BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

NZTDT 2019-35

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	**ADRIAN DAVID BAXTER** **Respondent**

TRIBUNAL DECISION
6 SEPTEMBER 2019

HEARING: Held on 19 July 2019 at Wellington (on the papers)

TRIBUNAL: Theo Baker (Chair)
David Hain and Dave Turnbull (members)

REPRESENTATION: Ms J Dawson the Complaints Assessment Committee
The respondent represented himself

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 particulars of the charge are:

> 1. *The CAC charges that ADRIAN DAVID BAXTER, registered teacher, of Whanganui:*
>
> *a. On 5 July 2017 Mr Baxter fell asleep while supervising a group of children in the outdoor area at the Centre.*
>
> *b. In September 2017 failed to report a concern about the appearance of a three-year old child's genitalia in a timely manner*.
>
> 2. *The conduct alleged in paragraph 1 amounts to serious misconduct pursuant to section 378 of the Education Act 1989 and Rule 9(1)(o) of the Teaching Council Rules 2016 (as drafted prior to the 19 May 2018 amendment), or alternatively amounts to conduct otherwise entitling the Disciplinary Tribunal to exercise its powers pursuant to section 404 of the Education Act 1989.*

2. The parties conferred and agreed on a Summary of Facts **(ASF)**

Summary of decision

3. We found that the respondent had fallen asleep but were not satisfied that he had been asleep for as long as two minutes. We did not find that this matter was of the character or severity to amount to conduct likely to bring discredit to the profession and did not warrant a finding of serious misconduct.

4. We found that the respondent failed to report his concerns about a three-year-old child in a timely manner and that this conduct amounted to serious misconduct on the basis that it reflected adversely on his fitness to be a teacher and was likely to bring the profession into disrepute under the third limb of the definition of serious misconduct under s 378 and we found it was likely to bring discredit to the profession under r 9(1)(o) of the Education Council Rules.

5. We imposed a penalty as outlined paragraph 51 of this decision and ordered a contribution of the Tribunal costs of 40%.

6. We made no order for non-publication of the respondent's name. We ordered non-publication of the children's names.

Findings on factual allegations contained in charge

7. The parties conferred and submitted an Agreed Summary of Facts (**ASF**), signed by Ms Dawson, as counsel for the CAC, and the respondent.

8. We were told that the respondent is a 46-year-old provisionally certified early childhood teacher. He gained his provisional certification on 17 July 2015.

Allegation One – on 5 July 2017 – fell asleep while supervising a group of children in the outdoor area at the Centre

9. On 5 July 2017 while employed at TopKids Victoria Ave, Wanganui, the respondent was supervising a group of children in the outdoor area with another teacher. She told him that she was going inside to check on the lunch break. When she returned the respondent was sitting with his eyes closed and his head slightly down. She initially thought that he was playing a game with a child, pretending to be asleep, so watched and waited, asking the child, "Is Adrian pretending to be asleep?" When there was no reply from the respondent, she began talking to him. She had to say his name three times before he woke up.

10. The respondent explained that he had fallen asleep due to his tonsillitis as he had only been sleeping an hour a night. During the Centre's investigation, the respondent provided a medical certificate which stated that he was fit for work from 6 July 2017.

11. There is a dispute as to how long the respondent was asleep. According to the ASF "It was estimated that Mr Baxter was asleep for a period of two minutes", whereas Mr Baxter said it was a "long blink". In his response to the Teaching Council investigator, the respondent said, "I maintain that if I was unresponsive to the child I was speaking to when I fell asleep for as long as was reported by the management…the child would have moved away and found something else to do instead of sitting waiting."

12. We are not sure on what basis the period of two minutes was estimated. We are satisfied that the respondent was asleep when his colleague approached him, and that he remained asleep while she spoke but we find it hard to believe that she watched him sleep for as long as two minutes. That said, we do not think that a "long blink" is an accurate description. However, the respondent is charged with falling asleep and we are satisfied that this allegation is established by the ASF.

Allegation Two – in September 2017 – failed to report a concern about the appearance of a three-year old child's genitalia in a timely manner.

13. During a conversation with another teacher on 29 September 2017, the respondent and his colleague both realised that they shared the same concerns for a three-year-old girl. They notified the Head Teacher and the matter was escalated to Oranga Tamariki and the Ministry of Education.

14. It transpired that on 13 September 2017 during a nappy change the respondent had observed that the child's vagina appeared to be more open than he would expect for child of that age. He discussed this with his wife who is also a trained teacher and she advised him to notify the Head Teacher, but he didn't follow this advice.

