**Complaints Assessment Committee (CAC) v Teacher P**
NZ Disciplinary Tribunal Decision 2018/29

On 9 August 2017, Teacher P (an early childhood teacher) advised her employer that her youngest child had been uplifted from her care by Oranga Tamariki. She accepted that she had assaulted her two older children. She was dismissed from her centre on 31 August 2017.

The Teaching Council's Complaints Assessment Committee (CAC) investigated the matter. Teacher P explained that she had contacted Oranga Tamariki after she slapped her daughter. As a result of her disclosure, she said her daughter was placed in care, Oranga Tamariki prohibited her from having her children living with her but was granted unlimited access by a judge.

The CAC referred the matter to the New Zealand Teachers Disciplinary Tribunal (Tribunal). Teacher P did not wish to engage in the disciplinary process, stating she had *"put her side across and will just wait to see what the outcome will be".*

The Tribunal found that Teacher P's use of violence undermines the high standard of professionalism and integrity the public expects of those in the teaching profession.

The Tribunal was satisfied that Teacher P's use of force reflects adversely on her fitness to teach, notwithstanding that it happened in a personal rather than professional setting.The Tribunal noted that teachers have an obligation to their students to both teach and model lawful behaviour. The Tribunal found that Teacher P's "*reversion to violence sends a very poor signal about the propriety of the use of force to resolve conflicts to the children whose behaviour – if she remained a member of the profession – she would be responsible for supervising."*

The Tribunal accepted that Teacher P committed serious misconduct, for assaulting her child.

In terms of penalty, the Tribunal considered that this was a case where cancellation was not inevitable. The Tribunal commended Teacher P for her honesty in disclosing her behaviour to both Oranga Tamariki and her employer. The Tribunal considered it conceivable that Teacher P might have been allowed to continue to teach, provided she could satisfy it that she will not pose a risk to children. However, since she chose not to participate in this proceeding, the Tribunal had no information that addresses whether she is remorseful and has insight into her behaviour.

As the Tribunal had no way of gauging whether a penalty short of cancellation would have been appropriate, Teacher P's registration was cancelled.

The Tribunal ordered that Teacher P be censured, her registration cancelled, the register annotated, and that she pays costs from the Tribunal.

The Tribunal made non-publication orders in relation to Teacher P's children, and as they shared her name, made non-publication orders for Teacher P's name, and the name of the early childhood centre where she worked.

**NZTDT 2018/29**

**BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL**

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| **UNDER** | the Education Act 1989 |
| **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**<br><br>Referrer |
| **AND** | **TEACHER P**<br><br>Respondent |

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## DECISION OF TRIBUNAL

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| Tribunal: | Nicholas Chisnall (Deputy Chair), Susan Ngarimu and Patrick Walsh |
| Hearing: | On the papers |
| Decision: | 8 April 2019 |
| Counsel: | J H Dawson for the referrer<br>No appearance for the respondent |

## Introduction

[1] The Complaints Assessment Committee (the CAC) charges Teacher P with serious misconduct and/or conduct otherwise entitling the Tribunal to exercise its powers and referred the matter to us for determination. The CAC's notice of charge alleges that the respondent:

(a) Assaulted a child in her care; and

(b) Had her youngest child removed from her care on or about 9 August 2017 by the Ministry for Vulnerable Children (Oranga Tamariki).

[2] This matter proceeded by way of formal proof, as the respondent did not engage with the Council.

[3] For the reasons we explain later in this decision, we have made orders suppressing the names and identifying particulars of Teacher P, her daughter and the early childhood centre at which the respondent taught. In light of those orders, we have anonymised this decision.

## The evidence

[4] The CAC relied upon the evidence contained in the affidavit of its investigator, Marie Fitchett. Having read that affidavit and its attachments, we are satisfied that the following facts are proved.

[5] Teacher P was employed as an early childhood teacher, at the same centre, between 2012 and when she was dismissed on 9 August 2017. On that day, Teacher P advised her employer that her youngest child had been uplifted from her care by Oranga Tamariki (the Ministry). However, Teacher P said that she disputed the Ministry's specific accusations against her. The respondent's employment was suspended while an investigation was undertaken.

[6] The respondent's employer subsequently made a mandatory report to the Teaching Council, on 6 September 2017.

[7] On 18 September, the Ministry advised of its involvement with Teacher P and said that it was investigating an allegation that she had assaulted two of her children.

[8] The respondent was interviewed by two senior representatives of the centre at which she worked on 24 August and admitted that she had assaulted her two older children. She signed the interview notes as true and correct. As a consequence, Teacher P's employment was terminated on 31 August.

[9] On 18 September, Ms Fitchett spoke to the respondent by telephone. Teacher P explained that she had contacted the Ministry after she slapped her daughter. However, she denied assaulting her son. The respondent advised that she is not teaching and does not intend to do so until the matter with the Council has been resolved.

[10] Police advised the Council that it does not intend to charge the respondent with assault.

