

BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

NZTDT 2022/54

KEI RARO I TE MANA O
Under

of the Education Act 1989 (**the Act**)

I TE TAKE O
In the Matter of

charge referred by the Complaints Assessment Committee to the New Zealand Teachers Disciplinary Tribunal

KO
Between

COMPLAINTS ASSESSMENT COMMITTEE

Kaiwhiu | Prosecutor/Referrer

ME
And

Registration

Kaiurupare | Respondent

**TE WHAKATAUNGA Ā TE TARAIPUNARA
RESULTS DECISION ON LIABILITY, COSTS AND NAME SUPPRESSION**

Dated 6 November 2023

NOHOANGA:
Hearing

26 September 2023 on the papers via Teams

TE TARAIPUNARA:
The Tribunal

Ian Murray (Tiamana Tuarua)
Maria Johnson raua ko Celeste Harrington (Ngā mema o te Taraipunara)

**NGĀ ROIA ME NGĀ
KAIAWHINA:**
Representation

Elena Mok for Complaints Assessment Committee
Alison Gordon for the Respondent

Hei timatanga kōrero – Introduction

1. The Complaints Assessment Committee (CAC) has referred to the Tribunal a charge of serious misconduct and/or conduct otherwise entitling the Tribunal to exercise its powers. The charge is set out below

TAKE NOTICE that a Complaints Assessment Committee (the CAC) has determined that in accordance with section 497 of the Education and Training Act 2020:

- (a) Information received in the mandatory report provided by [REDACTED] [REDACTED] about the conduct of [REDACTED] should be considered by the New Zealand Teachers Disciplinary Tribunal (the Disciplinary Tribunal).
- (b) The CAC charges that the teacher has engaged in serious misconduct and/or conduct otherwise entitling the Disciplinary Tribunal to exercise its powers.

Particulars of the Charge

1. The CAC charges that, on 25 February 2021, [REDACTED], registered teacher, of [REDACTED], pulled the rope of the rope swing that Child A (aged 3 years old) was holding onto, to remove him from the rope swing, which caused Child A to fall off the swing and hit his head.
2. The conduct alleged in paragraph 1 amounts to serious misconduct pursuant to section 10 of the Education and Training Act 2020 and rules 9(1)(a) and/or (k) of the Teaching Council Rules 2016; or, alternatively, amounts to conduct which otherwise entitles the Disciplinary Tribunal to exercise its powers pursuant to section 500 of the Education and Training Act 2020.

Whakarāpopoto o te whakataunga – Summary of decision

2. The Tribunal has considered the charge and concluded that it is not satisfied that the

conduct amounts to serious misconduct. It has also concluded that the conduct did not amount to misconduct or conduct otherwise entitling the Tribunal to exercise its powers. As a result, we make no finding against the respondent and impose no penalty. There was no order for costs, and we granted the respondent's application for name suppression.

Kōrero Taunaki - Evidence

3. Before the hearing the parties conferred and submitted and Agreed Summary of Facts (**ASF**), signed by the respondent and counsel for the CAC. The ASF is set out in full below:

SUMMARY OF FACTS

Background

1. The respondent, [REDACTED], is a fully registered teacher. Ms [REDACTED] held a practising certificate which expired on 5 December 2022.
2. At all relevant times, Ms [REDACTED] worked as a teacher at [REDACTED] [REDACTED] (**Centre**), an early learning centre in [REDACTED].
3. On 3 March 2021, Ms [REDACTED] resigned from the Centre and gave two weeks' notice. Her last day of work was to be 19 March 2022. Ms [REDACTED] was unwell from 8 March 2022 for the remainder of her notice period.
4. As at the date of this summary (April 2023), Ms [REDACTED] is not employed in the education sector. She did not renew her practising certificate and she has retired from teaching.

