TEACHING COUNCIL

NEW ZEALAND | Matatū Aotearoa

Complaints Assessment Committee v Jacqueline Herbert

NZ Disciplinary Tribunal Decision 2018-81

The CAC referred a charge of serious misconduct and/or conduct otherwise entitling the Tribunal to exercise its powers. The CAC charged that Ms Herbert yelled at a Year 5 student (Student A) and made Student A stand next to the student's table for a period of up to 30 minutes, and on another occasion pushed Student A.

The result: The Tribunal considered that the first incident (in which Student A was yelled at and forced to stand) constituted serious misconduct. The combination of Ms Herbert's act of yelling at the student and the length of time that the student was forced to stand supported that conclusion. The teacher was censured, and conditions were imposed, including to complete a course addressing the management of student behaviour, such as the Incredible Years Programme. The register was ordered to be annotated for a period of two years. The Tribunal did not find that Ms Herbert's pushing of Student A amounted to serious misconduct rather it attracted an adverse finding and was termed misconduct.

Ms Herbert had previously been the subject of disciplinary proceedings and the Tribunal found this history relevant to its need to protect the public, consider appropriate rehabilitative penalties and setting the standards of the profession. This Tribunal was however encouraged by Ms Herbert's engagement with counselling and mindfulness training.

The Tribunal made an order for non-publication of the name of Student A.

BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

NZTDT 2018-81

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	**JACQUELINE BRENDA HERBERT**
	Respondent

TRIBUNAL DECISION
31 OCTOBER 2019

HEARING: Held at Wellington on 17 April 2019 (on the papers)

TRIBUNAL: Theo Baker (Chair)
David Spraggs and Stuart King (members)

REPRESENTATION: Mr E McCaughan for the CAC
Mr D Fleming for the respondent

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.

Charge

2. In a Notice of Charge dated 18 October 2018, the CAC charged that the respondent, on or about 16 June 2017, yelled at a Year 5 student (Student A) and made her stand next to her desk for a period of up to 30 minutes; and on or about 23 June 2017, pushed Student A.

3. The CAC contended that this conduct amounts to serious misconduct pursuant to s 378 of the Education Act 1989 (**the Act**) and rr 9(1)(a) and/or (c) and/or (f) and/or (o) of the Education Rules 2016[1] (**the Rules**); or conduct that otherwise entitles the Disciplinary Tribunal to exercise its powers under s 404 of the Act.

4. The respondent did not agree that the conduct amounts to misconduct at all, but if it does, it does not meet the threshold for serious misconduct.

Summary of decision

5. On 14 October 2019 we issued a decision. We found that the respondent's actions in yelling at Student A and making her stand next to her desk for around 30 minutes amounted to serious misconduct and her pushing of Student A a week later amounted to misconduct.

6. We censured the respondent, imposed conditions as outlined in paragraph 69 and annotated the register for two years.

7. We initially ordered the respondent to pay 40% of the CAC costs under s 404(1)(h), but following a recall of that decision, we revised that to 25%.

8. We suppressed the name of the student under s 405(6) of the Act.

Recall

9. On 17 October 2019 Mr Fleming quite appropriately asked us to recall of the Tribunal's decision on the basis that we had made a finding on the basis of a misunderstanding of a fact: that the student was made to stand by the teacher's desk. He advised that the agreed fact was that it was the student's table, not the teacher's.

[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.

10. Further we had not considered a memorandum dated 21 May 2019 in which the CAC sought only 25% of its costs on the basis that the costs were higher than usual for a matter which proceeded on the papers.

11. The Chair considered the application for recall. In *CAC v Teacher NZTDT* 2016/68, this Tribunal proceeded on the basis that it had the inherent power to revisit a decision in exceptional circumstances. We said:

> Here, we will assume we have the inherent power to revisit a decision in exceptional circumstances. It is a high threshold, as while a court must be prepared to act to avoid a miscarriage of justice, it must also ensure that the principle of finality is not undermined.[2] As was said in *Horowhenua County v Nash (No 2) by Wild CJ*: [3]
>
> > Generally speaking, a judgment once delivered must stand for better or for worse subject, of course, to appeal. Were it otherwise there would be great inconvenience and uncertainty. There are, I think, three categories of cases in which a judgment not perfected may be recalled – first, where since the hearing there has been an amendment to a relevant statute or regulation or a new judicial decision of relevance and high authority; secondly, where counsel have failed to direct the Court's attention to a legislative provision or authoritative decision of plain relevance; and thirdly, where for some other very special reason justice requires the judgment be recalled.