[11] On 11 February 2018, Teacher P sent an email to Ms Fitchett in which she explained that she had slapped her 11-year-old daughter while they were in the Kmart carpark. She disclosed this in a text message sent to the Ministry, and, as a result, her daughter was placed in care. The respondent said that she is prohibited by the Ministry from having her children living with her, but has been granted unlimited access by a judge.

[12] The CAC met on 24 May 2018, but the respondent did not attend. In her absence, the CAC elected to refer the matter to the Tribunal. The CAC's decision letter and the notice of charge were emailed to Teacher P. On 5 November, the respondent sent an email to the Council stating that she does not want to participate in this proceeding, as she has "put her side across and will just wait to see what the outcome will be".

**Our findings**

[13] Section 378 of the Education Act 1989 defines "serious misconduct" as behaviour by a teacher that has one or more of three outcomes; namely that which:

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

[14] The test under s 378 is conjunctive.[1] As well as having one or more of the three adverse professional effects or consequences described, the conduct concerned must also be of a character and severity that meets the Council's criteria for reporting serious misconduct. The Education Council Rules 2016 (the Rules) describe the types of behaviour that are of a prima facie character and severity to constitute serious misconduct.[2] The CAC asserted that the respondent's behaviour towards her daughter contravened r 9(1)(f), which describes the "neglect or ill-treatment of a child or young person in the teacher's care".

[15] Turning to the first limb of the definition of serious misconduct in s 378 of the Education Act, we are satisfied that Teacher P's use of force reflects adversely on her fitness to teach: per s 378(1)(a)(ii).

[16] Section 378(1)(a)(ii) is also engaged. It obliges the Tribunal to consider 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 Teacher P's behaviour? We

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[1] *Teacher Y v Education Council of Aotearoa New Zealand* [2018] NZDC 3141, 27 February 2018, at [64].
[2] Now called the Teaching Council Rules 2016. Rule 9 was amended on 18 May 2018, but this decision refers to the preceding iteration that applied in August 2017.

consider there can be no doubt that the respondent's behaviour has that effect,[3] as her use of violence undermines the high standard of professionalism and integrity the public expects of those in the teaching profession.

[17] Teacher P's use of violence adversely reflects on her fitness to teach, notwithstanding that it happened in a personal rather than professional setting. As we have said numerous times, practitioners have an obligation to their students to both teach and model lawful behaviour. The respondent's reversion to violence sends a very poor signal about the propriety of the use of force to resolve conflicts to the children whose behaviour -if she remained a member of the profession - she would be responsible for supervising.

[18] We are also satisfied that the respondent's conduct is of a character and severity that engages 9(1)(f) of the Rules, which therefore fulfils the second stage of the test in s 378.

[19] We accept that Teacher P committed serious misconduct. For clarity's sake, we record that we have decided not to make a finding in relation to whether the second particular constitutes serious misconduct in its own right. Our preliminary view is that it is not apt, in the circumstances of this case, to view it as either standalone or complementary misconduct. After all, the respondent's assault on her daughter is what informed the Ministry's decision to uplift the child. The fact that the Ministry chose to do so, which is an orthodox response by the State, does not increase the gravity of the underlying behaviour.

**Penalty**

[20] The primary motivation regarding the establishment of penalty in professional disciplinary proceedings is to ensure that three overlapping purposes are met. These are to protect the public through the provision of a

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[3] *Collie v Nursing Council of New Zealand* [2001] NZAR 74, at [28].

safe learning environment for students, and to maintain both professional standards and the public's confidence in the profession.[4] We are required to arrive at an outcome that is fair, reasonable and proportionate in the circumstances in discharging our responsibilities to the public and profession.[5]

[21] The CAC submitted that the commensurate penalty is cancellation of Teacher P's registration to teach.

[22] In *CAC v Fuli-Makaua*[6] we said that cancellation is required in two overlapping situations, which are:

> (a) Where the behaviour is sufficiently serious that no outcome short of deregistration will sufficiently reflect its adverse effect on the teacher's fitness to teach and/or its tendency to lower the reputation of the profession;[7] and
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> (b) Where the teacher has insufficient insight into the cause of the behaviour and lacks meaningful rehabilitative prospects. As such, there is an apparent ongoing risk that leaves no option but to deregister.[8]

[23] We must seek to ensure that any penalty we institute is consistent with those imposed upon teachers in similar circumstances. Counsel for the CAC helpfully referred us to the outcomes in 12 decisions in which we considered the use of violence against children or young persons – in both professional

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[4] The primary considerations regarding penalty were discussed in *CAC v McMillan* NZTDT 2016/52.
[5] See *Roberts v Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354, at [51].
[6] *CAC v Fuli-Makaua* NZTDT 2017/40, at [54], citing *CAC v Campbell* NZDT 2016/35 at [27].
[7] Referring to the sixth of eight penalty factors described by the High Court in *Roberts v Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354, at [50].
[8] See *CAC v Teacher* NZTDT2013/46, 19 September 2013 at [36].

and personal settings. In some, the teacher was charged by police and we dealt with the resultant conviction. In others, like here, there was no criminal proceeding. Rather, the matter came to us as an allegation of serious misconduct. We accept the CAC's submission that cancellation, or at least suspension, will generally be the appropriate starting point for penalty when a teacher uses force against a child or young person.