15. In a written statement dated 29 September 2017 the respondent said he was "a little afraid of being labelled as someone who would pay undue attention to young children". In a revised statement of the same date, he said, "It concerned me, but as a male in the industry [I] was also concerned that I may be labelled as a person who would pay undue attention to young children." He said that he did not immediately link what he had seen to potential sexual abuse.

16. The respondent confirmed that his wife had said that as professionals they are advocates for children and the voice for those who have none and that he should report it. He said that he mulled this over for a while, and on 29 September while changing nappies he decided to ask another trusted colleague what she thought and she advised that she had also noticed this.

17. There was therefore a delay of 16 days between the respondent first identifying a concern and then reporting it. The charge is that he failed to report it in a timely manner.

18. According to the ASF on 10 April 2018 the New Zealand Police confirmed that they were made aware of the allegation through their protocol with Oranga Tamariki. They advised that "a referral was not made with Oranga Tamariki for over two weeks after the observed injuries", and "children were not interviewed due to age and limited verbal ability. The Police said "no visible injuries were noted by [Oranga Tamariki] staff and medical exam by [a] GP raised no concerns." The police file was closed.

19. The respondent said he did not immediately associate what he had seen with potential sexual abuse. However, based on his reported conversation with his wife, he must have realised by then that there was reason to suspect this. He was aware of the Centre's

Child Protection Policy which included a requirement that staff contact their manager, the Business Manager or Professional Services Manager if they have contacted Oranga Tamariki or the Police to report a matter or if concerned about the care and protection of a child and are uncertain whether a report is necessary.

20. We are satisfied that the ASF supports the factual allegations in the charge. However, we must now decide if the established conduct amounts to serious misconduct.

Serious misconduct

21. Section 378 of the Act provides:

> ***serious misconduct*** *means conduct by a teacher—*
>
> *(a) that—*
>
> *(i) adversely affects, or is likely to adversely affect, the well-being or learning of 1 or more students; or*
>
> *(ii) reflects adversely on the teacher's fitness to be a teacher; or*
>
> *(iii) may bring the teaching profession into disrepute; and*
>
> *(b) that is of a character or severity that meets the Education Council's criteria for reporting serious misconduct*.

22. The criteria for reporting serious misconduct are found in r 9 of the in the Education Council Rules 2016 (**the Rules**).[1] The CAC relied on r 9(1)(o):

> ***Criteria for reporting serious misconduct***
>
> *(1) The criterion for reporting serious misconduct is that an employer suspects on reasonable grounds that a teacher has engaged in any of the following:*
>
> *…*
>
> *(o) any act or omission that brings, or is likely to bring, discredit to the profession.*

23. We must decide if the respondent's conduct meets both part of the test for serious misconduct.

CAC submissions

24. For the CAC, Ms Dawson submitted that the respondent's conduct in falling asleep is best described as negligence, but that the result was that children were left unsupervised

[1] The amendments made by the Education Council Amendment Rules 2018 do not apply to conduct before 18 May 2018. See Schedule 1 Part 2.

at the centre "for a period". This could have resulted in harm.

25. Ms Dawson referred us to two cases:

- *CAC v Lam-Sam-Tai* NZTDT 2017-18[2] where a teacher failed to notice that a child was still in her van after delivering others home. The child stayed in the van for several hours and was fortunately unharmed. The teacher had failed to follow the Centre's check procedures;
- *CAC v Aiavao* NZTDT 2018-24,[3] where a head teacher locked up for the day, leaving a two-year-old asleep in a "stifling hot" room, fortunately only for about 15 minutes. We noted that "the public has an expectation that teachers in any learning environment will keep children and young people safe", and that her carelessness was "a failure to meet a basic expectation of care that the public has of an early childhood facility".

26. Ms Dawson submitted that in the present case, the respondent's inattention due to falling asleep cannot be excused by illness and lack of sleep. He had reported to work that day and his employer, his learners and their whanau all had an expectation that he would supervise children in his care at all times.

27. Ms Dawson said that the respondent's delay in reporting his concern about the child's genitalia meant that no evidence was able to be obtained, and that any evidence of what the teacher observed was no longer present. Potential evidence was lost. The respondent therefore put his own wellbeing before that of the child involved and therefore placed that child's wellbeing at risk.

28. Ms Dawson submitted that as well as bringing discredit to the profession, the respondent's conduct breached the Code of Professional Responsibility in that he failed to demonstrate a commitment to providing high-quality and effective teaching and to promote the wellbeing of learners and protect them from harm.

