

TEACHING COUNCIL

NEW ZEALAND | Matatū Aotearoa

Complaints Assessment Committee (CAC) v Kirstene Teo Hutana

NZTDT 2018-73

The CAC has referred to the Disciplinary Tribunal (the Tribunal) a registered early childhood teacher, Kirstene Hutana (Ms Hutana) for allegedly physically moving a child, which resulted in marks and bruising on their upper arm and shoulder.

The result: the Tribunal imposed a censure, annotation of the register and imposed conditions on Ms Hutana. She was ordered to contribute to the CAC and Tribunal's costs. There are no non-publication orders for this case.

On 1 July 2019 the Tribunal released its decision following a hearing on the papers. In February 2018 Ms Hutana was working as a teacher in an early childhood centre. She became frustrated with the behaviour of a child and moved him into the bathroom away from other children. The child continued to scream and yell. At one stage while moving the child Ms Hutana picked him up "rugby style" and squeezed his upper arm and shoulder with sufficient force to cause visible marks to their upper arm and shoulder.

The child reported this to his parents later in the evening and photos were taken of the marks on his shoulder and upper arm. The marks were described as 20cm long and the bruise the size of the 50c piece.

Ms Hutana agreed with these facts and said that she did not intend to hurt the child. In her response to the Teaching Council Ms Hutana claimed that the child was hitting and kicking and that she was trying to move him the best way she could. Ms Hutana submitted that she undertook all the professional development offered at the centre and provided several positive references.

The CAC submitted that Ms Hutana's conduct constituted serious misconduct and that the appropriate outcome was censure, annotation and conditions. The CAC noted Ms Hutana's cooperation with the process, her admission of her conduct, that this was an excessive force case (rather than a case of a teacher striking a child) and that this was a one-off incident.

The Tribunal expressed their concerns that picking the child up and taking them to the bathroom borders on seclusion. It was also concerned about the manner in which this case had been presented to them, they noted that had Ms Hutana attended the hearing that they may have been convinced that the manner and degree of restraint was justified given the child's behaviour. However, they were bound to rely on the agreed summary of facts.

The Tribunal was satisfied that Ms Hutana's conduct met the definition of serious misconduct as the child complained of being hurt, her conduct reflected adversely on her fitness to be a teacher and is capable of bringing the profession into disrepute. Teachers must at all times maintain a level of self-awareness and self-control such that children cannot be injured in this way.

The Tribunal noted that it was necessary to record that Ms Hutana's conduct was unsatisfactory, however there is evidence that she is contrite and otherwise has a good teaching history. The Tribunal considered that the appropriate outcome in this case should be censure, annotation and the following conditions:

- Complete professional development in classroom behavioural management;
- Provide a copy of the Tribunal decision to current and prospective employers for two years;
- Undergo mentoring focused on behaviour management for 12 months after resuming teaching.



The conditions were designed to be rehabilitative in nature. Ms Hutana was also ordered to contribute towards the CAC's and Tribunal's costs.



BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

NZTDT 2018/ 73

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**

AND **Kirstene Teo Hutana, registered teacher, teacher registration 328410**

Respondent

DECISION OF NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

HEARING: 19 March 2019 (on the papers)

TRIBUNAL: John Hannan (Deputy Chair), Simon Williams, Kiri Turketo

DECISION: 1 July 2019

COUNSEL: Elena Mok for Complainant
Respondent in person

Introduction

1. By a notice of charge dated 8 October 2018 the Complaints Assessment Committee (CAC) charges that the respondent engaged in serious misconduct and/or conduct otherwise entitling the Disciplinary Tribunal to exercise its powers.
2. The particulars of charge are that the respondent on 12 February 2018 physically moved a child, which resulted in marks and bruising to the child's upper arm and shoulder.
3. The CAC alleges that this amounts to serious misconduct under section 378 of the Education Act 1989 and Rule 9 (1) (f) and/or (o) of the Education Council Rules 2016 (as they were prior to 18 May 2018) or alternatively amounts to conduct which otherwise entitles the Disciplinary Tribunal to exercise its powers under section 404 of the Education Act.
4. This matter has been dealt with on the papers.