Incident at the Centre

5. On 25 February 2021 at around 1pm, Ms [REDACTED] was outside supervising two children at the Centre who were playing on the rope swing. There were three teachers on duty that day, including Ms [REDACTED]. At the time of the incident, the other two teachers were inside.

6. One male child aged three-years old, ██████ (Child A), wanted a turn on the swing while another child, ██████ (Child B), was already using it. Child B did not want to share the swing with Child A. Child A became frustrated and hit Child B in the face with his hand. Child B got off the swing, and Child A got on the swing. Ms ██████ told Child A that it was not ok to hurt others. She also told Child B that Child A wanted a turn and that he needed to share.
7. Child B was standing in the way of the rope swing.
8. Another teacher, ██████ (Ms ██████), asked Child B to move out of the way, as he was standing on the box in front of the rope swing, and would get hit by the swing. Child B kept jumping on the swing while Child A was on it. As Child B was standing on the box in front of the swing, Child A was swinging back and forth. Child A then hit Child B in the head with his feet as he was swinging.
9. Ms ██████ tried to get Child A down from the swing using a firm voice, but he did not listen. Ms ██████ then pulled on the rope of the swing, which caused Child A to fall backwards off the swing, onto the bark underneath the swing, hitting his back and head on the bark. A photograph of the playground showing the swing set (without the rope swing attached) is at **Tab A**.
10. Child A stood up quickly and was holding his mouth. Ms ██████ was shocked because she had only wanted Child A to get off the swing by pulling on the rope that Child A was holding so that she could talk to him and calm him down. Ms ██████ checked Child A's head and back. She did not observe any marks on his body. Ms ██████ then made Child A sit next to her.
11. Ms ██████ then offered Child B a cold flannel for his face due to his having been hit by Child A. Ms ██████ took Child A inside to change his nappy and, while doing so, also checked on his head and mouth for any bleeding. There did not appear to be any physical injuries to Child A.

12. Around 20 minutes later, Ms [REDACTED] went inside and spoke to the Acting Manager at the time, [REDACTED] (Ms [REDACTED]), about the incident. She told Ms [REDACTED] that Child A had smacked Child B on the face because Child B would not let Child A have the swing, so she took Child A off the swing and, as she did that, he fell on the ground. Ms [REDACTED] asked Ms [REDACTED] to write up the incident in the incident log book.

Ms. [REDACTED] wrote details of the incident between Child A and Child B in the incident book. Ms. [REDACTED] did not record the incident between herself and Child A as she did not understand that this is what Ms. [REDACTED] was asking her to do. The Centre's Manager, [REDACTED] [REDACTED] (Ms. [REDACTED]) later also recorded the incident in the Centre's incident book.

Centre investigation and mandatory report

13. On 1 March 2022, a staff hui was held. The incident with Ms [REDACTED] and Child A was brought up. Ms [REDACTED] left the meeting early as she did not feel comfortable discussing the incident in front of all of the staff at the Centre, as some staff members at the meeting were not present during the incident.
14. On 2 March 2022, the Centre Manager, Ms [REDACTED] wrote a letter to Ms [REDACTED] asking her to provide a detailed written explanation of the playground incident as part of the Centre's investigation process. Ms [REDACTED] provided a written account of the events to Ms [REDACTED] on 3 March 2022.
15. In her written account, Ms [REDACTED] stated that after Child A hit Child B on the face with his hand, Child B got off the rope and Child A got on the rope swing. After telling Child A that it was not ok to hurt Child B, Ms [REDACTED] tried to get Child A down from the swing using her firm voice. Ms [REDACTED] stated that Child A refused, so she tried to remove him by pulling on the rope he was holding. When she pulled the rope, he fell off the swing, onto the bark on his back and head. Child A got up and Ms [REDACTED] checked his head and back for injury. Ms [REDACTED] wrote that she felt

bad that Child A had fallen from the swing, and it was never her intention for him to have fallen. She said her intention was to calm Child A down and then to remove the rope swing to dispel the conflict between the two children.

