

TEACHING COUNCIL

NEW ZEALAND | Matatū Aotearoa

Complaints Assessment Committee (CAC) v Astwood

NZ Disciplinary Tribunal Decision 2018/6

Teacher's registration cancelled following serious misconduct in physically abusing a child.

Mr Gregory James Astwood was a physical education teacher at Tauhara College, Taupo. He had taught at the College since 1992. Prior to teaching Mr Astwood had had a 20-year military career.

At the time of the incident Mr Astwood had developed a health issue with multiple blood clots in the lungs with dangers of internal bleeding. He was diagnosed in July 2016 with multiple bilateral pulmonary emboli.

In October 2016, the Mr Astwood was supervising students in the school gym playing a game called kickball. Mr Astwood was standing near third base when a student ran towards third base. The student said that he had his eyes closed and his head was down in order to avoid the ball. He ran into Mr Astwood causing him to fall to the ground. The student said he was 'kind of laughing, I didn't see you' when Mr Astwood stood up and hit him four to five times in the head. The student was 14 at the time.

Mr Astwood says he felt something hit him with great force and power in the head causing whiplash and knocking him completely off his feet. He said it was immediately followed by laughter and a comment about not seeing him as 'my head was down'. He said that his immediate reaction was to roll over and see who had 'taken me out'. He saw the student still laughing.

Mr Astwood admitted that he hit the student with several blows while verbally chastising him for his stupidity. He said the force of the blows was minimal as they both got up and eyeballed each other.

Later that morning, Mr Astwood got the student out of the class to apologise. He explained he was sick and could not think straight. The student said he was saddened and did not want to tell his father because he did not want Mr Astwood to lose his job.

The police investigated and decided not to charge Mr Astwood and instead issued a pre-charge warning, and release notice for common assault.

Following a school investigation Mr Astwood was dismissed from his employment. At the time of the hearing he had written a letter stating that he did not intend to teach again and wanted to voluntarily deregister.

However, once a Council investigation is underway a teacher cannot voluntarily deregister. The Council must deregister a person if it receives a written request from a person, and that person is not the subject of an investigation into their conduct or competence (Section 358 of the Education Act 1989).

Mr Astwood provided 16 references from people in the community and students attesting to his good character. In deciding penalty, the Tribunal were clear that Mr Astwood's actions of striking the student amounted to serious misconduct. However, they considered Mr Astwood's evidence and considered how his medical condition had contributed to his actions. Despite this, the Tribunal found this was clearly physical abuse of a young person.

The Tribunal cancelled his registration and he was ordered to pay 30 percent costs.



BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

UNDER the Education Act 1989

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

BETWEEN **THE COMPLAINTS ASSESSMENT COMMITTEE**

Complainant

AND **Gregory James Astwood, registered teacher, teacher registration 180781**

Respondent

DECISION OF NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

Tribunal: John Hannan (Deputy Chair), Maria Johnson, Simon Heath

Hearing: 12 June 2018

Decision: 7 November 2018

Counsel: Adam Lewis for Complainant
No appearance for Respondent

Introduction

1. By a Notice of Charge dated 21 March 2018 the Complaints Assessment Committee (**CAC**) charged the respondent in accordance with section 401 of the Education Act 1989 with behaving in a manner amounting to serious misconduct in that on 21 October 2016 he punched student B with closed fists between 3 to 5 times about the sides of student B's head.
2. The CAC alleges that this conduct amounts to serious misconduct pursuant to section 378 of the Education Act 1989 and Rule 9(1)(a),(c),(n) and/or (o) of the Education Council Rules 2016 (now the Teaching Council Rules 2016) (Rules), or alternatively amounted to conduct otherwise entitling the Tribunal to exercise its powers under section 404 of the Education Act.
3. At a prehearing conference 10 April 2018 counsel for the CAC stated that he had not been able to make contact with the respondent. He stated that he had spoken with the respondent's former lawyer who has no instructions. The matter was accordingly set down for formal proof on 12 June 2018.
4. An affidavit of Marie Janice Fitchett sworn 3 May 2018 was filed in the Tribunal annexing various documents referred to below. Ms Fitchett is a senior investigator for the CAC.
5. Among the materials annexed to Ms Fitchett's affidavit was correspondence from lawyers LePine & Co, dated 18 December 2017. LePine & Co advised that they had been instructed by the respondent to assist with the matter. They confirmed he had been served with a bundle of documents that related to a complaint before the Complaints Assessment Committee. They gave some factual details of the respondent's response to the allegations, which will be detailed further below. They also gave information about a medical condition from which the respondent was said to suffer, and attached medical reports. They also attached a significant number of references. They recorded that the respondent has signed an undertaking not to teach and has not taught since the incident in question, having secured alternative employment outside of teaching. The letter stated that the respondent, currently 63 years old, does not intend to teach again.
6. LePine & Co also noted that the respondent wished to voluntarily deregister to resolve the issue but that this is not a process which can normally occur. While LePine & Co asked to be kept informed of matters as they develop, they said they

were unlikely to make substantive submissions. They stated that the respondent has no submissions to make in respect of name suppression.