12. The Chair considered that the grounds advanced by the respondent were a special reason for which justice required the decision to be recalled so that the factual matter can be established. The parties were invited to file a joint memorandum by 24 October 2019 confirming the facts as described by Mr Fleming. This duly happened.

13. The Tribunal panel then reconsidered our decision based on the clarified facts. We confirm our original finding of serious misconduct for the reasons outlined in paragraph 47.

14. The costs decision is revised so that the respondent is to pay 25% of the CAC's costs, which comes to $2,405.49.

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[2] See *R v Smith* [2003] 3 NZLR 617, at [36].)
[3] *Horowhenua County v Nash (No 2)* [1968] NZLR 632 (SC), at 633.

Evidence

15. Before the hearing the parties conferred and submitted an Agreed Summary of Facts (**ASF**), signed by the respondent and counsel for the CAC. The ASF is set out in full:

AGREED SUMMARY OF FACTS

Introduction

1. *Mrs Jacqueline Herbert was first granted full registration by the Education Council in 2003. She has been employed Pinehurst School since 2000, when she began teaching with "subject to confirmation" status, before her full registration in 2003.*

2. *Mrs Herbert teaches science to the primary school.*

Allegations

INCIDENT ONE: 16 June 2017 – allegation that Mrs Herbert yelled at Student A and made her stand beside her desk for 30 minutes

3. *In June 2017, Student A was a Year 5 student in Mrs Herbert's science class.*

4. *On 16 June 2017, Student A attended Mrs Herbert's science class.*

5. *Students in Mrs Herbert's class sit on stools. Part of the classroom floor is covered in vinyl, part of it in carpet. Mrs Herbert has previously expressed the view to the school that these stools are unstable, particularly on the vinyl, and there is a risk of children falling off them and being injured. The table Student A was sitting at backs onto open shelves on which equipment including glass cylinders is stored.*

6. *About 15 minutes into the lesson, Student A moved her stool, which made a scrapping noise. Mrs Herbert told her to "stop wiggling around".*

7. *Shortly thereafter, there was a repeated banging noise from Student A's stool. Mrs Herbert assumed that Student A was responsible for the banging noise. Student A gave the explanation that the noise came from another student banging her feet on Student A's stool. Mrs Herbert told Student A to stop banging the stool. Student A says Mrs Herbert yelled at her, and another student (Student B) says that Mrs Herbert "screamed at her". Mrs Herbert denies yelling and screaming, but admits it is likely she used a raised voice. Student A explained that it was another student*

who was making the banging noise. However Mrs Herbert did not believe this explanation.

8. *Mrs Herbert then told Student A that she could not sit on the stool for the rest of the lesson. Student A stood next to the table for the remainder of the class. Student A believes this was about 30 minutes. Mrs Herbert cannot recall.*

9. *Student A was upset and sad following this incident.*

10. *Later that afternoon, the Primary Principal, Ms Sian Coxon, received an email from Student A's mother stating that Student A had come home from school very upset due to Mrs Herbert yelling at her and making her stand next to her desk for 30 minutes.*

INCIDENT TWO: 23 June 2017 – allegation that Mrs Herbert pushed Student A

11. *On 23 June 2017, Student A attended Mrs Herbert's science class.*

12. *At the beginning of the class, Mrs Herbert was handing out assessment sheets. Student A approached Mrs Herbert and told her that she was not able to complete the assessment as she had been away sick.*

13. *Student A was standing close to Mrs Herbert, between her and the door.*

14. *Mrs Herbert needed to leave the room to pick up additional copies of the assessment sheets.*

15. *Mrs Herbert pushed her away with two hands, saying as she did so, "It doesn't matter, just do the ones you know".*

16. *Mrs Herbert does not recall pushing Student A, but accepts she must have done so as she tried to manoeuvre around Student A to exit the room.*

17. *Student A left the classroom, saying she had to go home early.*

18. *Student A was later discovered by Ms Hannah Fisher in another classroom. She was visibly upset. Student A then told Ms Fisher what had happened.*

19. *Three other students from the class were spoken to about the incident. All three described witnessing Student A approach Mrs Herbert to speak with her, and Mrs Herbert respond and push her away.*

16. The Summary of Facts also set out Mrs Herbert's response to the school and to the mandatory report made to the Education Council. These are discussed further below.