16. On 3 March 2021, Ms [REDACTED] also provided Ms [REDACTED] with a resignation letter, stating that her last day of work would be 19 March 2021.
17. On the same day, Ms [REDACTED] provided Ms [REDACTED] with a letter advising her that a meeting would be held on 9 March 2022 between her, Ms [REDACTED] and the Centre owner [REDACTED] (Mr [REDACTED]). The letter reminded Ms [REDACTED] that the meeting was not a disciplinary meeting but was instead the next step in the Centre's investigation process, and that Ms [REDACTED] could bring a support person if she wanted. Ms [REDACTED]'s resignation was formally accepted in this letter.
18. On 10 March 2021, the meeting was held with the Mr [REDACTED] and Ms [REDACTED]. Ms [REDACTED] did not attend. The purpose of the meeting was to discuss the final findings of the investigation that the Centre had conducted. Because Ms [REDACTED] was not at the meeting to provide further evidence of the incident, Mr [REDACTED] and Ms [REDACTED] determined that there was not enough evidence to take further action, so it was agreed the matter would be closed. At the meeting, it was also determined that a mandatory report needed to be made to the Teaching Council because Ms [REDACTED] had resigned from the Centre within 12 months after a conduct issue was raised.
19. On 26 March 2021, Ms [REDACTED] made a mandatory report to the Teaching Council.

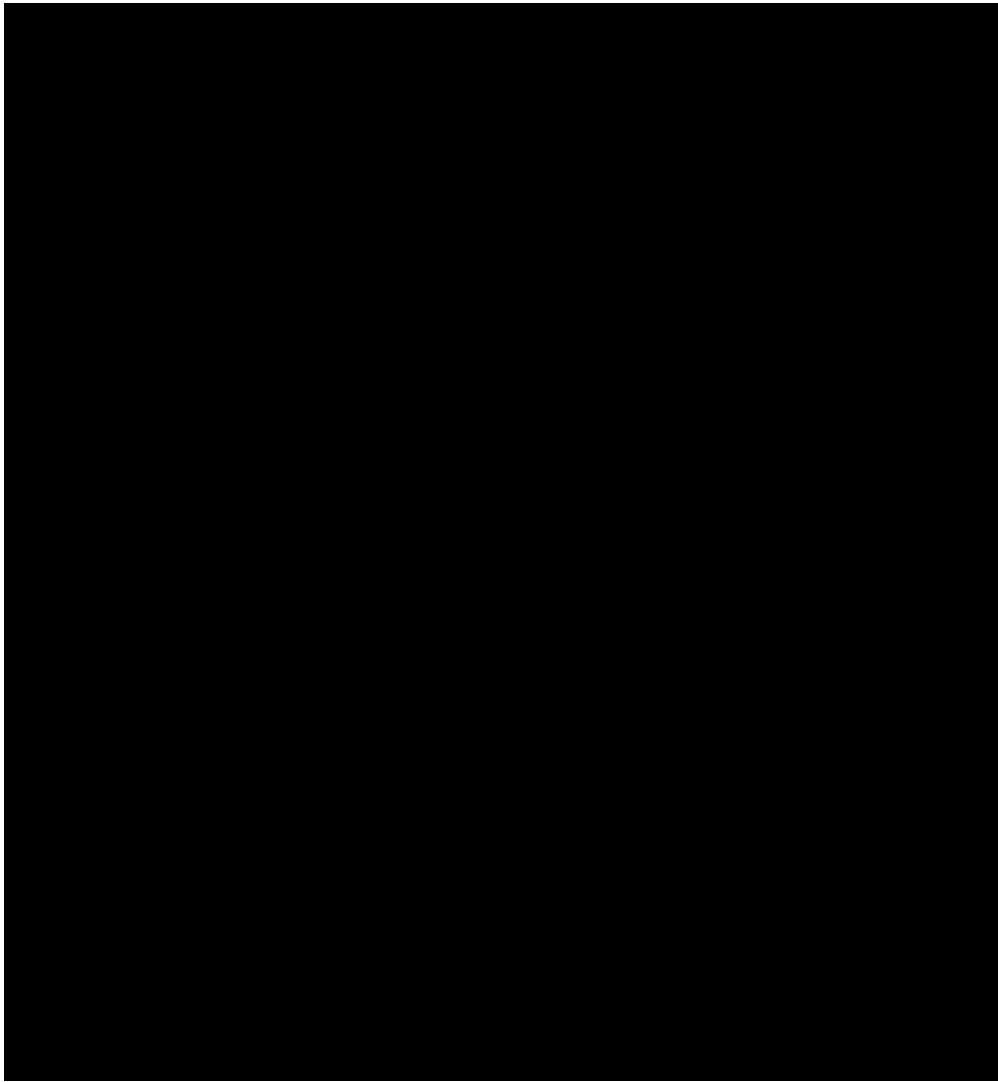
Ms [REDACTED]'s response to the mandatory report