7. No submissions were received from or on behalf of the respondent prior to the matter being dealt with on the papers by way of formal proof.

Facts

8. Based on Ms Fitchett's affidavit and the material provided by LePine & Co the Tribunal finds the following facts have been established.
9. The respondent was a senior physical education teacher at Tauhara College, Taupo. He was a long-standing member of the staff having taught at the College since 1992.
10. Prior to teaching in the college he had been in the New Zealand Army. He had a 20 year military career, becoming the chief instructor at the joint services PE & RT school, and developing remedial/rehabilitation programs for injured or unconditioned soldiers. Accolades he had received included a commendation from the Air Force, and Queens New Year's honours for services to PE.
11. On retirement from the Army in 1991 an opportunity arose to work as a relieving teacher at Tauhara College. Later he was given an interview for HOD PE which was successful and consequently he began teaching in the school. He was responsible for health, PE, sport, outdoor education, fitness, and discipline. He developed a rapport of mutual trust and respect with the student and parent bodies.
12. At the time of the incident in question he had developed a health issue, being multiple blood clots in the lungs with dangers of internal bleeding. He was diagnosed in July 2016 with multiple bilateral pulmonary emboli, resulting in a diagnosis of pulmonary embolism. He was placed on medication. At this time he suffered ongoing shortness of breath, despite having had excellent exercise tolerance prior to the development of this condition.
13. On 21 October 2016 the respondent was supervising students having a game in the school gym called "kickball", which involved running between bases and throwing balls at the runners.

14. The respondent was standing near third base when student B ran towards third base. The student said that his eyes were closed and his head was down to avoid the ball, and he ran into the respondent.
15. The respondent fell on the ground and the student landed on the mat. The student said that he was "kind of laughing, I didn't see you" when the respondent stood up and hit him 4 to 5 times.
16. Student B was 14 years old at the time.
17. The respondent provided an incident report to the Board of Trustees (BOT) and the principal. He acknowledged that during the class he was hit by the student and fell to the ground. He said that while he was watching the game from the side of third base, something to his right hit him with great force and power in the head causing whiplash and knocking him completely off his feet. He said this was immediately followed by laughter and a comment about not seeing him as "my head was down". He said that his immediate reaction was to roll over facing the mat to discover who it was that had "taken me out" and came up with student B who was still laughing over the incident.
18. He admitted that he hit student B with several blows while verbally chastising him for his stupidity. He said the force of the blows was minimal as they both got up and eyeballed each other. He said that student B then pushed him in the chest and his response to this was to tell the student to go and calm down, which he did by leaving the gym.
19. He said that he followed up in the next period and spoke to the student where they reconciled their differences, shook hands, and moved on. He admitted that he had let his own standards down by his actions towards student B.
20. Part of the material submitted by the respondent through LePine & Co included a medical report and ACC injury claim form relating to the incident with student B. This recorded that the respondent had suffered a contusion, whiplash injury, and a lumbar sprain, together with renal pain and blood in the urine suggestive of renal contusion.
21. The student complained to the school which commenced a disciplinary investigation. Ultimately, the school dismissed the respondent. It lodged a

mandatory report. On 2 December 2016 the respondent signed an undertaking in which he agreed voluntarily not to teach.