17. We must be satisfied on the balance of probabilities that the CAC has proved the factual allegations in the charge. The charge is that Student A had to stand by the desk for a period of "up to 30 minutes." This is clearly established by the agreed facts.

18. What is not agreed is whether or not it was as much as 30 minutes. Although the respondent has not actually accepted that she had Student A stand by her table for up to 30 minutes, she does not dispute it; she cannot recall how long it was. She has accepted that the child believes it was about 30 minutes. In the absence of evidence to the contrary, we are satisfied that the length of time was in the region of 30 minutes.

19. The respondent has not admitted that she pushed Student A, but she has not denied it. It is appreciated that the respondent may not wish to go to the expense of a defended hearing, but if she does not accept the facts of the charge, it can make our job difficult. The respondent agrees that three students said they had seen the respondent push Student A. She agrees that Student A says that she was pushed. The respondent doesn't recall it but accepts that she must have done it. We therefore find that the respondent pushed Student A.

20. We are satisfied on the balance of probabilities that the respondent had Student A stand by her desk for up to 30 minutes on 16 June 2017, and on 23 June 2017 pushed Student A.

Serious misconduct

21. Having found that the factual allegations are established, we must now decide if the established conduct amounts to serious misconduct (or conduct otherwise entitling the Tribunal to exercise its powers).

22. 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*.

23. The criteria for reporting serious misconduct are found in r 9 of the Rules. The CAC

relies on rr 9(1)(a),(c),(f) and (o) that were in place at the time of this conduct.[4]

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:

(a) the physical abuse of a child or young person (which includes physical abuse carried out under the direction, or with the connivance, of the teacher):

…

(c) the psychological abuse of a child or young person, which may include (but is not limited to) physical abuse of another person, or damage to property, inflicted in front of a child or young person, threats of physical or sexual abuse, and harassment:

…

(f) the neglect or ill-treatment of any 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.

CAC submissions

24. For the CAC, Mr McCaughan referred to three cases:

a) *CAC v Emile* NZTDT 2016-51,[5] and *CAC v Teacher S* NZTDT 2018-5,[6] where in both cases we made adverse findings, but did not find the conduct amounted to serious misconduct.

b) *CAC v Whelch* NZTDT 2018-4,[7] where we found serious misconduct.

c) *CAC v Teacher* NZTDT 2014-49,[8] in which we said:

We repeat as we have said in a number of cases in the past that the use of

[4] Clause 3 of Schedule 1 of the Teaching Council Rules 2016 provides that possible serious misconduct by a teacher that occurred before 19 May 2018 must be reported and dealt with in accordance with the principal rules that were in force immediately before that date.
[5] *CAC v Emile* NZTDT 2016-51, 14 December 2016
[6] *CAC v Teacher S* NZTDT 2018-5, 21 August 2018
[7] *CAC v Whelch* NZTDT 2018-4, 23 July 2018
[8] *CAC v Teacher* NZTDT 2014-49, 20 May 2014

physical force – even at the lower level such as evident in this case – is unacceptable in New Zealand schools, and that any teacher who uses physical force contrary to s 139A puts his or her status as a teacher in peril.

Section 378(a)(i) – Conduct adversely affecting Student A's wellbeing or learning

25. Mr McCaughan submits that following the first incident, Student A reported feeling upset and sad, and was upset enough to tell her mother about it. In relation to the second incident she made an excuse to leave early and was later observed by another teacher being visibly upset. Mr McCaughan submitted that each incident represents an adverse impact on Student A's wellbeing, and that given the second incident occurred six days after the first one and involved the same teacher and occurred in front of the same peer group, it is submitted that there would have been accumulative impact on her wellbeing as demonstrated by the fact that she felt it necessary to remove herself from the classroom due to her distress.