20. On 3 May 2021, Ms [REDACTED] provided a written response to the mandatory report. Ms [REDACTED] stated that she did not have anything further to add to the written response she provided to Ms [REDACTED] dated 2 March 2021, about why she left the hui on 1 March 2021.

21. Regarding the meeting on 10 March 2021, Ms [REDACTED] stated that she took advice from a doctor, who told her not to attend the meeting, as it would cause her more stress and she had no legal support to accompany her. Ms [REDACTED] stated that she felt like she could have handled the conflict between Child A and Child B in a “more professional manner”, which added to her decision to resign.
22. With regard to Ms [REDACTED]'s written account of the incident, Ms [REDACTED] stated that it was a true record. Ms [REDACTED] stated that she has a “loving and caring manner for the children in my care”. She further stated that there are times in teaching when we know we could have handled a conflict in a more professional manner. Ms [REDACTED] states that she “should have stood back and talked to the child regarding [their] behaviour on the swing” and that “I thought I could persuade [Child A] to come down with holding his body, but his struggles caused him to fall”.

Ms [REDACTED]'s response to the investigation report

23. In an email dated 5 October 2021 in response to the Complaints Assessment Committee investigator's draft investigation report, Ms [REDACTED] stated that she stood by what she wrote in her first response dated 3 May 2021. She further stated that “there was only one witness and my word regarding this incident”.



4. We must be satisfied on the balance of probabilities that the CAC has proved the particulars of the charge. In this case, the admissions in the summary of facts provide an adequate basis to establish the particulars of the charge. Accordingly, we find that the particulars are established.

Ko te hātepe ture o tonono nei – Procedural History

5. The alleged incident occurred on 3 March 2021. There was an investigation by the childcare centre and during that investigation the respondent resigned from her employment at the childcare centre. The employment procedure continued on, and on 26 March 2021, the centre made a mandatory report to the Teaching Council.
6. The CAC investigated the complaint and the charge against the respondent was laid

against the respondent dated 10 October 2022. The CAC amended the charge twice. The first amended charge was dated 11 July 2023 and second was dated 30 August 2023. It was this second charge that was before the Tribunal.

7. A pre-hearing conference was convened on 16 June 2023 and the matter was timetabled for a hearing on the papers, to take place on 26 September 2023.

Hīanga Nu - Serious Misconduct

8. It is for the Tribunal to be satisfied that the established conduct amounts to serious misconduct or conduct otherwise entitling the Tribunal to exercise its powers.

9. Serious misconduct is defined in section 10 of the Act as:

serious misconduct means conduct by a teacher—

(a) that—

- (i) adversely affects, or is likely to adversely affect, the well-being or learning of 1 or more students; or
- (ii) reflects adversely on the teacher's fitness to be a teacher; or

(iii) may bring the teaching profession into disrepute; and

(b) that is of a character or severity that meets the Teaching Council's criteria for reporting serious misconduct.