[24] We do not treat this as a case that falls into the first category described in *Fuli-Makaua,* where cancellation is virtually automatic. The circumstances of the assault are sparsely addressed in the evidence.

[25] While we do not condone the respondent's use of force against her child, we commend her for her honesty in disclosing her behaviour to both the Ministry and her employer. It is conceivable that the respondent might have been allowed to continue to teach, provided she could satisfy us that she will not pose a risk to children. However, since the respondent has chosen not to participate in this proceeding – we have no information that addresses whether she is remorseful and has insight into her behaviour. As we said in *CAC v Fuli-Makaua*, a practitioner's degree of insight into the cause of behaviour will be important in assessing his or her rehabilitative potential. Knowing what motivated the conduct is a way to gauge the risk of repetition. Cancellation is less likely to be required where the practitioner understands what led him or her to behave in the way addressed in the charge and is taking, or has taken, meaningful steps to reduce the risk of it happening again.

[26] We have no way of gauging whether the disciplinary purposes behind the Tribunal's powers might be met by a penalty short of cancellation. As such, a less severe penalty is not a realistic option based on the information before us. We therefore cancel the respondent's registration to teach.

[27] We wish to emphasise – for Teacher P's benefit – that whether she can make a return to teaching in future depends on her. It will fall to the

respondent to satisfy the Council that she has addressed her personal issues and does not pose a risk to the children for whom she will be responsible.

**Non-publication order regarding the respondent's daughter**

[28] Rule 34(4) of the Rules obliges the Tribunal to consider making a suppression order whenever it receives evidence from anyone who falls into one of four specified categories of persons deemed to be vulnerable.[9] Rule 34(1)(a) applies, given that the victim of the respondent's behaviour is a "child or young person".

[29] We make an order under s 405(6) of the Education Act for the permanent suppression of the name and identifying particulars of the respondent's daughter.

**Why we have decided to permanently suppress the respondent's name**

[30] The default position is for Tribunal hearings to be conducted in public and the names of teachers who are the subject of these proceedings to be published. The Tribunal's powers around non-publication are found in s 405 of the Education Act. We can only make an order for non-publication 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.

[31] The respondent did not seek permanent name suppression. However, as the CAC realistically acknowledged, the nub of the issue is whether the respondent's name should be suppressed to ensure her daughter is not identified. The policy underpinning r 34 of the Rules is to protect children and young persons who are the victims of misconduct from

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[9] Rule 34 of the Rules is headed "Special protection for certain witnesses and vulnerable people". It obliges the Tribunal to consider whether it is proper to make an order for suppression under s 405(6) of the Education Act whenever it has evidence before it that "includes details relating to a person described in subclause (1)".

being identified. The question for us, therefore, is whether there is an appreciable risk that naming the respondent will undermine the efficacy of the non-publication order we have made in respect to her daughter?

[32] We are satisfied that it is inevitable that naming the respondent would result in her daughter being identified. After all, they share the same name. We observe that we ordered blanket suppression in similar circumstances in NZTDT 2016/67.[10] There, we said that, "The relationship of mother and daughter is an intrinsic part of the charge and the evidence, and so it is difficult to protect [the daughter's] privacy interests if the respondent is named". That concern applies with equal force here.

[33] We are of the opinion that, having regard to the interests of the respondent's daughter, it is proper to displace the open justice principle and suppress Teacher P's name. We so order. For completeness, we also suppress the name of the early childhood centre at which the respondent worked.

**Costs**

[34] The CAC has not sought costs. However, we order the respondent to make a 40 per cent contribution towards the Tribunal's own costs.

**Orders**

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

(a) Pursuant to s 404(1)(b), the respondent is censured.

(b) The respondent's registration is cancelled under s 404(1)(g).

(c) The register is annotated under section 404(1)(e).

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[10] *CAC v Teacher* NZTDT 2016/67, 13 September 2016, at [69].

(d) Pursuant to s 405(6)(c) and r 34 of the Education Council Rules 2016, there is an order permanently suppressing the name and identifying particulars of the respondent's daughter.

(e) Under s 405(6)(c), the names of the respondent, and the early childhood centre at which she taught, are permanently suppressed.

(f) The respondent is to pay $458 to the Tribunal pursuant to s 404(1)(i).

**Nicholas Chisnall**
Deputy Chair

**NOTICE**

1 A person who is dissatisfied with all or any part of a decision of the Disciplinary Tribunal under sections 402(2) or 404 of the Education Act 1989 may appeal to a District Court.

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) apply to every appeal as if it were an appeal under section 356(1).