Facts

5. A summary of facts was agreed and signed by the respondent, dated 4 November 2018. The agreed summary of facts is as follows.

1. *Kirstene Teo Hutana (respondent) is a registered teacher. At all material times, the respondent was employed as a teacher at an early childhood centre, TopKids, Welcome Bay, Tauranga (centre), which is owned and operated by Best Start (company),*

2. *Between 4pm and 4.30pm on 12 February 2018, as parents began arriving to pick up their children from the centre, the respondent became frustrated with the behaviour of a three-year-old child (student A), who was being disruptive and loud. The respondent removed the student A from the Koru room at the centre, and took him to the bathroom away from the other children. Student A continued to scream and yell. At one stage while the respondent was moving student A, she picked student A up and squeezed his upper arm and shoulder with sufficient force to cause visible marks to student A's upper arm and shoulder.*

3. *Another teacher at the centre at the time (but who did not directly witness the incident) said that it appeared that student A kept opening the door and throwing things, which frustrated the respondent further. At one stage, the teacher walked to the Koru bathroom to check on the situation between student A and the respondent because of the commotion coming from the bathroom.*

4. *Student A's mother, a non-registered teacher at the company who was teaching in the Koru room (but who had left the room when the incident occurred), also went to the bathroom at one stage after hearing student A screaming. She found the respondent, sitting on the floor between the two bathrooms while student A continued to scream. She stated that the respondent stood up and walked back to the Koru room without saying anything about what had happened.*

5. *Student A's mother took student A, who was crying, upstairs and asked him what had happened, Student A said the respondent "hurt me".*
6. *At 4.30pm, student A's father picked him up from school and took him home. On the drive home, student A told his father that the respondent had been mean to him.*
7. *Later that evening, student A's father noticed marks on student A's shoulder and upper arm. Student A said that the respondent had done it and demonstrated how by squeezing his father's arm and shoulder really hard.*
8. *Student A's mother arrived home and student A repeated his demonstration of how he had received the marks, and reiterated that the respondent had done it. Student A's mother took photos of the marks on student A's shoulder and upper arm, describing one mark as about 20cm long and the bruise on student A's upper arm as bigger than a 50 cent piece.*
9. *By engaging in the above conduct, the respondent breached clause 2.1 of the Code of Professional Responsibility, which provides that teachers will work in the best interests of learners by promoting their wellbeing and protecting them from harm.*

Subsequent events

10. *On 13 February 2018, an investigation was commenced by the Business Manager at the company, Lynda Ewing. The respondent was suspended pending the outcome of the investigation.*
11. *On 16 February 2018, a disciplinary investigation meeting was held. The respondent stated that she had not intended on hurting student A, but that it could have happened when she tried to move him, that he was "behaving in a way that was hard to manage", and that she was "trying to move him the best way I could".*
12. *At the conclusion of a meeting on 19 February 2018, the respondent was dismissed from Best Start Employment.*
13. *On 21 March 2018, the Professional Services Manager at the company, Sheree Bos, filed a mandatory report with the Teaching Council (formerly known as the Education Council).*

Response

14. *In a response to the Teaching Council's Investigator dated 19 April 2018, the respondent stated that:*

"I am absolutely devastated that this has happened, my intention was never to harm [Student A] but merely to calm him until his Mum returned into the room. With the intensity of his hitting and kicking I felt I couldn't ask [the other staff member] to try calm him as he was getting physical, as she was pregnant. There were also other toddlers and babies in the area, not to mention whanau arriving to pick up their tamariki. Ultimately I was thinking of everyone's [sic] safety and wellbeing until [student A's mother] came back, including [student A], I didn't want him to hurt himself either. After attempts to lead (student A) away from kicking the door by holding his hands when calm words were not working, I made the decision to pick him up rugby style as I was being kicked and hit myself. I believe this is how I may have bruised his shoulder. I had no idea I had hurt him and it was most definitely unintentional."
15. *The respondent also said that: "I believe I was in a state of shock and was extremely emotional but in no way did it mean that I was not concerned for [Student A] and [student A's mother]. If I was able to talk to them or see*

them I would have and very much wanted to".

