

## Complaints Assessment Committee (CAC) v Maryjane Queenie Aiavao

### NZTDT 2018/24

*Teacher Maryjane Aiavao appeared before the Disciplinary Tribunal charged with leaving a child asleep and alone after closing up an early learning centre for the day in 2017. The CAC argued this amounted to serious misconduct.*

*The result: Ms Aiavao was censured for her serious misconduct; the register was annotated for 18 months and conditions were placed on her practising certificate. Ms Aiavao was also required to contribute to the CAC and Tribunal's costs.*

*There are no publication orders in relation to this decision.*

The CAC alleged that Ms Aiavao, who was employed as the head teacher, closed an early childhood centre at around 3.30pm without checking that the rooms were empty. Inside a two-year-old child was still asleep on a cushion. The child's mother arrived shortly after 3.30pm and tried to get in contact with several people from the centre and the office of the onsite primary school. At around 3.45pm the mother gained access to the Centre with the assistance of a staff member from the onsite primary school. The child was found asleep on a cushion in a "stifling hot" room.

Ms Aiavao acknowledged that she has left the child asleep inside the centre and stated that she was disappointed and ashamed that she did not do the last check of the day more thoroughly.

The CAC argued that the conduct amounted to serious misconduct and neglect of the child. The CAC argued that the length of time the child was alone and Ms Aiavao's extra responsibilities as head teacher were aggravating factors for the Tribunal to consider. Ms Aiavao's response to the incident, apology to the parents and remorse for her actions were acknowledged as mitigating factors.

The Tribunal considered it fortunate that the child was found quickly and unharmed but considered the underlying act of inattention to be neglect. Though the neglect was inadvertent, it was nonetheless of a character or severity that warrants reporting to the Council.

The Tribunal was satisfied that 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 Ms Avaiao's behaviour. While the Tribunal acknowledged Ms Avaiao's response to the incident, it also found her carelessness was a failure to meet a basic expectation of care that the public has of an early childhood facility.

Ms Avaiao was censured and the register was annotated for a period of 18 months. Conditions were placed on her practising certificate that she for a period of 18 months show any employer a copy of the April 2019 Tribunal decision. The CAC and Tribunal was awarded a contribution to costs.





**BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL**

**NZTDT 2018-24**

**IN THE MATTER** of the Education Act 1989

**AND**

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

**BETWEEN** **COMPLAINTS ASSESSMENT COMMITTEE**

**AND** **MARYJANE QUEENIE AIAVAO**  
**Respondent**

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**TRIBUNAL DECISION**

**DATED: 16 April 2019**

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**HEARING:** Held at Wellington on 9 October 2018 (on the papers)

**TRIBUNAL:** Theo Baker (Chair)  
Sheila Grainger, Maria Johnson (Members)

**REPRESENTATION:** Mr Jeff Simpson for the Complaints Assessment Committee

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 that on 21 March 2017 the respondent left a two-year-old child asleep alone in an Early Learning Centre, locked up and left for the day.
2. The matter was heard on the papers. We had submissions from the CAC and a Summary of Facts. At a prehearing conference on 18 July 2018, timetabling directions were issued for the filing of an Agreed Summary of Facts and submissions for each party. The respondent did not file any submissions