26. It was further submitted that the conduct reflects adversely on the respondent's fitness to be a teacher.

27. Mr McCaughan submitted that the nature of the respondent's conduct (yelling at Student A and then punishing her by making her stand next to her desk for up to 30 minutes in front of her peers) was a disproportionate and degrading use of power. He submitted that such methods of classroom discipline are inappropriate and reflect adversely on the respondent's fitness to be a teacher.

28. In relation to the second incident, Mr McCaughan submitted that regardless of whether the respondent's push was motivated by frustration or was an unconscious push resulting from feeling stressed and unsettled by Student A's approach, it also reflects adversely on the respondent's fitness to be a teacher. He submitted there was nothing unusual about a teacher having to deal with a request from a student while the remainder of the class are awaiting instructions. Managing the needs of multiple students is an everyday component of a teacher's role. There is no excuse for pushing a 12-year-old girl out of the way with both hands in order to complete photocopying, whether it was inadvertent or not.

29. Mr McCaughan submitted that the respondent's actions were contrary to the ideal of teachers establishing positive caring relationships with learners because it is these responsive trusting relationships that foster better learning.

30. Mr McCaughan submitted that the first incident was a breach of the respondent's commitment under the Code of Ethics for Certified Teachers to promote the physical, emotional, social, intellectual and spiritual wellbeing of learners.

31. It was submitted that for the same reasons that the conduct reflects adversely on the respondent's fitness to be a teacher, it is conduct that may bring the teaching profession into disrepute.

32. As for the second part of the test for serious misconduct, Mr McCaughan submitted that first, the conduct whether viewed collectively or individually is conduct that brings or is likely to bring discredit on the teaching profession. In particular, the CAC submitted 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 the respondent's behaviour, namely:

    a) Yelling or screaming or speaking with a raised voice to a 12-year-old student in front of her peers;

    b) Forcing that student to remain standing in front of her peers for the duration of the lesson;

    c) Pushing that same student less than a week later in front of the same group of her peers; and

    d) In circumstances where the student was plainly upset by the respondent's actions after both incidents.

33. The CAC also submitted that the conduct, particularly when viewed collectively amounted to "ill treatment" under r 9(1)(f), and noted the comments in *Whelch*[9] that "There may be situations where there is no physical or psychological abuse but the teacher's conduct amounts to neglect or ill treatment under 9(1)(f)".

34. The CAC further submitted it was possible that the combined conduct amounted to psychological abuse of Student A in terms of r 9(1)(c) on the basis that the two incidences of conduct both involved her and occurred within a relatively short timeframe. However it was acknowledged that the Tribunal may consider that the same features would be better captured by a finding that the criteria under rr 9(1)(f) or

[9] Above, note 5

(o) were satisfied.

35. The CAC noted the Tribunal's comments in the case of *Teacher S*[10] that a single push would undoubtedly amount to physical abuse where there was a significant force used or where the teacher was either intending (or reckless as to the likelihood of harm) for example pushing with two hands into a wall or off a platform.[11] The CAC acknowledged that none of those factors was apparent here and therefore it was unlikely that we would consider it was physical abuse.

Respondent's position

36. In addition to facts to support the Notice of Charge, the ASF also sets out the respondent's explanation for her conduct. The respondent told the CAC that the first incident was never taken up with her at the time and her in-class response was seen as being reasonable by the Executive Principal, Mrs Penman-Walters.

37. As for the second incident, the respondent said that she handed out an assessment sheet to about half of the class before realising that she did not have enough sheets for the remaining students. She needed to quickly leave the classroom to print more copies. As she was trying to leave the classroom, Student A approached her and said that she couldn't complete the assignment as she had been absent. She replied to Student A that she should complete the assessment for the work she had been here for and could complete. The respondent was feeling stressed and unsettled as Student A approached her, as she was requiring individual attention when the remainder of the class had not yet started the exercise. The respondent was anxious to leave the room to complete the photocopying. Student A was standing very close to her and she felt that her personal space had been invaded. She could not recall pushing Student A away but realised that she must have unconsciously put her hands up and pushed her as she tried to manoeuvre around Student A to exit the room.

