness's account is inherently plausible (does it make sense, is it likely that people would have acted in the way suggested?); and whether the

[28] Our decision at [3]-[4].
[29] At [83]-[84].
[30] *Taniwha v R* [2016] NZSC 123, [2017] 1 NZLR 116.

witness has been consistent in his or her account over time and, if not, why not?[31]

Ms [redacted] directly confronted the allegation in her evidence. We are satisfied that the respondent told us the truth, or, at the very least, there is a reasonable possibility that she did so. That is not to say that we found the CAC's witnesses to be dishonest. *Rather, Ms [redacted] left us in a position where we were unable to prefer the evidence of Ms [redacted] that she was not the person who wrapped Child A, over Ms [redacted]. That conclusion was required to enable the CAC to satisfy us that the particular is proved on the balance of probabilities. Therein lies the rub in this case – there was not a principled basis for concluding that the CAC had discharged its burden because we could prefer its witnesses' evidence over that from the respondent.*

[Footnotes in original, our emphasis]

[45] Mr Goddard referred to [94] our decision. For completeness, we will set out that paragraph, as well as those that preceded it, which place our comments on the "inappropriate restraint" element in context:

[92] Ms Best submitted that there was an alternate pathway to a finding that Ms [redacted] misconducted herself, which hinged on determining:

(a) The particular circumstances in which the respondent covered Child A's face; and

(b) Whether those facts amount to serious misconduct as that term is defined in the Act?

[93] We have answered Ms Best's question (a). That leaves no room to incorporate Ms Best's analysis of a decision in which the Tribunal held that "swaddling" is a practice that invites a finding of serious misconduct because it risks adversely affecting children's wellbeing.[32] Looked at through r 9(1)(a)'s lens, swaddling may constitute "unjustified or unreasonable physical force".[33] That analysis would have had a bearing if we had concluded that Ms [redacted] was the person who wrapped Child A, but we did not.

[94] We acknowledge Mr Goddard's careful submissions addressing "immobilisation", which, in the ECE setting, is a more apt term than "restraint". While not addressed in the CAC's submissions, Mr Goddard drew our attention to r 56(2) of the Education (Early Childhood Services) Regulations 2008, which requires operators of ECE centres to exclude a person "from coming into contact with the child participating in the service or,

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[31] *Taniwha* at [38] and [45].
[32] *CAC v Costello* NZTDT 2020/29, at [116](d) and [127]-[128].
[33] We acknowledge Mr Goddard's submission that s 24 of the Act addresses the use of force in ECE centres.

> as the case requires, the children being educated by the educator" if satisfied it is necessary to do so to ensure that no child is ill-treated. This obligation is engaged, inter alia, if a person has "in guiding or controlling a child, [subjected] the child to solitary confinement, *immobilisation*, or deprivation of food, drink, warmth, shelter, or protection".
>
> [Footnotes in original]

[46] Having traversed the arguments, we said that, "We need not decide the point, given our conclusions regarding the first stage of the test for serious misconduct …"[34]

[47] We do not accept that the way in which the CAC drafted its notice of charge constitutes a good reason to order costs against it. The parties' careful interpretive analysis shows that this was an issue that would have required resolution by the Tribunal if we had not made the determinative veracity and reliability findings we referred to earlier. However, that does not mean that the CAC's notice of charge was "misconceived". Contrary to what Mr Goddard submitted, the case presented by the CAC was that – whatever the label attributed to the act - Ms [redacted] was the person who physically restrained Child A by tightly wrapping him.

[48] There is a key error permeating the reasoning in support of costs. Mr Goddard submitted that our finding that Ms [redacted] had not seriously misconducted herself meant that the Centre "should not have submitted a mandatory report" under s 491 of the Act,[35] and if it had not done so, "… none of the consequences described above should have occurred".[36] While not expressly stated as such, we took Mr Goddard's submission to be that the CAC should have foreseen that its witnesses' credibility and reliability would be found wanting by the Tribunal.