22. The police investigated the matter but ultimately determined not to charge the respondent, issuing a pre-charge warning and release notice on 23 February 2017 for common assault under section 9 of the Summary Offences Act 1981 (maximum penalty 6 months imprisonment).
23. The police took a written statement from the student B and from other students who had been present. The Tribunal refers to these as likely to be the most accurate records of evidence from the student B and the other student witnesses, having been obtained by a trained investigator.
24. Student B said that as he ran towards the mat one of the other students started throwing the ball so he ducked his head and he couldn't see where he was going and ran into the respondent.
25. The student said that the respondent hit the ground, while the student hit the mat. The student said that the respondent was smiling, so he thought everything was "all good" and he said "sorry sir". At this point the respondent started punching him. The student said that the respondent punched him with closed fists about four or five times. The student said that the respondent stated "you don't fucking run into people like that". The student said that he does not recall what he said to the respondent but thinks that he was swearing at the respondent. He got up and pushed the respondent.
26. The student says that the respondent then told him to "get out and calm down" and he left the gym. Later that morning the respondent came to get him from class. He apologised to the student and said that he was sick and couldn't think straight. The student said that he was saddened and didn't want to tell his father because he didn't want the respondent to lose his job.
27. Other students interviewed by the police gave slightly different accounts. One student said that he was not sure whether the hitting on the head was with closed fists or open. He did not know how many times student B got hit but it was more than once.

28. Another student said that the respondent had struck student B about three times on the side of his head. "It looked like he had open palms". "The hits weren't overly hard but they did connect".
29. Another student said that at the point where the respondent was run into by student B, and fell on the ground, "everyone in the class started laughing". The student said that he saw the respondent punch student B with a closed fist on his cheek, and then saw a couple more hits after that both with closed and open fists. The student said that the respondent probably hit student B about four times. He confirmed that student B got up and pushed the respondent in the chest
30. Notes of a conversation that took place on the day of the incident, 21 October, between (apparently) the Deputy Principal of the school and student B record the student saying that at the point in time where the respondent started hitting student B, the respondent had said "you shouldn't do that because I'm injured". The student stated that he pushed respondent away and shouted "you can't fucking hit a child".
31. The respondent provided 16 references to the CAC, together with a submission by his union representative.
32. Some of the references were from persons with whom he had served in the New Zealand Army, including one from a superior officer. This described the respondent as "an outstanding citizen" whom the referee was "proud to work alongside, and have working for me". He is described as "...conscientious, sensible, respected, and very good at his job".
33. Another referee stated that during his career in the Army the respondent had held many important positions within the physical training Corps. It described him as "highly respected, of good character, dedicated and loyal". He is also described as having always shown "exceptional leadership, good judgement, and self-control". This referee had also worked on contract at the college as an outdoor education teacher working with the respondent and stated that he had found the respondent to be a fantastic mentor and curriculum advisor. The referee said that as a teacher the respondent was "highly motivated, dedicated, and will always place the students' learning and safety before anything else".
34. Other references were given by persons from the local community who are former students and in some instances are now parents of current students. One such

referee stated that the respondent “has loyalty, devotion and is a pure asset to Tauhara College and the Taupo community”. It went on to say “[the respondent] is one teacher who gives genuine and true interpersonal connection with the teens.” It said that the teenagers of the area had a hashtag in existence about bringing back the respondent. It said “these children are affected greatly by the absence of an excellent teacher”. The reference stated that the respondent is “... professional, committed to education, honest, reliable, supportive, an excellent role model, loyal and dedicated”. “He has had a personal positive influence on my own life, the life of my child, and the life of my child’s father who also attended here”.

35. Other references from parents are in a similar vein. One in particular stated “[the respondent] also used his strong connections within the Maori community to enhance a mentoring role and provide a role model for many students. He gave his free time to fundraising activities to enable sports teams to travel for competitions.”
36. There were also references from students. An example; “he has been a very inspirational role model for me throughout my college years”.
37. Another student said “...to the school, he was one of the greatest teachers here. It was sad for everyone when he left. With this I say he is a great teacher, a greater inspiration but also the greatest friend.”
38. Finally, a further reference from a parent stated that the respondent had made it possible for their son to achieve a sporting goal of travelling to the United States with a sporting code. It said that without the respondent’s support during the students’ trial period of three months, plus 9 months of training and fundraising, this trip would have been impossible. This was an “incredible” sporting achievement which would not have been possible for the student without the support of the respondent.

Submissions

39. Counsel for the CAC reminded the Tribunal of the elements which must be established here:
 - Serious misconduct, being conduct that adversely affects or is likely to adversely affect the wellbeing or learning of one or more students; or
 - Being conduct that reflects adversely on the Teacher's fitness to be a teacher; or
 - Being conduct that may bring the teaching profession into disrepute: and,