10. The criteria for reporting serious misconduct are found in r 9 of the Rules. The CAC relies on the following reporting rules:

(a) using unjustified or unreasonable physical force on a child or young person or encouraging another person to do so:

(k) an act or omission that brings, or is likely to bring, the teaching profession into disrepute.

Ngā Kōrero a te Kōmiti – CAC Submissions

11. In arguing that this behaviour amounted to serious misconduct, the CAC argued that the conduct was likely to adverse effect both the physical and emotional wellbeing of Child A. The CAC noted that given the child's age, the possibility that Child A may have fallen and the potential for risk of harm was a foreseeable consequence of her conduct.

12. The CAC noted the child experienced some pain and that the respondent made the child sit next to her which could be inferred as being done to punish the child, who had hit Child B twice immediately prior to the incident.
13. The CAC argued that the conduct adversely reflects on the respondent's fitness to be a teacher arguing that she ought to have known that by pulling the rope that Child A was holding onto, could cause him to fall off the swing. The decision to pull the rope showed a lack of regard for the child's safety. It was a poor decision that reflects adversely on the respondent's teaching practice because she failed to recognise that a more appropriate behavioural management strategy was available to her.
14. Further, the CAC argued that reasonable members of the public would expect teachers to be able to deal with conflicting children in an appropriate manner and not resort to this type of conduct. Further, in support of the argument that there was a potential to bring the teaching profession into disrepute, the CAC noted that the respondent had breached two aspects of the Code of Professional Responsibility, being the maintaining of public trust and confidence in the teaching profession by maintaining high standards and working in the best interests of learners by promoting their wellbeing and protecting them from harm.
15. With regard to the reporting requirements, the CAC argued that this was unjustified or unreasonable physical force being applied to a child and was conduct that could bring the profession into disrepute for the reasons already articulated.
16. The CAC argued that if the Tribunal did not find it to be serious misconduct, then it still amounted to misconduct because of the statutory limbs in s 10(1)(a) had been established so that the Tribunal could find misconduct and exercise its disciplinary powers.

Ngā kōrero a te Kaiurupare – Respondent's submissions.

17. The respondent argued that not all departures from accepted professional standards amount to misconduct and that the professional disciplinary regime under the Act clearly provides for degrees of wrongdoing.
18. The respondent noted that there was no evidence that she pulled the arm of Child A, but rather that she pulled on the rope of the swing which then caused Child A to fall backwards.

19. The respondent argued therefore that the issue is not whether there was direct contact, but whether the indirect contact with the rope is sufficient to establish serious misconduct. The respondent argued that it did not. She argued that her intention was to defuse the conflict between the children rather than acting in anger or to discipline Child A.
20. The respondent argued that the rationale for why she took the actions in question is significant in assessing whether this is sufficiently serious to be classified as serious misconduct or misconduct.
21. The respondent argued that the conduct did not rise to the level of adversely affecting the wellbeing or learning of any student. Although Child A was holding his mouth there is no evidence that he was injured, and it is relevant that the respondent's actions were an attempt to dispel conflict between two children to prevent escalation or continuation of that conflict.
22. The respondent argued that the behaviour does not adversely reflect on her fitness to be a teacher consistent with the Tribunal's reasoning in *CAC v Williams*. While her actions in responding to conflict may have been characterised with the benefit of hindsight as being inconsistent with best practice, the absence of any ill intent on her part means that the conduct does not reflect adversely on her fitness to be a teacher.
23. Further, the actions in trying to dispel conflict between two children would not be viewed by reasonable members of the public fully informed of the circumstances as bringing discredit on the profession.
24. The respondent argued that the reporting rules were not established because this was not unreasonable force and did not bring the profession into disrepute.