### **Evidence**

3. The evidence was submitted as an Agreed Summary of Fact dated 10 August 2018. Although the document is not signed by the parties, according to the CAC submissions, the respondent does not dispute the facts. The Agreed Statement is set out in full:
  1. *Mary Aiavao is a registered teacher, whose practising certificate expires on 23 March 2021.*
  2. *In March 2017, Ms Aiavao was employed at E-Babies Early Learning Centre (Centre) as Head Teacher.*
  3. *The normal procedures for closing down the Centre each day commence at around 3:15pm. These include packing away toys, covering the sandpit, locking the shed, shutting computers, completing laundry, vacuuming and closing windows. All staff stay to assist with this process. The Head Teacher does the final check and is responsible for close down.*
  4. *On 21 March 2017, Ms Aiavao was working at the Centre with three other teachers: Tere Te Puia, Lana Antipas, and Monica Torrey. The last child to be collected at the end of the day was J, a two year old child who was asleep on a cushion from around 2:55pm onwards.*
  5. *Between 3:15pm and 3:25pm, the other teachers finished and left for the day after advising Ms Aiavao that they were leaving.*
  6. *At around 3.30pm a student arrived at the door from the onsite primary school. This student asked about collecting a stroller for his grandmother. Ms Aiavao exited by the front door of the Centre and locked it on the way out. While the stroller was being retrieved from the back of the centre, the student's grandmother arrived and talked with Ms Aiavao for a few moments. Ms Aiavao then left the premises.*

7. *Ms Aiavao did not check the rooms were empty of children before locking up and leaving the premises. J was still inside asleep in the Centre's sleep area when Ms Aiavao left, which is located close to the front door of the Centre.*
8. *J's mother, Mrs B, arrived at the Centre shortly after 3:30pm to collect J. The Centre was locked. Mrs B knocked a couple of times and went around the outdoor area, then telephoned the Centre's mobile number which went directly to voice mail. Mrs B phoned the office of the onsite primary school but got no answer.*
9. *At 3:39pm, Mrs B telephoned Ms Te Puia, who advised that J had been asleep when she left the Centre. Mrs B went back to the Centre, looked in the window and saw J inside asleep.*
10. *Mrs B went to the onsite primary school for help. At around 3:45pm, Mrs B gained access to the Centre with assistance from a staff member from the onsite primary school. J was found asleep on a cushion inside the Centre.*
11. *J had slept through the incident and was not harmed. In a letter written later that day, Mrs B stated that J was tired from sleeping and very hot. The room inside the Centre was stifling hot like it had been closed up for a while.*
12. *Ms Aiavao was contacted by Ms Ann Brell, the Centre Manager, and returned to the Centre. Two of the other teachers, Ms Te Puia and Ms Torrey had also returned. After discussion with the teachers, the Centre Manager verbally notified Ms Aiavao that she was stood down from a leadership position pending the outcome of an investigation.*
13. *On the morning of 22 March 2017, Ms Aiavao submitted her resignation to the Centre.*
14. *On 22 March 2017, J's parents, Mrs B and Mr B complained to the Centre.*
15. *On 23 March 2017, Ms Aiavao wrote an incident report concerning what had happened on 21 March 2017, as requested by her support person. In this report Ms Aiavao acknowledged that she had left J asleep inside the Centre.*
16. *On 24 March 2017, Ms Aiavao wrote an apology letter to J's parents, Mrs B and Mr B.*
17. *On 29 March 2017, the Centre Manager wrote to Ms Aiavao accepting her resignation. Ms Aiavao continued working at the Centre until 5 April 2017.*
18. *On 25 August 2017, the Education Council received a mandatory report from*

*the Centre Manager. The mandatory report was referred to the Complaints Assessment Committee for investigation.*

19. *On 20 October 2017, Ms Aiavao provided the Education Council with a written statement dated 16 October 2017. Ms Aiavao stated:*

*This process (10 October 2017) has brought back the unintentional situation that occurred at E-babies Early Learning Centre on 21-3-17 to which I accidentally (through distraction) left a child asleep.*

*I feel disappointed and ashamed that I did not do my last check on the day more thoroughly, I feel that while it was my responsibility to check the sleep area as head teacher, this was not my responsibility alone, or my area of responsibility on 21-3-17. I feel that the person responsible for putting him to sleep (Tere Te Puia) should have woken him up and got him ready to go home, rather than leave him sleeping. That person, Tere Te Puia was then elevated to head teacher by Ann Brell, and I was stood down.*

*... Forgiving myself has been the hardest part of this journey, as I am still reliving this situation over and over again. I know that this doesn't absolve me or make it ok.*