[49] We accept Ms Best's submission that Ms [redacted] has overlooked s 489(1) of the Act, which provides an alternative basis for submitting a mandatory report to the Council:

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[34] At [97].
[35] "Mandatory reporting of possible serious misconduct".
[36] This was said in the submissions in support of name suppression and referred to the effects the proceedings had on Ms [redacted] which we addressed earlier in this decision.

> When an employer dismisses a teacher for any reason, the employer must immediately report the dismissal to the Teaching Council.

[50] The Centre met its mandatory reporting duties under both ss 489 and 491 of the Act. However, we consider that the answer to Mr Goddard's criticisms about the quality of the case against Ms [redacted] is found in s 497(5) of the Act, which describes the test for referral from the CAC to the Tribunal. It relevantly provided at the time that the CAC was seized of Ms [redacted] case that it, "must refer to the Disciplinary Tribunal any matter the Committee considers may possibly constitute serious misconduct".[37] As we discussed in *CAC v Rowlingson*,[38] *CAC v Davies* and *CAC v Teacher B*,[39] s 497's antecedent in the Education Act 1989, 401(4), replaced an earlier provision (which had a higher threshold that matches the iteration of s 497 now in force), requiring the CAC to be satisfied that:[40]

> [If] the facts as they have assessed them to be can be proved, then there is a realistic possibility that the Tribunal will regard the teacher's conduct as constituting serious misconduct.

[51] Section 497(5) obliged the CAC to determine the "realistic possibility" that the Tribunal would regard Ms [redacted] behaviour to constitute serious misconduct to meet its referral burden. We are satisfied this threshold was met, and no criticism can be levelled at the CAC for bringing the case.

[52] Ms [redacted] argument assumes that s 497(5) enabled the CAC to step into the Tribunal's shoes, and make definitive credibility and reliability findings of the type that led to us find the charge was not proved to the requisite standard. This conflates the CAC's gate-keeper function under s 497, and the Tribunal's role as the decision-maker. Had the CAC made credibility findings in relation to the CAC's witnesses vis-à-vis Ms [redacted] it would have encroached upon the Tribunal's function. Given the threshold in s 497(5), the CAC would have contravened its power had it not referred the matter to us.

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[37] The referral threshold was heightened on 29 July 2023.
[38] *CAC v Rowlingson* NZTDT 2015/54.
[39] *CAC v Davies* NZTDT 2016/28 and *CAC v Teacher B* NZTDT 2017/7.
[40] *Rowlingson*, at [17].

[53] To mirror what we said in *McClutchie-Mita*,[41] the Tribunal is sympathetic to the fact that disciplinary proceedings inevitably cause a degree of professional and financial hardship to those charged and, at first blush, the different approach to costs awarded to successful regulators vis-à-vis successful practitioners appears inequitable. We acknowledge the difficulties that Ms [redacted] faced as a consequence of this proceeding. However, as the authorities that underpin the Practice Note explain, there are strong policy reasons why this approach in disciplinary proceedings has developed. We do not accept the submission that the CAC's case was without evidential foundation. We are satisfied that there is not a good reason to make a costs order against the CAC. To call in aid the considerations described in *Baxendale-Walker*, this was not an improperly brought complaint, and nor was it a "shambles from start to finish".

[54] Costs are to lie where they fall.

Orders

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

(a) We affirm the order we made on 26 April 2023 under s 501(6)(c) permanently suppressing the name and identifying particulars of Child A.

(b) We make an order under s 501(6)(c) prohibiting publication of the name of [redacted], and the names and identifying particulars of its employees who gave evidence on 15 November 2022: [redacted], [redacted] and [redacted].

(c) We make an order under s 501(6)(c) suppressing the name and identifying particulars of Ms [redacted].

Nicholas Chisnall KC
Deputy Chair

[41] *CAC v McClutchie-Mita* NZTDT 2017/3C, 4 December 2017 at [35].