

BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

NZTDT 2021/53

IN THE MATTER of the Education and Training Act 2020

AND

IN THE MATTER of a charge of serious misconduct referred by the
Complaints Assessment Committee to the New
Zealand Teachers Disciplinary Tribunal

BETWEEN **COMPLAINTS ASSESSMENT COMMITTEE**

Referrer

AND


Respondent

DECISION OF THE TRIBUNAL ON CHARGES

28 June 2022

HEARING: Held on 30 March 2022 on paper via Teams

TRIBUNAL: Rachael Schmidt-McCleave (Deputy Chair)
Neta Sadlier and Nikki Parsons (members)

REPRESENTATION: C Paterson/A-R Davies, Meredith Connell for the Complaints
Assessment Committee
D Grindle, WRMK Lawyers for the respondent

Hei timatanga kōrero – Introduction

1. Pursuant to section 497(4) of the Education and Training Act 2020 (the “Act”), the Complaints Assessment Committee (“CAC”) referred the respondent’s conduct to the Tribunal, on the basis that the CAC considers that it constitutes “serious misconduct” as defined in section 10(a) of the Act.
2. The charge alleges that the respondent, a registered teacher of Whāngarei, while working in the children’s bathroom at [REDACTED], [REDACTED], on or about 4 September 2020:
 - (a) Verbally reprimanded a toddler (Child A) using words to the effect that “these are called ears and they aren’t painted on so please use them, if you used them to listen with, you could have been back outside playing by now”; and/or
 - (b) Pulled on Child A’s ear, causing Child A to say “stop pulling on my ear, it hurts, please stop”, or words to that effect.
3. The CAC alleges that the conduct above separately and/or cumulatively amounts to serious misconduct pursuant to section 10 of the Act and any or all of Rules 9(1)(a), (j) 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 Act.
4. The matter was heard on the papers via Teams on 30 March 2022.

Ko te hātepe ture o tono nei – Procedural History and Preliminary Matters

5. A pre-hearing conference (“PHC”) was held on 14 December 2021. The parties agreed to various timetabling matters. An interim name suppression order was made in respect of [REDACTED], to stay in place until the charge is disposed of.

Kōrero Taunaki - Evidence

Agreed Summary of Facts

6. The ASoF is set out in full below:

“Introduction

1. ██████████ is a registered teacher ██████████ with a full practising certificate. Her practising certificate is due to expire on ██████████

Background

2. On 29 September 2020, the Teaching Council received a mandatory report from ██████████, the Centre Manager at ██████████ (Centre).
3. The mandatory report related to conduct towards a child (**Child A**) who was three years and five months old at the time.

Conduct

4. On 4 September 2020, ██████████ was working as a teacher in the “over twos” section at the Centre. ██████████ was assigned that day to toilet the children.
5. At around 12 pm, Child A was brought into the bathroom by another teacher who advised Child A had soiled and needed to be changed. ██████████ was changing another child at that time.
6. When ██████████ was finished changing the first child, she asked Child A to come to her. ██████████ explains [sic] that Child A was un-cooperative and spread faeces on himself and on the bathroom.
7. In the course of changing Child A’s “pull-up” nappy, ██████████ verbally reprimanded Child A, saying to Child A words to the effect of “these are called ears and they aren’t painted on so please use them, if you used them to listen with, you could have been back outside playing by now.” ██████████ grabbed Child A’s ear and pulled on it with enough force that Child A said something like “ow don’t pull my ears” and “it’s hurting.”
8. ██████████ conduct was witnessed by a parent of another child who described ██████████ as “growling” at Child A.
9. On 7 September 2020, the parent called the Centre Manager and informed her what had happened.
10. On 9 September 2020, the Centre sought to have a disciplinary meeting with ██████████, to take place on 16 September. On 15 September, ██████████ handed in her resignation. ██████████ did not attend the disciplinary meeting on 16 September, nor did she attend an exit interview with the Centre.
11. Child A’s mother stated she did not recall that Child A mentioned anything to her about the incident when she picked him up that day.
12. The Centre Manager reported ██████████ conduct to the Police who carried out their investigation. ██████████ was formally warned for assault on a child.

Teacher’s comments

13. During the Teaching Council's investigation, ██████ admitted that:

- a. she had "tweaked" Child A's left ear. ██████ stated that Child A repeatedly refused to co-operate when she was trying to clean him up, and he had faeces spread over him, the floor and the toilet. Child A was upset and crying because she would not let him leave the toilet dirty.
- b. ██████ admits that when she pulled Child A's ear, he cried and said "ow don't pull my ear."
- c. ██████ explained that on that day, she was not feeling well with an earache and a tooth ache. She had recently been diagnosed with ██████. At the time, she was feeling very anxious.
- d. ██████ stated that she was very embarrassed about this situation and apologised to Child A's mother on the phone.