38. The respondent recognised that she should have instead invited Student A to either come with her to the printer to discuss her situation, or politely asked her to wait and assist her once she had returned from the printer. The respondent believed that her stress and emotions contributed to her reaction. She had been working extremely long hours recently and was feeling particularly fragile given the first anniversary of her

[10] Above, note 4.
[11] Similar comments were made in *CAC v Emile*, above, note 3

mother's death. She deeply regretted the incident and wished to apologise to Student A.

39. For the respondent Mr Fleming submitted that neither incident is of such a nature and severity as to meet the test for serious misconduct and that the particulars of the charge do not comprise a course of conduct, and therefore they cannot cumulatively amount to serious misconduct. He referred to *CAC v Teacher* NZTDT 2016-50,[12] in support of this argument.

40. Mr Fleming submitted that Incident One did not involve any unlawful acts by the respondent. There was no physical contact, exclusion or seclusion. Although the respondent used a loud voice, there is no allegation that the words used were abusive or humiliating. Mr Fleming submitted that the respondent acted for a proper purpose (she believed that the student was acting in a way that could cause her to fall from the stool) and her intervention was directed at preventing a recurrence of the behaviour. The issue before us is not whether the respondent blamed the wrong student for banging the stool, but whether her conduct was abusive, and if it was, whether it was of such a nature or quality as to constitute serious misconduct.

41. In relation to Incident Two, Mr Fleming referred to *CAC v Haycock* NZTDT 2016-2, where the Tribunal commented that s 139A prohibits the use of force by way of correction or punishment, but does not prohibit the use of force per se. There are gradations of use of force, from the slightest touch through to a serious beating, and "it would be harsh in the extreme if conduct at the lower end of that scale were to have disciplinary consequences for teachers".[13]

42. Mr Fleming summarised the following from NZTDT 2016-50:[14]

    a) Not all uses of force, even where used for the purposes of correction, will compromise serious misconduct.

    b) A nuanced approach needs to be taken to determining whether a physical act by a teacher constitutes abuse.

    c) It is appropriate to consider both whether the child has been treated with cruelty or violence, and whether the force is used for a bad purpose.

[12] CAC v Teacher NZTDT 2016-50, 6 October 2016. Mr Fleming referenced paragraph 33
[13] *CAC v Haycock* NZTDT 2016-2, at paragraphs 14 to 15
[14] Above, note 10

d) Although the teacher (in that case) dealt with the student "quite forcibly" they did not commit an act of serious misconduct.

43. Mr Fleming also referred to *CAC v Teacher B* NZTDT 2017-7[15] where we found that a teacher who prised a student's hands off a bar, put his arms around the student's waist, and carried the student to the Principal's office was found not to have committed serious misconduct as the force was not used to ill effect and did not constitute physical abuse.

44. Mr Fleming submitted that the respondent's actions were less serious than those of *CAC v Teacher S*,[16] referred to by the CAC, where a teacher pushed a child back to their seat in response to the child having misbehaved while sitting on the floor. There is no evidence that the respondent used significant force, acted with any improper purpose, violence or aggression or hurt the child. She did not act for purposes of correction or punishment and did not breach s 139A.

Discussion

45. We must be satisfied that the respondent's conduct meets one of the definitions of serious misconduct in s 378 of the Act, and that it is of a character or severity that meets the criteria for reporting serious misconduct contained in r 9.

Incident One

46. We do not see the respondent's decision to have Student A stand by her desk for the remainder of the class as a reasonable response to her concerns about a student's personal safety. She could have ignored the banging of the chairs. She could have gone to that end of the class as she was teaching, in order to prevent it from recurring. She could have said, "Please don't do that". She has not satisfied herself that she knew who was banging the stools. It seems to us that she has arbitrarily chosen a child to be punished and made an example of.