16. *The respondent further stated that she had informed student A's mother about what had happened when she entered the bathroom and that this information was passed on to student A's father when he came to collect student A.*

6. The respondent has also provided a statement to the CAC and Tribunal. She says that she has been employed at the Centre for nearly 13 years. During this time she had a child, while studying for her teaching diploma and teacher registration. She says she has taken part in all professional development and Best Start conferences. She says she earned the head teacher role 5 years ago. She says she is a passionate teacher who is always looking for ways to extend learning and including all Tamariki.
7. She repeats what is in the Agreed Summary of Facts; she is absolutely devastated that this has happened. Her intention was never to harm the child but merely to calm him until his mother returned into the room. She says that with the intensity of the child's hitting and kicking she felt she needed to intervene, in particular as another staff member who was present was pregnant. After attempts to lead him away from kicking the door by holding his hands and words were not working, she made the decision to pick him up "rugby style" as she was being kicked and hit herself. She believes this is how she may have bruised his shoulder. She had no idea she had hurt him and it was definitely unintentional.
8. She says that she told the mother what had happened when the mother came back. She says in addition that she would especially love to be able to continue to be a teacher, mentor and facilitator of learning.
9. She says the incident and the processes involved have devastated her and her whanau.
10. The respondent has provided a medical certificate dated 23rd January 20. The doctor says that she is a patient registered with the practice and that the work-related investigator process which has been underway has been extremely stressful and "supportive therapy has been necessary".
11. The respondent has also provided references. The first is from a person who says that she has known the respondent for approximately 6 years in both a personal and professional capacity. The professional capacity is not specifically explained but it appears that this person was a co-worker at the Centre where the incident occurred. This referee says that both of the referee's children, aged 7 and 3, were taught by the respondent. The referee says that she always felt that her children were safe and

happy in the respondent's care and that she has never seen the respondent be anything other but patient, firm and fair with her children and other children in the centre. This referee was the respondent's support person for the employment disciplinary meeting which resulted in her dismissal from the centre. The referee says that the respondent is an honest, reliable and trustworthy person who "truly deserves to continue teaching".

12. A second referee says that her son was in the centre because the respondent worked there and that the respondent is "great with my son".
13. The third referee is a non-qualified early childhood education teacher who has known the respondent 13 years and worked with her for 12 of those years. This referee says that the respondent is a "wonderful teacher". The referee says that if there were behavioural issues with children the respondent was always supportive in working out strategies or stepping in when needed.
14. A final referee states they have known the respondent for 12 years as a co-worker and employee. This referee was the respondent's Centre manager. The referee says that the respondent is a reflective professional practitioner with a good theoretical understanding of children and their development and is an extremely valuable teacher with a natural rapport with children. The referee says that the respondent is "very caring and calm" and "firm but fair and very consistent in her approach to behaviour management".

Submissions from the CAC

15. The CAC submitted that the respondent's conduct meets each limb of the definition of serious misconduct in section 378 of the Education Act, in that it adversely affected the physical and emotional well-being of the child, reflects adversely on the respondent's fitness to be a teacher, and brings the teaching profession into disrepute.
16. The CAC referred to a number of cases involving teachers in early childhood education who in various ways used some degree of physical force when dealing with challenging behaviour from a child. These included in NZTDT 2017/31, NZTDT 2015/50, NZTDT 2017/22 and NZTDT 2014/46. In some of these cases, involving a particular isolated incident where a child had engaged in challenging behaviour (such as spitting on a teacher's hand, or refusing to move), where the teacher engaged in a single "open handed hit on the back of the child's head" in one case, or in picking up and carrying the child, penalties of censure, annotation, and conditions were

imposed. In one case these penalties included additionally a requirement to complete a professional development course.