14. Before the Tribunal, ██████ accepts the full extent of her conduct as charged in the Amended Notice of Charge dated 15 February 2022 and as described above in this summary of facts.

15. ██████ has since found alternative employment in a non-teaching role."

Te Ture - The Law

7. Section 10 of the Act defines serious misconduct:

serious misconduct means conduct by a teacher –

(a) that –

- (i) adversely affects, or is likely to adversely affect, the wellbeing 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.

8. As confirmed by the District Court in relation to the identical test under section 378 of the Education Act 1989 (the "former Act"),¹ the test under section 10 is conjunctive, meaning that as well as meeting one or more of the three adverse consequences, a teacher's

¹ *Teacher Y v Education Council of Aotearoa New Zealand* [2018] NZDC 3141, 27 February 2018 at [64]

conduct must also be of a character or severity that meets the Teaching Council's criteria for reporting serious misconduct, pursuant to Rule 9 of the Teaching Council Rules 2016.

9. The criteria for reporting serious misconduct are found in the Teaching Council Rules 2016 (the "Rules"). The Tribunal also accepts the CAC's submission that, if established, the respondent's conduct would fall within the following sub-rules of Rules 9(1):
 - (a) Rule 9(1)(a): unjustified or unreasonable physical force on a child:
 - (b) Rule 9(1)(j): an act or omission that may be the subject of a prosecution for an offence punishable by imprisonment for a term of 3 months or more:²
 - (c) Rule 9(1)(k): an act or omission that that brings, or is likely to bring, the teaching profession into disrepute.
10. The Tribunal accepts that the test under Rule 9(1)(k) will be satisfied if reasonable members of the public, informed of the facts and circumstances, could reasonably conclude that the reputation and standing of the profession was lowered by the respondent's behaviour.³

Ngā Kōrero a te Kōmiti – CAC and Respondent Submissions

CAC submissions

11. In summary, the CAC submits that the respondent's conduct meets both limbs of the misconduct definition.
12. In terms of the first limb, the Committee submits that the Tribunal is not required to find that a child suffered actual harm as a result of the teacher's conduct; it may conclude that the teacher's conduct was, "likely to" adversely affect a child's wellbeing or learning. The Committee said that, while there may be no direct evidence of lasting adverse consequences for child A, the Tribunal is entitled to proceed on the basis that such consequences are a logical outcome or "likely to have occurred" as a result of the teacher's conduct.

² Namely, assault.

³ *Collie v Nursing Council of New Zealand* [2001] NZAR 74 at [28]; *CAC v Collins* NZTDT 2016/43, 24 March 2017.

13. The Committee goes on to submit that the respondent's conduct and pulling Child A's ear was at least likely to adversely affect the child's wellbeing. It submits that the respondent's conduct was not insignificant and resulted in Child A saying, "it's hurting" and "oww, don't pull my ears". The Committee submits that, self-evidently, pulling a child's ear would have a negative effect on the child's physical and emotional wellbeing.
14. The Committee submits that the respondent's conduct reflects adversely on her fitness to be a teacher. It points out that the respondent's conduct contravenes section 24 of the Act, which prohibits teachers from using force towards any child and ECE service for the purposes of correction or punishment. The Committee also submits that the respondent's conduct was contrary to the Code of Professional Responsibility for the teaching profession, which requires teachers to (among other things):
 - (a) Maintain public trust and confidence in the teaching profession by demonstrating Commitment to providing high quality and effective teaching; and High standard of professional behaviour and integrity.
 - (b) Work in the best interests of learners by promoting the wellbeing of learners and protecting them from harm.⁴
15. After pointing to a number of applicable cases, the Committee says that, while it does not appear that the respondent poses an ongoing risk to students, her conduct taken at the time nevertheless reflects poorly on the profession.
16. In terms of the second limb of the misconduct test, the Committee submits that the respondent's conduct was a serious breach of Rules 9 (1)(a), (j), and (k) of the Code. The Committee submits that the conduct was of a character and severity that meets the threshold for serious misconduct. The child was young, rendering him more vulnerable to harm. Pulling a child's ear as a reactive or corrective measure is an aggravating feature of this conduct. This was accompanied by a verbal reprimand which, coupled with the ear pulling, would, in the Committee's opinion, have been frightening and painful for the child.