47. We find that yelling at a 10-year-old student and having her stand by her desk for the remainder of the class and for about thirty minutes was likely to adversely affect this student's well-being and learning under paragraph (a)(i) of the definition of serious misconduct under s 378. We consider it was an act of shaming the student, and to remain standing while the rest of her peers were seated was likely to demean and

[15] *CAC v Teacher B* NZTDT 2017-7, 2 August 2017
[16] Above, note 8

embarrass her. We also find the respondent's actions reflect adversely on the respondent's fitness to be a teacher under paragraph (a)(ii). It was the combination of the yelling and the length of time that the child had to stand by her desk that led us to that conclusion.

48. In order to meet the test for serious misconduct, we must also find that the conduct is of the character or severity that it meets one of the criteria in r 9. We consider it that reasonable members of the public, fully informed of the facts and circumstances would consider the standing of the profession is lowered by this conduct and it therefore meets r 9(1)(o).[17]

Second incident

49. We find that s 139A does not apply to the respondent's pushing of Student A. We do not find that the respondent was motivated by a desire to correct or punish Student A.

50. We agree that the respondent's pushing of Student A is more serious than that of *Teacher S*,[18] who placed her hands on a student's shoulders and pushed him over to his desk. Although in this instance, the student felt the impact quite keenly, in the circumstances of this case, it was not physical abuse. It was done absent-mindedly. We considered the question of "abuse" in *CAC v Emile* NZTDT 2016-51,[19] where we suggested that a single push would undoubtedly amount to physical abuse where there is significant force used, or the teacher is either intending (or reckless as to the likelihood of) harm, for example pushing with two hands into a wall, or off a platform. The fact that two hands were used to push the student makes elevates the conduct, but we find the respondent's conduct is in the realm of that in *CAC v Emile,* where a teacher had no recollection of pushing a small child to the floor.[20]

51. We do not believe that it reaches the threshold for r 9(1)(o). We do not find that members of the public would consider the reputation of teachers is lowered because of this unthinking action.

Rules 9(1)(c), 9(1)(f) and cumulative effect

52. Mr Fleming's argument that the combination of incidents does not make the conduct

[17] The test adopted from the High Court in *Collie v Nursing Council of New Zealand* [2001] NZAR 74
[18] Above note 4
[19] Above note 3
[20] It was also relevant to our finding in that case that the child was not affected by the push.

serious misconduct is well made. The factor that leans us towards finding this was a "course of conduct" is that in both instances Student A was the subject of the behaviour. It raised the question of whether the respondent found this particular student irritating in some way. Mr McCaughan submits that when viewed together, the two incidents might amount to ill-treatment under r 9(1)(f) or psychological abuse under r 9(1)(c) on the basis they both involved Student A and occurred within a relatively short timeframe.

53. We agree that the combination of the events raise a question of psychological abuse, or ill-treatment, but the charge has not been framed as one of inappropriate or unfair attitude or treatment of Student A .There is not enough evidence about the respondent's relationship with Student A and the overall context to satisfy us that either individually or collectively we can make that finding.

54. Therefore our finding is that the treatment of Student A in the first incident was sufficiently serious to amount to serious misconduct, and that the conduct in the second incident attracts an adverse finding and can be termed misconduct.

Penalty

55. 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 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.

CAC submissions

56. Mr McCaughan advised that the respondent has previously been the subject of disciplinary proceedings, and provided a copy of the CAC decision dated 29 January 2015 regarding a mandatory report about the respondent's conduct towards five students between December 2008 and November 2012. That CAC found that the respondent's manhandling of a boy in 2008, when she pulled him backwards off his feet, amounted to misconduct at a lower level, as did her manhandling of a child in 2011, when she grabbed a student by his arm and pulled him to a sitting position. The CAC also found that the respondent was not empathic in her handling of a student who was upset and distressed when waiting on an upturned dinghy during a "water-wise" event; that she handled another incident mildly inappropriately and that she touched a child's head.

57. The CAC found that each of the five elements of the mandatory report was not on its own sufficiently serious to warrant further action, but cumulatively they were. They said that whilst technically the conduct could meet the definition of serious misconduct as physical or psychological abuse, they would not refer it to the Tribunal.[21] The CAC found that the respondent did not have good behaviour management strategies, particularly when dealing with challenging boys. She impressed the CAC as "knowledgeable in her subject, reflective, willing to listen to feedback and open to making changes in her practice. She showed energy and interest that were qualities worth retaining for the benefit of learners". Therefore a rehabilitative approach was deemed appropriate.