- Is of a character or severity that meets the Education Council's criteria for reporting serious misconduct;
40. The CAC referred to Rule 9, and drew the Tribunal's attention to paragraphs 9(1)(a), physical abuse of a child or young person, (c) psychological abuse of a child or young person, (n) any other act or omission that could be the subject of a prosecution for an offence punishable by imprisonment for a term of three months or more, and (o) any act or omission that brings is likely to bring discredit to the profession.
 41. The CAC referred to a passage from *Collie v Nursing Council of New Zealand* [2001] NZAR 74 at [28] in which Gendall J defined "bringing discredit to the profession". Gendall J said that the standard is an objective standard with the question being asked whether reasonable members of the public, informed of the facts and circumstances, could reasonably conclude that the reputation and good standing of the profession (in that case nursing) was lowered by the behaviour of the practitioner concerned.
 42. The CAC also referred to section 139A of the Education Act which prohibits any teacher using force by way of correctional punishment towards any student.
 43. References were made to a number of previous cases in which grabbing, tapping, slapping and hitting students have been held to amount to serious misconduct, for example NZTDT 2014/49. Specifically reference was made to *CAC v Rowlingson* NZTDT 2015/54 where it was noted that "context is everything", and that if the teacher's action involved gentle contact to get the student's attention for instruction, this would not be abuse amounting to serious misconduct, but a forceful kick would certainly be capable of constituting physical abuse.
 44. The CAC said that it was clear that the respondent did punch the student's head, between 3 to 5 times. This, said the CAC, was not a reflex action but a sustained attack over several blows and would constitute "physical abuse" on any definition, but in particular in light of the *Rowlingson* and *Haycock* decisions (see *CAC v Haycock* NZTDT 2016/2)
 45. The CAC also submitted that these actions would constitute psychological abuse of the other students present in the gym who witnessed the assault. It could also be said that student B was psychologically abused given the way in which the respondent approached the student after the event to try to "sort the issue out" creating guilt in his mind about complaining.

46. Finally the CAC submitted that there could be little doubt that the general public would conclude that the standing of the teaching profession was diminished by the respondent's overreaction and loss of control. It noted that the respondent is a former soldier, of some significant seniority.
47. The CAC submitted that the conduct clearly adversely affected the well-being or learning of student B, who was upset, pushed the respondent and left the gym swearing at the respondent. He promptly reported the event to the principal.
48. The CAC maintains that the respondent's actions reflect adversely on his fitness to teach in that he lost control in a teaching setting and assaulted a student.
49. The CAC submitted that the matter reaches the threshold that cancellation of the respondent's registration is warranted. While noting that the Tribunal must consider, before imposing a particular penalty, whether a lesser penalty could meet the purposes of disciplinary proceedings, the CAC continued to seek the cancellation of the respondent's registration, noting that it is an outcome that he also desires as he has given up teaching.
50. The CAC sought name suppression for student B.

Decision

Did the respondent's actions adversely affect, or were they likely to adversely affect, the wellbeing or learning of one or more students?

51. Striking student B adversely affected that student's welfare. There is no adequate evidence about the effect, or likely effect, on other students.

Did the respondent's actions reflect adversely on his fitness to be a teacher?

52. Ordinarily, losing control and striking a student in this way would be regarded as raising very significant issues about that teacher's fitness to practice. However in these circumstances, where the respondent had an existing medical condition which apparently was causing him distress shortly before the incident, and was then knocked over, hard, to the point where the ACC report records blood in his urine, the question of whether the loss of control in this context reaches the point of reflecting adversely on the respondent's fitness to be a teacher is finely balanced. Had the respondent chosen to advance evidence demonstrating that his medical issues were acute at the time but have now been resolved in a way making it unlikely that there would be a further loss of control of this nature, and that this was

very much an out of character “one-off”, the Tribunal might have concluded that in the totality of the circumstances the respondent’s actions did not reflect adversely on his fitness to be a teacher. However on the overall state of the evidence, and noting that these matters require to be established only on the balance of probabilities, the Tribunal must conclude, with a measure of reluctance, that the incident does reflect adversely on the respondent’s fitness to practice.

Did the Respondent engage in conduct that may bring the teaching profession into disrepute?

53. We consider that this aspect is also finely balanced. Applying the *Collie* test of whether reasonable members of the public, informed with knowledge of the factual circumstances, could reasonably conclude that the reputation and good standing of the profession would be lowered, we consider that a reasonable member of the public fully aware of the context, the respondents prior medical condition, and the severity of the blow which knocked him over and caused real injuries, might well conclude that such a reaction was overall understandable, though not excusable, and not a reflection on the profession as such. However we have not had an opportunity to hear from the respondent, and on the face of things a loss of self-control of this nature, even in these circumstances, could cause a reasonable member of the public to see the profession in a lesser light.

Was the Conduct of a Character or Severity that meets the Education Council's Criteria for reporting Serious Misconduct?