⁴ *Code of Professional Responsibility at 1.1, 1.3 and 2.1.*

17. Accordingly, the Committee submits that the Tribunal should find that the respondent's conduct meets the threshold of serious misconduct.

Respondent submissions

18. The respondent accepts that the threshold for serious misconduct has been met. She submits that she has been cooperative and forthright in respect to the matter under inquiry and admits her actions as they're outlined in the agreed statement of facts. She further admits that her conduct constitutes serious misconduct as defined by section 10 of the Act and Rules, 9 (1)(a), (j) and (k) of the Rules.
19. By way of mitigation, the respondent explains that she is a married woman with two adult children. At the time of the incident, the respondent advises that she was under extraordinary stress and was labouring under physical and mental health problems:⁵
- (a) Only five months prior to the incident, the respondent learned [REDACTED].
 - (b) On the morning of the incident, the respondent was unwell and attended her doctor with an ear infection and flu-like symptoms.
 - (c) At lunchtime on the day of the incident, the respondent left work to get antibiotics prescribed by her doctor.
 - (d) On the day of the incident, the respondent was feeling anxious because [REDACTED].
20. The respondent submits that she has not previously exhibited behaviour of this type and it is appropriate to say that this behaviour was out of character for her.
21. The respondent explains that she has now found work in another field and has no intention of returning to work in the ECE sector.

⁵ Affidavit of respondent dated 24 November 2021.

Kupu Whakatau – Decision

22. The Tribunal finds all the particulars set out in the notice of charge are established to the requisite standard.
23. The Tribunal considers that, cumulatively and for the reasons discussed below with respect to the legal position, the established particulars amount to serious misconduct pursuant to section 378 of the Act, and rules 9(1)(a), (j) and (k) of the Rules. The Tribunal considers that the respondent's conduct:
- (a) adversely affected, or was likely to adversely affect, the well-being or learning of the children involved (section 10(a)(i) definition);
 - (b) reflects adversely on her fitness to be a teacher (section 10(a)(ii) definition);
 - (c) may bring the teaching profession into disrepute (section 10(a)(iii) definition and Rule 9(1)(k));
 - (d) constituted unreasonable and unjustified physical force (Rule 9(1)(a));
 - (e) with respect to one particular, amounted to an acts or omission that may be the subject of a prosecution for an offence punishable by imprisonment for a term of 3 months or more, namely assault (Rule 9(1)(j)).
24. This Tribunal has commented many times that the use of force for corrective purposes,⁶ even where they may be no aggression or anger involved, will typically amount to serious misconduct, while acknowledging that each case must be determined on its facts and having regard to the nature of the force used and the surrounding circumstances.⁷
25. Here, the Committee notes that the respondent's conduct involved her pulling on Child A's ears with sufficient force to make him complain to her it was hurting and to ask her to stop. She also verbally harshly reprimanded Child A.
26. Additionally, section 24 of the Act expressly prohibits the use of corrective and disciplinary force. As stated of section 139A of the Education Act 1989 (the predecessor to section 24

⁶ See for example *CAC v Haycock* NZTDT 2016 – 2, 22 July 2016; *CAC v G Trow* NZTDT 2019 – 82, 28 July 2020.

⁷ *CAC v Haycock* NZTDT 2016/2, 22 July 2016.

of the Act) in *CAC v Rangihau*,⁸ “it is incumbent on all members of the teaching profession to have a clear appreciation of the legislative prohibition on the use of corrective and disciplinary force”.

27. As also stated by the CAC, the importance of ensuring the protection and safety of children in educational settings has been strengthened by the enactment of the Children's Act 2014 (previously called the Vulnerable Children's Act) and the amendments to the Act in 2015.
28. In *CAC v Dinsdale*⁹, the teacher had smacked a child on the hand on two separate occasions with the second occasion being a slap twice on the hand. The teacher had carried out these actions because the child had hit another child at the early childhood centre involved. The Tribunal in that case determined that the teacher's action in hitting the child on two occasions had been for the purposes of correction, and that her conduct was not necessary to protect other children at the centre. The Tribunal in that case determined that the teacher had engaged in serious misconduct (albeit not accepting that rule 9 (1)(a) applied, given the nature of the force used was relatively low level).
29. In *CAC v Kaufusi*,¹⁰ the teacher had on at least two occasions pulled the ears of two 4-year-old children, with the explanation that he (the teacher) was tired, the children were running around, and he was trying to call them back. The teacher in that case emphasised he had not meant to hit the children. Nonetheless, the Tribunal found that the conduct was in contravention of the Act and met all three limbs of the definition of serious misconduct. The Tribunal found that while the conduct was not the most serious category of physical abuse, the conduct also met the criterion for the purposes of rule 9 (1)(a) and amounted to unjustified or unreasonable physical force on a child. The Tribunal commented that both incidents together gave an impression that this may have been a pattern of behaviour on behalf of the teacher.
30. The Tribunal considers that the conduct in this case is of a similar nature to that in *Kaufusi*. Whilst this may have happened on only one occasion, in contrast to the teacher in *Kaufusi*, nonetheless the Tribunal was particularly perturbed by the nature of the child's statements in this case. This suggests that the incident must have been painful to the child, accompanied as it was by a forceful reprimand.
31. For this reason, the Tribunal considers that the respondent's conduct does constitute unreasonable and unjustified physical force under Rule 9 (1)(a) and, with respect to the actual ear pulling incident, may also amount to an act or omission that may be the subject