58. It was a condition of the respondent's practising certificate that she attend the

[21] Section 401(4) of the Act which requires a CAC to refer to the Tribunal any matter which it considers "may possibly constitute serious misconduct" did not come into force until 1 September 2016. The earlier CAC decision was made before amendments to the Act made by s 40 of the Education Amendment Act 2015 took effect.

"Incredible Years" programme, or undertake an alternative programme with two or three priority students with either behavioural or academic challenges and develop strategies to engage those students to participate in a safe and interactive way.

59. Mr McCaughan advised that in May 2017 the respondent was released from those conditions, having provided sufficient information regarding her compliance. The present conduct occurred approximately 6 weeks later. Mr McCaughan submitted that it is concerning that the respondent has demonstrated an ongoing deficiency in behaviour management strategies, despite her having undertaken prescribed professional development. He conceded that the present matters do not show a significant escalation in seriousness or a significantly heightened risk to students in her care.

60. Mr McCaughan acknowledged the comments of the Executive Principal of Pinehurst School who provided a letter for the hearing. The Principal noted that there have been no comparable incidents and that the respondent has continued to teach with great professionalism and commitment and her students have enjoyed the benefits of her experience and enthusiasm. Since these events she has taken steps to manage her wellbeing and manages the times at which she is conscious additional strain could occur.

61. Therefore the CAC proposed the following penalty:

    a) Censure under s 404(1)(b)

    b) Subject to any evidence provided by the respondent regarding steps she has already taken, require her to undertake further remedial professional development under s 404(1)(c);

    c) Require the respondent to notify any future employers of the Tribunal's decision for a period of 24 months under s 404(1)(c); and

    d) Annotation of the register for a period of 24 months under s 404(1)(e).

Respondent's submissions

62. The respondent accepted that the proposed penalty as outlined above in paragraphs 61 (a), (c) and (d), but objected to the requirement that she undertake further profession development because the two incidents occurred at a time that she was subject to a combination of personal stresses, and they would unlikely have occurred

otherwise. Since the incidents, she has continued to teach at Pinehurst School and there have been no further incidents. She continues to have the confidence of her employer. The assistant teacher working in her classroom has also commented positively on her day-to-day interactions with students. The respondent has undertaken counselling and mindfulness training since these events.

63. As for the respondent's previous history, Mr Fleming referred to the decision of *Daniels v Complaints Committee 2 of the Wellington District Law Society* HC WN CIV-2011-485-000227, as authority for the proposition that a previous disciplinary record may most properly be characterised as the absence of a mitigating factor. [22]

Discussion

64. We gained the impression that the respondent is passionate about science and imparting her knowledge, but not that interested in her students' experience. She sees herself as a good teacher, with an exciting programme, but we felt that she also sees herself as teaching a subject, not a student. She seems focused on her own tasks, distancing herself from the students. She does not demonstrate good behaviour management skills. We are concerned that these two incidents which occurred around the anniversary of her mother's death were not the first incidents of this kind, occurred just after conditions on her practising certificate had been released, and that she had undertaken professional development. Standing a child by one's desk is not consistent with the Incredible Years programme.

65. We have considered the respondent's previous history. The High Court in *Daniels*[23] was discussing the decision of a Wellington District Law Society's Complaints Committee, where counsel for the Complaints Committee had submitted that the appellant's continued denial of the charge was an aggravating factor. The High Court said that immediate acknowledgement of wrongdoing, apology, genuine remorse, contrition and acceptance of responsibility can be substantial mitigating factors, and absence of those factors, whilst not aggravating, nevertheless may touch upon issues such as a person's fitness to practise and good character or otherwise.[24] The High Court's comments at paragraph [32] were made in reference to the manner in which a practitioner conducted him or herself in response to legitimate complaints, as opposed

[22] *Daniels v Complaints Committee 2 of the Wellington District Law Society* HC WN CIV-2011-485-000227, 8 August 2017 at paragraph 32
[23] Above, note 20
[24] Above, note 20, at [28] and [29]

to whether or not a charge was defended. The Court said:

> [32] A Tribunal, when determining ultimate fitness to remain in practice whether limited by suspension, or striking off, is entitled to review the entire conduct of the practitioner and transgressions the subject of the disciplinary proceedings, and the general behaviour of the practitioner. It cannot regard poor behaviour as justifying more severe penalties, but it the obvious absence of a mitigating factor and relevant to balancing matters of character.