17. In another case, NZTDT 2017/22, a child was acting out towards other children and teachers (and had some history of this). The teacher responded by pushing the child forcefully down onto the floor and then pulling the child forcefully by the arm to the office. The Tribunal found that the teacher's use of force was inappropriate and not necessary for the prevention of harm to the child or anyone else. It also found the use of force was accompanied by anger and emotion on the part of the teacher, and was concerned about this. The Tribunal concluded that an adverse finding was warranted and expressed concern that the teacher had not accepted responsibility for her wrongdoing and did not demonstrate any willingness to engage in reflective practice. The Tribunal concluded that cancellation was the appropriate penalty given that the teacher no longer wished to teach. It nevertheless considered that while the conduct was likely to adversely affect the well-being or learning of the child, it was not such as to bring the profession into disrepute. It is worth noting that the Tribunal considered that this use of force was not of a degree which would ordinarily warrant a referral to the Tribunal. The conduct was at the minor end of the scale.
18. In the present case the CAC submitted that an appropriate outcome would be censure, annotation and conditions. It noted the respondent's cooperation with the process and her admission of the conduct. It pointed out that this is a case of the use of excessive force to control a child, rather than intentionally striking a child. It occurred on only one occasion rather than being part of a pattern of abuse or rough-handling. The suggested conditions would require a professional development course in classroom behavioural management, and the provision of a copy of the Tribunal's decision to current and prospective employers for period of 2 years from the date of the Tribunal's decision.

Respondent submissions

19. The respondent provided a written submission which has been summarised above.

Decision

20. While this is not a case involving the deliberate striking of a child, either in anger or for purposes of punishment, the Tribunal is concerned at the picking up of a child "rugby style" and also at the removal to the bathroom which borders on seclusion. The child involved complained of having been hurt by the respondent so this was not simply a situation involving picking up the child, but also involved the application of

sufficient force in the course of doing so to cause the child to complain of being hurt. This caused visible marks of some size, "about 20cm long" and a bruise bigger than a 50 cent piece. In the professional experience of the practitioner members of the Tribunal, children of the age of the student concerned will very seldom say that someone "hurt" them without reason. And, a teacher in any capacity picking up a child "rugby style" gives cause for concern.

21. Having said that, the Tribunal is also somewhat concerned about how this matter has been presented to it. We feel that the evidence provided to us verges on establishing that this could have been a use of physical restraint that was justified on the basis of the protection of the child or others, within section 139AC(1) Education Act 1989. Essentially the respondent verges on saying that this was a justified use of restraint. Had we heard from her it is possible that we might have concluded that the manner and degree of restraint was justified. The child was hitting, kicking and throwing things.
22. The respondent says that she was thinking of everyone's safety and well-being. She also did not want the child to hurt himself. She says that she made initial attempts to lead the child away by holding his hands "when calm words were not working", but made the decision to "pick up rugby style" as she was being kicked and hit herself. She says she had no idea she had hurt him and it was most definitely unintentional.
23. Notwithstanding that, the Tribunal is bound to approach the matter on the basis of the agreed summary of facts in which the respondent has accepted that she physically removed the student by picking him up and that she squeezed his upper arm and shoulder with sufficient force to cause visible marks and cause the student to complain that the respondent had hurt him. The Tribunal accepts that this was not a deliberate application of force intended to hurt the student in this way, and certainly not intended to cause bruising. However under section 139AC(1) the restraint must be "reasonable and proportionate" and the production of bruising is evidence from which it is possible to infer that it was not.
24. We consider the admitted conduct satisfies the definition of serious misconduct. Teachers must at all times maintain a level of self-awareness and self-control such that children cannot be injured or hurt in this way, and must comply with the standards set in section 139AC(1) of the Education Act. We appreciate that this can at times be an extremely trying and difficult task and we have sympathy with any teacher who must deal with a child who is out of control and hitting and kicking. Unfortunately the respondent has fallen short of the standards required on this occasion. The legislature has circumscribed the use of physical force by teachers for

the purposes of restraint. It is only where the teacher reasonably believes that restraint or force is required for the purposes of protection of the student or other students from "serious and imminent risk" that "reasonable and proportionate" physical restraint is allowable under section 139AC, even though it might be justified under the somewhat lesser threshold of "preventing or minimising harm" provided in section 59 of the Crimes Act 1961.