⁸*CAC v Rangihau* NZTDT 2014 – 49, 20 May 2014.

⁹ *CAC v Dinsdale* 2019 – 42, 22 May 2020.

¹⁰ *CAC v Kaufusi* NZTDT 2019 – 58, 15 October 2019.

of a prosecution for assault and breach of rule 9 (9)(j). This is shown by the fact that the Police gave a warning to the respondent.

32. The Tribunal therefore considers that the conduct adversely affected, or was likely to adversely affect, the wellbeing or learning of the children involved, reflects adversely on the respondent's fitness to be a teacher, and may bring the teaching profession into disrepute.

Whiu - Penalty

33. Having determined that this case is one in which we consider serious misconduct to be established, the Tribunal must now turn to consider what is an appropriate penalty in the circumstances:

500 Powers of Disciplinary Tribunal

(1) *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:*

- (a) *any of the things that the Complaints Assessment Committee could have done under section 401(2):*
- (b) *censure the teacher:*
- (c) *impose conditions on the teacher's practising certificate or authority for a specified period:*
- (d) *suspend the teacher's practising certificate or authority for a specified period, or until specified conditions are met:*
- (e) *annotate the register or the list of authorised persons in a specified manner:*
- (f) *impose a fine on the teacher not exceeding \$3,000:*
- (g) *order that the teacher's registration or authority or practising certificate be cancelled:*
- (h) *require any party to the hearing to pay costs to any other party:*

- (i) *require any party to pay a sum to the Education Council in respect of the costs of conducting the hearing:*
 - (j) *direct the Education Council to impose conditions on any subsequent practising certificate issued to the teacher.*
- (2) *Despite subsection (1), following a hearing that arises out of a report under 493 of the conviction of a teacher, the Disciplinary Tribunal may not do any of the things specified in subsection (1)(f), (h), or (i).*
- (3) *A fine imposed on a teacher under subsection (1)(f), and a sum ordered to be paid to the Teaching Council under subsection (1)(i), are recoverable as debts due to the Teaching Council.*

34. We note that, in determining penalty, the Tribunal must ensure that the three overlapping principles are met, that is, the protection of the public through the provision of a safe learning environment for students and the maintenance of both the professional standards and the public's confidence in the profession.¹¹ We refer to the decisions of the superior Courts which have emphasised the fact that the purpose of professional disciplinary proceedings for various occupations is actually not to punish the practitioner for misbehaviour, although it may have that effect.¹²
35. In *McMillan* we looked at the principles the Tribunal must turn its mind to when considering penalty following a finding entitling it to exercise its powers¹³:
- (a) Protecting the public;
 - (b) Setting the standards for the profession;
 - (c) Punishment;
 - (d) Rehabilitation;

¹¹ *CAC v McMillan*, NZTDT 2016/52.

¹² *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [97]; *In re A Medical Practitioner* [1959] NZLR 784 at p 800 (CA).

¹³ Above n 16 at [40] – [62]

- (e) Consistency;
 - (f) The range of sentencing options;
 - (g) Least restrictive;
 - (h) Fair, reasonable and proportionate.
36. The Tribunal does not intend to repeat what we said in that decision, other than to note that we have turned our mind to these principles in reaching our decision on penalty.
37. In its submissions on penalty, the CAC, submits that the following orders would be appropriate in the circumstances:
- (a) Censure;
 - (b) Annotation of the register for two years;
 - (c) the imposition of conditions on the respondent's practicing certificate, including:
 - (i) the respondent be required to inform any future teaching employers of this decision for a period of 24 months;
 - (ii) before commencing in a teaching role, the respondent is to attend a training course in behaviour management - in coping strategies for working with young children.
 - (d) The respondent submits that, with regard to available and comparative case law, the respondent's conduct in this case, although meeting the threshold for serious misconduct, is at the lower end of the spectrum. The respondent draws an analogy with the *Kaufusi* case. In the present case, she says she was dealing with a child who had, and continued to, spread faeces over himself. She states that while that fact does not mitigate or excuse her behaviour, she submits it does give some insight into the reason for her loss of self-control, in conjunction with the other medical issues operating upon her.