66. We did not understand the Court to be saying that previous history was not relevant to penalty. Irrespective of whether it is termed an "aggravating feature", when considering the purpose of disciplinary proceedings, and the factors to take into account in imposing a penalty, we must have regard to previous offending. In *CAC v McMillan*[25] 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.

67. And in *Roberts v Professional Conduct Committee,*[26] Collins J also observed that part of the function of protecting the public involves the Tribunal setting penalties that will deter other health professionals from offending in a similar way.[27]

68. If this were the first time the respondent had been the subject of the disciplinary powers under the Act, we would have fewer concerns about her. It would be nonsensical to treat every charge of serious misconduct or other matter referred to us as though it were the first offence. The respondent's history is relevant to our need to protect the public, consider appropriate rehabilitative penalties, and setting standards for the profession.

69. We are encouraged by the respondent's engagement with counselling and mindfulness training and hope that this has helped her reflect on her emotions and

[25] NZTDT 2016/52, 23 January 2017, paragraph 23.
[26] *Roberts v Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354, at [51].
[27] Paragraph [44]

their impact on others. However, we feel that she would benefit from some further professional development. She needs to implement strategies for preventing undesirable behaviours and teaching and reinforcing desirable ones, as well as recognising triggers for her own behaviour. It is not clear to us whether the respondent previously completed the Incredible Years programme or some other professional development. We therefore impose the following penalty:

a) Censure under s 404(1)(b)

b) Under s 404(1(c) there are conditions on the respondent's practising certificate as follows:

   i. Within 12 months of the date of this decision the respondent is to complete the Incredible Years Programme or Positive Behaviour for Learning, or similar course aimed at student behaviour management;

   ii. The respondent is to provide her current employer with a copy of this decision and for a period of 18 months[28] from the date of this decision, she is to notify any prospective or future employers and provide them with a copy of it.

c) Annotation of the register for a period of 24 months under s 404(1)(e).

Costs

70. The CAC initially sought a contribution of 40% of its costs under s 404(1)(h).

71. Mr Fleming argued that the costs should be set at no more than 30% of the costs in recognition that the respondent had admitted the facts, had a hearing on the papers and had sought to reach agreement with the CAC as to outcomes.

72. Mr McCaughan noted that the CAC is required to refer to the Tribunal any matter that might possibly constitute serious. We have upheld one particular of the charge as serious misconduct, and made an adverse finding, which can be termed "misconduct" in relation to the other.

73. Most cases which come before us are on the papers on the basis of agreed facts. We usually award 40% costs. We therefore considered that a contribution of 40% towards the CAC cost is reasonable. Because of the delay in issuing a decision, we waived the

[28] The reduction from 24 months to 18 months is in recognition of the delay in issuing this decision.

contribution to the Tribunal costs.

74. In a later memorandum dated 21 May 2019, Mr McCaughan sought only a 25% contribution towards its costs. The CAC acknowledged that its costs were higher than ordinarily expected for a matter which proceeded on the papers. The costs resulted from the fact that there were significant discussions between the parties on all aspects of the matter over a relatively lengthy period, but given the respondent's co-operation ultimately resulted in the matter being dealt with on the papers, the CAC sought 25%. This submission had not been considered before we issued our decision on 14 October.

75. In their joint memorandum following the recall of that decision, the parties confirmed that costs were agreed based on the 21 May memorandum.

76. The Tribunal therefore orders the respondent to pay $2,405.49 which is 25% of the CAC's actual and reasonable costs under s 404(1)(h).

Non-publication

77. The respondent does not oppose the CAC's application for non-publication of the student's name. We therefore make an order for non-publication of the name of Student A under s 405(6) of the Act.

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).