54. The conduct was clearly physical abuse of a young person. We do not conclude that it amounted to psychological abuse either of student B or others. It was an act or omission which could be the subject of a prosecution for an offence punishable by imprisonment for a term of three months or more. Given our conclusion on whether this was conduct which could bring the teaching profession into disrepute, we must also conclude that that element of the criteria for reporting serious misconduct is also satisfied.

55. Accordingly the charge of serious misconduct is established.

56. This is a sad and distressing way for the respondent, after a distinguished career both in the Army and in teaching, to leave the teaching profession. It is clear that the respondent contributed much in the course of his life as a teacher, and most likely had much more to contribute.

Penalty

57. The Tribunal has considered all available options as set out in section 404 of the Education Act.
58. The Tribunal takes into account the considerations of the protection of the public, the maintenance of professional standards and the appropriate penalty. The Tribunal must also seek to apply the least severe outcome consistent with satisfactorily discharging due consideration of the above factors. Ordinarily it will also need to have regard to whether there are realistic possibilities for rehabilitation, noting any rehabilitative steps that the teacher concerned may already have embarked upon, and considering whether the circumstances of the misconduct and of the teacher suggest rehabilitation is a real possibility.
59. In this case, given the respondent's long-demonstrated capability for self-disciplined and quite devoted discharge of his duties, the evidence as to his contribution to the profession, and the medical condition from which he suffered at the time of the incident, an outcome focussed on rehabilitation would ordinarily be given major consideration.
60. The respondent however says that he does not wish to resume teaching and that he wishes to voluntarily deregister. The legislation does not provide for that. The conduct in question is certainly conduct that would be highly likely, absent other factors, to result in deregistration. However given the respondent's prior medical condition, and the very hard blow resulting in real injury which he suffered, and which preceded the loss of self-control, this is a matter which in our assessment could be dealt with otherwise than by cancellation of registration.
61. We have concluded, given the respondent's indication that he wishes to voluntarily deregister, that the matter should now be put to rest simply by cancelling the registration of the respondent. No other disciplinary step is required. We record that in this instance cancellation of registration should not be seen as an outcome intended to denounce grossly unacceptable misconduct.

Orders

62. The Tribunal orders as follows:
- (a) The respondent's registration is cancelled;

- (b) No person is to publish of the name of student B, or the name of any of the other student witnesses, or any details capable of identifying him or them.

Costs

63. The CAC sought an order for costs and referred to the cases noting that professional groups should not be expected to bear all the costs of a disciplinary regime and that members of the profession who appear on disciplinary charges should make a proper contribution towards the cost of the enquiry and hearing. The cases note that costs are not punitive, that the practitioner's means, if known, are to be considered, and that in a general way 50% of reasonable costs is a guide to an appropriate costs order in the professional disciplinary context subject to discretion to adjust upwards or downwards. Refer *Vatsyayann v Professional Conduct Committee of the New Zealand medical Council* [2012] NZHC 1138.
64. The letter from LePine & Co 18 December 2017 says that the respondent is not in a position to pay any costs and notes that he has essentially let the processes go forward without any obstruction from him at all.
65. Ordinarily the Tribunal works from a base of 50% of the actual and reasonable costs of the CAC and the Tribunal itself where a matter is defended. Where a practitioner does not defend a matter, in particular if a practitioner agrees a statement of facts, costs may be reduced to approximately 40% or possibly less depending upon all the circumstances. The means of the practitioner should also be taken into account.
66. In the present case it can be said that the respondent has made the road easier than an agreed statement of facts, by taking the position that he does not oppose the matters put forward and agrees to the cancellation of his registration. While he has not put forward detailed materials as to his means and his asserted inability to pay costs, we think in all the circumstances it is appropriate to set costs at 30% of the actual and reasonable costs of the CAC and of the Tribunal.
67. We have a schedule of the Tribunal's costs, set at \$1145. 30% of that sum is \$343.50. The respondent is ordered to pay \$343.50 towards the Tribunal's costs.
68. We do not have a schedule of the CAC's costs. The respondent is ordered to pay 30% of the CAC's actual and reasonable costs. In the event that agreement cannot

be reached on the amount of actual and reasonable costs, the Tribunal delegates to the Deputy chair the fixing of the actual and reasonable costs and the relevant dollar amount.

Date: 7 November 2018



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JGH Hannan
Deputy Chairperson

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

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. Subsections (3) – (6) of section 356 apply to every appeal as if it were an appeal under subsection (1) of section 356.