38. While accepting that the words used by the respondent to reprimand the child are not suitable comments, she submits they are not egregious and do not elevate the seriousness of the offending.
39. The respondent submits that given her stated intention to not teach, the imposition of conditions on her practicing certificate will be of limited utility. However, she submits that she does not oppose a censure or annotation on the register.
40. The Tribunal has taken into account both sets of submissions carefully and considered the cases referred to by both parties.
41. Bearing in mind the above, as well as the obligation upon us to impose the least restrictive penalty in the circumstances, pursuant to section 404(1) of the Act, we therefore order as follows:
 - (a) a censure under section 500 (1)(b) of the Act;
 - (b) Annotation of the register for two years from the date of this decision under section 500 (1)(e) of the Act.
 - (c) Under section 500(1)(c), the imposition of conditions on the respondent's practicing certificate, including:
 - (i) The respondent be required to inform any future teaching employers of this decision for a period of 24 months;
 - (i) Before commencing in a teaching role, the respondent to attend a training course in behaviour management and coping strategies for working with young children, such course to be approved by the Council (Incredible Years or a similar course), with evidence of such attendance to be provided to the Council.

Utu Whakaea – Costs

42. The CAC submits that a 40% contribution to the CAC's overall costs is appropriate. This reflects a discount from the starting point of 50% to acknowledge the respondent's cooperation.

43. The Tribunal sees no reason to depart from the usual principles and therefore orders 40% costs in favour of the CAC. The CAC is to file a Costs Schedule within 7 days of this decision, and any objection to that Costs Schedule is to be filed and served within a further 7 days from receipt.
44. The respondent is also ordered to pay 40% of the Tribunal's costs pursuant to section 500(1)(i).

He Rāhui tuku panui – Non-publication

45. There is an interim order for non-publication. The respondent has made an application for permanent suppression on the ground that identifying her will cause extreme hardship to her and her family. In addition to the evidence, comprising medical evidence, provided in support of her application for interim name suppression (by affidavit dated 24 November 2021), the respondent has filed a second affidavit accompanied by letters from her medical team [REDACTED] and [REDACTED].
46. The application of the principle of open justice to proceedings before the Tribunal is contained in section 405(3) of the Act. The primary purpose behind open justice in a disciplinary context is the maintenance of public confidence in the profession concerned through the transparent administration of the law.¹⁴
47. The Tribunal's powers to prohibit publication is found in section 405(6) of the Act. It can only make one of the non-publication orders in (a) to (c) of section 405(6) if it is of the opinion that it is "proper" to do so having regard to the interests of any person, including but not limited to, the privacy of the complainant and to the public interest.
48. The Tribunal has adopted a two-step approach to applications for non-publication orders. First, it considers whether it is proper to make a non-publication order having regard to the various interests identified in section 405(6); and, secondly, it decides whether to exercise its discretion to make the orders sought.¹⁵ Bare assertions will not suffice for displacing

¹⁴ *CAC v Teacher* NZTDT 2016/27 at [66] [citing *X v Standards Committee (No 1) of the New Zealand Law Society* [2011] NZCA 676 at [18].

¹⁵ *Ibid* at [61].

the principle of open justice and nor will the “ordinary” hardships or expected consequences of a proceeding involving allegations of serious professional misconduct.¹⁶

49. The Committee has noted it abides the respondent’s name suppression application.
50. In the circumstances of this case, the Tribunal is satisfied that the respondent in this case has provided sufficient evidence of the medical hardship she suffers which the Tribunal considers will be exacerbated if her name and identifying details are published. The respondent’s interest in non-publication in this case outweighs the public interest in publication. The Tribunal therefore orders non-publication of the respondent’s name and identifying details, her medical information and the names of her medical providers, the names of the children in the Charge, and that of the early childhood centre.

R. E. Schmidt-McCleave

Rachael Schmidt-McCleave
Deputy Chair

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

1. This decision may be appealed by the 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).

¹⁶ *Y v Attorney-General* [2016] NZCA 474 citing *Hart v Standards Committee (No 1) of the New Zealand Law Society* [2011] NZCA 676 approved by the Supreme Court declining leave to appeal in *Hart v Standards Committee (No 1) of the New Zealand Law Society* [2012] NZSC 4.