*... The situation continually plays on my mind and makes me review and reflect on my practices consistently to ensure that a repeat will never happen again.*

### **Serious misconduct**

4. The CAC alleges that the conduct amounts to serious misconduct under s 378 of the Education Act 1989 (**the Act**) or alternatively amounts to conduct otherwise entitling the Disciplinary Tribunal to exercise its powers pursuant to section 404 of the Education Act 1989.
5. Section 378 of the Act defines serious misconduct as follows:

**serious misconduct** means conduct by a teacher –

- (a) *that –*
- (i) *adversely affects, or is likely to adversely affect, the well-being or learning of one or more students;*
  - (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 Education Council's criteria for reporting serious misconduct.*

6. The criteria for reporting serious misconduct are found in r 9 of the Education Council Rules 2016 (**the Rules**), and the CAC relies rr 9(1)(f), and/or (o) of the Rules,<sup>1</sup> which are:

**9 Criteria for reporting serious misconduct**

(1) *For the purposes of section 394 of the Act, an employer of a teacher must immediately report to the Education Council if it has reason to believe that the teacher has engaged in any of the following kinds of serious misconduct::*

...

(f) *neglect or ill-treatment of a child or young person in the teacher's care*

...

(o) *any act or omission that brings, or is likely to bring, discredit to the profession.*

7. For the CAC, Mr Simpson submitted that the respondent's conduct was best described as negligent. As a result of her inattention, Child J was left alone inside the locked centre for approximately 15 minutes.
8. We accept his Mr Simpson's submission that paragraph (a)(i) of the definition of serious misconduct in s 378 is the most applicable – that the respondent's conduct was likely to adversely affect the well-being of Child J. As Mr Simpson noted, the child could have woken up and been distressed, and we are told that the room was stifling hot, as though it had been shut up for a while.
9. We also agree that this is conduct that might bring the teaching profession into disrepute. The public has an expectation that teachers in any learning environment will keep children and young people safe. The younger the child, the greater onus on the teacher.
10. The CAC submits that leaving a child locked in a classroom can be considered neglect under r 9(1)(f) of the rules.
11. We readily accept that the respondent's conduct was negligent. The word "neglect" has more serious connotations. In the consideration of "neglect," Mr Simpson points to the length of time for which Child J was left unattended, and that as head teacher, the respondent had the responsibility of overseeing the centre's close down procedures. He also refers to our previous decision of *CAC v Lam-Sam-Tai NZTDT*

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<sup>1</sup> The Education Council Rules 2016 were amended by the Education Council Amendment Rules 2018, and their name changed to the Teaching Council Rules by s 12 of the Education (Teaching Council of Aotearoa New Zealand) Amendment Act 2018. Because this conduct occurred before 19 May 2018, the pre-amendment rules apply (see Schedule 1 of the Teaching Council Rules 2016).

2017-18<sup>2</sup> where an early childhood teacher was dropping off children at their homes, but forgot one 4-year-old child, leaving her alone and restrained in the van, parked at the teacher's home. The child was found four or five hours later, still strapped in her car seat. A police investigation resulted in a formal written warning for neglect<sup>3</sup> of a child.

12. It is fortunate that in the present case, the child was found sooner, or the consequences could have much more serious. The underlying act of inattention however, is the same as in *Lam Sam Tai*, and we find that it can be termed neglect. In both cases this is inadvertent, but nonetheless is of a character or severity that warrants reporting to the Council.
13. We also find that the respondent's conduct is clearly likely to bring discredit to profession. In our view the test in *Collie v Nursing Council of New Zealand*<sup>4</sup> is met. We are satisfied that reasonable members of the public, informed of the facts and circumstances, could reasonably conclude that the reputation and standing of the profession is lowered by the behaviour of the practitioner. The respondent's carelessness was a failure to meet a basic expectation of care that the public has of an early childhood facility.