Kōrerorero – Discussion

25. Ultimately, we have concluded that this conduct, while not best practice, was not of the severity or seriousness to justify a disciplinary finding of either serious misconduct or of misconduct.
26. In our view, the criteria in the Act and the reporting rules are not established and so we do not find that this was misconduct or serious misconduct.
27. Starting with the effect on the learning or wellbeing of Student A, we do not consider the respondent's actions in grabbing a swing to try and manage a situation of conflict

between two young students did not establish this first criteria in the Act. We do not consider that the behaviour either did or was likely to adversely affect the wellbeing of the student. The child falling off the swing was unfortunate, but we do not consider it was intentional and was not the result that the respondent was trying to achieve by grabbing hold of the rope on the swing. While the child was initially affected by the fall, there is no evidence of any continued injury or harm for the child and ultimately conclude that the criteria for serious misconduct is simply not made out.

28. We also conclude that the respondent's instinctive reaction in grabbing the swing during an incident involving a conflict between two students can be characterised as adversely reflecting on a fitness to be a teacher. Undoubtedly, it was something that with the benefit of hindsight she accepts she should have not done, but that does not mean that it triggers this criteria for finding serious misconduct. We simply do not accept that a momentary mistake by a teacher in challenging circumstances necessarily triggers this criteria for finding serious misconduct.
29. For similar reasons, we do not consider that the test for the potential to bring the teaching profession into disrepute is established. The test for deciding whether a teacher's actions are likely to bring the teaching profession into disrepute is set out by the Court in *Collie v Nursing Council of New Zealand*.¹ It is an objective test and requires consideration of whether reasonable members of the public informed of the facts and circumstances, could reasonably conclude that the reputation and good standing of the profession is lowered by the respondent's actions.
30. Right thinking members of the community aware of the facts of this case and would not consider that the teaching profession as a whole was diminished by this momentary and impulsive act of the respondent.
31. As a result, we find none of the statutory criteria made out.
32. Further, we do not consider that the respondent's actions in grabbing a swing leading to a child falling off the swing to the ground establishes unjustified or unreasonable physical force on a child or young person. The respondent's actions in this case were not directed at the child. While we accept that this conclusion is not to be taken as meaning that a teacher could never be found to have unreasonably applied physical force to a child simply because the force was indirect rather than direct, in this case

¹ *Collie v Nursing Council of New Zealand* [2001] NZAR 74.

given the way in which the incident unfolded, we do not consider that that criteria is established either. For the reasons already outlined we do not consider that this had the tendency to bring the teaching profession into disrepute.

33. As a result, we have found none of the criteria in the Act or the reporting rules made out and that means that we have not found the behaviour to be either misconduct or serious misconduct.

Utu Whakaea – Costs

34. We have not found that the criteria for either serious misconduct or misconduct are established. As a result, we will not be awarding costs against the respondent. However, we consider given the current test for serious misconduct, the CAC was required to refer this charge to the Tribunal. The fact that the Tribunal ultimately did not find it established does not mean that the CAC was wrong to bring the charge. The usual rule is that where a charge is not established costs would not be awarded against the CAC and we intend to follow that ordinary rule and make no order for costs.

He Rāhui tuku panui – Non-publication

35. Pursuant to section 405(6) we make an order suppressing the name of child A, the childcare centre and the respondent and any details that may lead to their identification.
36. The respondent applied for name suppression. Were we to have found the charge proven, we may not have suppressed the respondent's name, but given that we have not found the charge proven and given the fact that the respondent lives in a small community where information is spread quickly, she has vulnerable family members with health issues and a grandson at daycare, and given that she has been vindicated by this process, we consider it proper to suppress her name and identifying particulars.



Ian Murray
Deputy Chair

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

1. This decision may be appealed by teacher who is the subject of a decision by the Disciplinary Tribunal or by the Complaints Assessment Committee.
2. An appeal must be made within 28 days after receipt of written notice of the decision, or any longer period that the court allows.
3. Section 356(3) to (6) applies to every appeal under this section as if it were an appeal under section 356(1).