Respondent submissions

29. The respondent acknowledged that falling asleep whilst supervising children is "not okay". He has vowed that he will never go back in the workplace if he is feeling unwell;

[2] *CAC v Lam-Sam-Tai* NZTDT 2017-18, 24 October 2017

[3] *CAC v Aiavao* NZTDT 2018-24, 16 April 2019

he is not going to be bullied, cajoled or lured into a position that would make others or himself feel unsafe.

30. On the question of failure to report suspected abuse, he said that he was incorrect in thinking that a report of suspected abuse was an accusation. He also said that he was unaware that what he was seeing was actually a sign of abuse. During this time the respondent was under a lot of stress because of some very difficult family circumstances which he outlined to us. It was not until he showed his colleague and she advised him of other things that were going on in the home that they decided that possible abuse had occurred. He said that as soon he was sure that something was indicative of abuse, he reported it. The respondent observed that none of the other staff had reported anything about the girl.

31. The respondent strongly felt that management were "told off" by the Police and Oranga Tamariki for the time it took to report the matter and they felt embarrassed and decided to find someone to "blame".

32. The respondent also disputed that retrieving evidence was hindered by the time-delay. He said that he saw no "discharge, fluids, bruising, redness, pain or anything like that".

33. While he was stood down, the respondent spoke to Child Matters in Auckland and was told that even an expert would be hard-pressed to identify that as a sign of abuse and that reading a policy is not enough to constitute as training.

34. The respondent said that he is being punished for not reporting something about a child that would seriously affect the mana of the children, the whanau and their well-being if it were to be proven false, and for not making a report when there is no evidence.

35. The respondent also noted that no other teacher at the Centre was referred to the Teaching Council.

Discussion

36. The respondent is charged with falling asleep (while supervising a group of children). This is not the same as taking a nap instead of performing the expected tasks. As Ms Dawson noted, this was negligent rather than wilful. We are critical of any teacher who nods off while in charge of students and we recognise that when supervising small children vigilance is essential.

37. Falling asleep might meet the first limb of the definition of serious misconduct under

s 378: it is likely to adversely affect the well-being of one or more learners. However, we do not think that it reflects adversely on an individual's fitness to be a teacher. We do not think this is in the same category as *Lam-Sam-Tai* and *Aiavao,* where both teachers were solely responsible for the child or children in their care at the time of their forgetfulness. In contrast, the respondent's inattention was momentary and there were other teachers around. We do not find that reasonable members of the public on being informed of the facts and circumstances of this case could reasonably conclude that the reputation and good-standing of the teaching profession was lowered by the behaviour of the respondent.[4] It therefore does not meet the test of the third limb of the definition in s 378 and nor is it of the character or severity to amount to conduct likely to bring discredit to the profession under r 9(1)(o).

38. The second particular of the charge concerns us more. We make some preliminary comments.

39. We acknowledge that men working in early childhood might feel vulnerable to accusations of inappropriate behaviour. That is why it is important to be transparent and honest in all matters and discuss concerns with colleagues.

40. Based on the information contained in the ASF, we cannot conclude that as a result of the respondent's delay in reporting his concerns, no evidence was able to be obtained; that any evidence of what the teacher observed was no longer present or potential evidence was lost. All we know is that the respondent observed that the entrance to the child's vagina seemed to be open. There is insufficient evidence to know whether that was a recent development. In fact, we do not know if this child has ever been abused.

41. Teachers are not expected to investigate or conclude that sexual abuse has occurred. It is not the teacher's role to accuse or identify culprits. Teachers are expected to raise concerns so that others who are qualified to make inquiries can do so. The respondent did not need to take into account other circumstances so that he could be "sure" that what he had seen was indicative of abuse. The child's family situation was irrelevant.

42. We agree with the respondent's wife who told him that as professionals, teachers are advocates for children and the voice for those who have none and that the respondent should report his concerns. This is consistent with the Code of Professional

[4] The test for discredit to the profession under *Collie v Nursing Council of New Zealand* [2001] NZAR 74 at [28]

Responsibility, which requires teachers to "work in the best interests of learners by … promoting the wellbeing of learners and protecting them from harm". It is also what was required by the Centre's policy which the respondent had read: if staff were concerned about the care and protection of a child and were uncertain whether a report was necessary, they were to contact their manager, the Business Manager or the Professional Services Manager. As soon as he thought that there was a possibility of abuse, he needed to escalate his concerns. This should have been the next day at the latest.

43. Turning to the definition of serious misconduct in s 378, although it is possible that reporting concerns might prevent further harm, we do not think that we can go so far as to say in this instance that the respondent's failure to report what he had seen adversely affected or was likely to adversely affect the well-being of the child. However, we find the respondent's delay, indecision, lack of confidence in himself and worry about how others would see him reflects adversely on his fitness to be a teacher.