### Penalty and costs

14. Section 404 (1) of the Act provides:

#### **404 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:*

<sup>2</sup> CAC v *Lam-Sam-Tai* NZTDT 2017-18, 24 October 2017

<sup>3</sup> Ill-treatment or neglect of child or vulnerable adult is a crime (s 195 of the Crimes Act 1961)

<sup>4</sup> [2001] NZAR 74 at [28]

- (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.*

15. For the CAC, Mr Simpson submitted that an appropriate penalty is:
- Censure
  - Annotation of the register
  - A condition on the respondent's practising certificate to disclose the Tribunal's decision to her current employer and any prospective employer for a period of two years.
16. The CAC also sought costs of 40%.
17. Mr Simpson submitted the aggravating factors are:
- (a) the length of time which Child J was left unattended and unable to be reached by his mother or any other staff; and
  - (b) the respondent's role as head teacher. Although she was assisted by other teachers on the day, it was her responsibility to oversee the close down procedures for the centre. As the last teacher to leave it would be expected that she would perform a final check before locking up.
18. The following mitigating factors were acknowledged:
- (a) The respondent immediately returned to the centre when contacted by the Centre Manager, Ms Ann Brell, about the incident. She has accepted from the outset that she left Child J asleep inside the centre.
  - (b) The respondent has apologised to Child J's parents, expressed remorse and indicated that it has made her review and reflect on her practices; and
  - (c) The respondent has cooperated with the Committee's investigation.
19. We accept Mr Simpson's submission that the main difference between the present case and *Lam-Sam-Tai* is that the child was locked in the vehicle for a much longer

period, but that factor may be more attributable to the actions of other persons in retrieving the child, and the accessibility of staff to retrieve the child.

20. We are not sure that the length of time in this case is an aggravating feature. We certainly do not to minimise the seriousness of the action and potential consequences but do not consider this was an aggravating feature.
21. We agree that in her role as head teacher, there was a particular onus on the respondent to ensure that all children had been collected before she locked up, but we would expect any staff member to have done that. What was not clear to us was whether there was an adequate process in place to ensure this did not happen. For example, was there an expectation that as other staff left, they would provide a handover to whoever was going to lock up? Was it clear who was going to lock up? What was the expectation of the last person before leaving? We hope that as a result of this event, the centre has instituted some clear expectations of the responsibilities and accountabilities of all staff.
22. We acknowledge the mitigating factors set out by the CAC. We have no doubt that this was a horrifying experience for all concerned, especially the parents of Child J, but also accept that the respondent immediately reacted and did her best to hold herself accountable.
23. We agree with the penalty proposed by the CAC.. We therefore make the following orders under s 404:
  - (a) Censure under s 404(1)(b)
  - (b) Annotation of the register for a period of 18 months from the date of this decision.
  - (c) Conditions under s 404(1)(c) on the respondent's practising certificate that she for a period of 18 months<sup>5</sup> from the date of this decision show any employer a copy of this decision.
  - (d) Under s 404(1)(h) the respondent is to pay 40% of the CAC's costs; and
  - (e) 40% of the Tribunal's costs under s 404(1)(i).
24. We have a schedule of estimated costs for the Tribunal, and therefore order costs under s 404(1)(i) of \$458.00.
25. The Tribunal delegates to the Chairperson authority to determine the quantum of the

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<sup>5</sup> The reduction of six months from the CAC's submission of two years is in recognition of the delay in issuing a decision.

CAC costs and issues the following directions:

- (a) Within 10 working days of the date of this decision, the CAC is to provide the Chairperson and the respondent a schedule of the Tribunal's costs
- (b) Within a further 10 working days the respondent is to file with the Tribunal any submissions she wishes to make in relation to the costs of the Tribunal.

26. The Chairperson will then determine the total costs to be paid.

**Non-publication**

27. There were no applications for non-publication. The name of the child was not in any information that was placed before the Tribunal.



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Theo Baker

Chair

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

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