25. The child complained of being hurt, so this was conduct that adversely affected the well-being of a student.
26. The misjudgment as to the application of sufficient force to hurt the child and cause marks reflects adversely on the respondent's fitness to be a teacher. It is also capable of bringing the teaching profession into disrepute.
27. The respondent's actions meet the other requirement of being of a character that meets the criteria for reporting serious misconduct, under Rule 9 (1)(f), neglect or ill-treatment of a child in the teacher's care.
28. The primary purposes of professional disciplinary proceedings are the protection of the public and the maintenance of professional standards. In discharging its responsibilities to the public and profession, the Tribunal is required to arrive at an outcome that is fair, reasonable and proportionate in the circumstances. It also must seek to apply the least punitive sanction which is appropriate in the particular circumstances. If rehabilitation of the teacher appears a credible and reasonable possibility that will be a highly relevant consideration.
29. On balance we have concluded that the least punitive outcome reasonable in the circumstances is censure, annotation, and the imposition of rehabilitative conditions. In reaching this view we have noted that the respondent seems to have engaged in a misjudgment as to the appropriate action to deal with the child's behaviour, and also misjudged the degree of force to be applied in the course of that action. At the same time there is no evidence that the respondent acted out of anger or with the intention of punishing the child. While there were marks on the child there were no lasting or serious injuries. This was a one-off incident. It is necessary to record that the respondent's behaviour management approach was unsatisfactory, to a serious degree, but there is also clear evidence that the respondent is contrite and otherwise has a good teaching history.
30. The Tribunal therefore orders as follows:
 - (a) The respondent is censured;

- (b) The register is to be annotated;
- (c) The following conditions are imposed on the respondent's practising certificate:
 - (i) The respondent is to complete a professional development course in classroom behavioural management;
 - (ii) The respondent is to provide a copy of this decision to current and prospective employers for a period of 2 years from the date of the Tribunal's decision;
 - (iii) The respondent is to undergo mentoring focused on behaviour management for 12 months after she resumes teaching, by a person acceptable to the Manager – Professional Responsibility, Teaching Council.

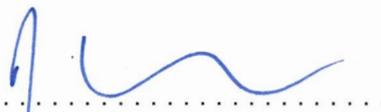
Costs

- 31. It is appropriate that in a professional disciplinary system the costs of carrying out appropriate professional disciplinary procedures be borne at least to a significant extent by teachers who are found to have engaged in professional misconduct, to avoid an inappropriate burden being placed upon the balance of the teaching profession. The Tribunal normally requires teachers found to have engaged in serious misconduct to pay 50% of the costs of both the CAC, and of the Tribunal itself. In situations where the teacher has cooperated with the process and in particular has avoided the need for an in-person hearing by agreeing a summary of facts, the Tribunal will reduce the costs to 40%, and sometimes to a lesser percentage in cases involving proven hardship or other particular circumstances.
- 32. The Tribunal orders that the respondent pay 40% of the CAC's actual and reasonable costs. No costs schedule has yet been received from the CAC. In the event that the parties cannot agree the actual and reasonable costs, the Tribunal delegates to the Deputy Chair the task of fixing the amount of those costs.
- 33. The respondent is also ordered to pay 40% of the Tribunal's costs. The Tribunal's

costs are \$1145. 40% of that amount is \$458 and the respondent is ordered to pay that sum.

Date:

1 July 2019



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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.