44. When considering whether the conduct brings the teaching profession into disrepute, we have applied the same test as found in *Collie v Nursing Council of New Zealand* [2001] NZAR 74. We are satisfied that reasonable members of the public, informed of all the facts and circumstances could reasonably conclude that the reputation and good-standing of the teaching profession was lowered by the respondent's delay in reporting these concerns. Therefore, it meets the criterion in r 9(1)(o).

Penalty

45. Section 404 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:

(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 Teaching Council in respect of the costs of conducting the hearing:

(j) direct the Teaching Council to impose conditions on any subsequent practising certificate issued to the teacher.

46. In *CAC v McMillan*[5] we summarised the role of disciplinary proceedings against teachers as:

> *… to maintain standards so that the public is protected from poor practice and from people unfit to teach. This is done by holding teachers to account, imposing rehabilitative penalties where appropriate, and removing them from the teaching environment when required. This process informs the public and the profession of the standards which teachers are expected to meet, and the consequences of failure to do so when the departure from expected standards is such that a finding of misconduct or serious misconduct is made. Not only do the public and profession know what is expected of teachers, but the status of the profession is preserved.*

47. The CAC submitted the following penalty is appropriate:

- Censure
- Annotation of the register
- A condition that the respondent must inform any prospective employer of the profession disciplinary proceedings and to provide that employer with a copy of the decision

48. The respondent advised that he has been without work now for almost two years and

[5] NZTDT 2016/52, 23 January 2017, paragraph 23.

his career as a teacher has ended. He is now retraining.

49. The Tribunal did wonder about the implementation of policies and education at the Centre. It was not clear how long the other teacher had had concerns for and whether she had delayed in raising them with the Centre.

50. We emphasise that we do not consider that the respondent's actions would ordinarily end a career in teaching. His current practising certificate expires in August 2021. Should he decide to return, we believe that he needs a mentor to help him understand his obligations to report.

51. We therefore make the following orders:

(a) The respondent is censured under s 404(1)(b).

(b) Under s 404(1)(c), the following conditions are imposed on the respondent's practising certificate:

(i) For the next two years he must inform any current or prospective employer of this Tribunal decision and provide a copy of it to them;

(ii) If he takes up another teaching role in early childhood education, he must organise a mentor for a period of six months and within six months from the date of commencement of the role, provide to the Senior Manager, Professional Responsibility, evidence that he understands his reporting responsibilities.

(c) Under s 404(1)(e) the register is annotated for a period of two years.

Costs

52. The CAC does not seek a contribution to costs.

53. The Tribunal secretary has submitted a schedule of estimated costs totalling $1145, and seeks a 40% contribution of $458. Under s 404(1)(h) we order payment of those costs.

Non-publication

54. The CAC seeks non-publication orders of the names of the children at the Centre.

55. The respondent has applied for name suppression for the sake of his family.

Discussion

56. Section 405(3) of the Act provides that hearings of this Tribunal are in public. This is consistent with the principle of open justice. The provision is subject to subsections (4)

and (5) which allow for whole or part of the hearing to be in private and for deliberations to be in private. Subsection (6) provides:

> *(6) If the Disciplinary Tribunal is 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, it may make any 1 or more of the following orders:*
>
> *…*
>
> *(c) an order prohibiting the publication of the name, or any particulars of the affairs, of the person charged or any other person.*

57. Therefore, in deciding if it is proper to make an order prohibiting publication, the Tribunal must consider the interests of the applicants, as well as the public interest. If we think it is proper, we may make such an order.

58. The names of the children are not evident from the material before us. We think it is proper to order non-publication of the children's names under s 405(6) of the Act.

59. In *CAC v Teacher* 2016-27 we considered family interests and said:[6]

> *It is almost inevitable that a degree of hardship will be caused to the innocent family members of a teacher found guilty of serious misconduct. Such "ordinary hardships are not sufficient to justify suppression. However more acute forms of professional and familial embarrassment can make suppression the proper outcome.*[7]

60. We appreciate that this had been stressful for the respondent and his family, but that can be said of most cases that come before us. We are not persuaded that the public interest and the presumption of open justice is outweighed by the respondent's personal interests. There is no order for non-publication of his name.

Theo Baker, Chairpeson

[6] CAC v Teacher 2016-27, 25 October 2016, at para [65].
[7] See ABC v Complaints Assessment Committee [2012] NZHC 1901 at [49] to [58]