BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

NZTDT 2019-58

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	**ALEKI SANITA KAUFUSI**
	Respondent

TRIBUNAL DECISION
15 OCTOBER 2019

HEARING: Held at Auckland on 18 September 2019

TRIBUNAL: Theo Baker (Chair)
Aimee Hammond and Maria Johnson (members)

REPRESENTATION: Mr E McCaughan for the CAC
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 matter was heard in Auckland on 18 September. Mr Kaufusi attended.

Charge

2. In a Notice of Charge dated 8 May 2019, the CAC charged that the respondent, on 30 May 2018 grabbed and pulled the ear of a four-year-old child (Child R) and/or during 2018 grabbed and pulled the ear of a four-year-old child (Child K).

3. The CAC contended that this conduct amounted to serious misconduct pursuant to s 378 of the Education Act 1989 (**the Act**) and rr 9(1)(a) and/or (c) and/or (o) of the Education Rules 2016 (**the Rules**) as drafted before the May 2018 amendments[1] and/or rr 9(1)(a) and/or (c) and/or (k) of the Rules as drafted after the May 2018 amendments. Alternatively, it was conduct that otherwise entitles the Disciplinary Tribunal to exercise its powers under s 404 of the Act. In Mr McCaughan's written submissions, we were advised that the CAC did not want to pursue r 9(1)(c) of either version of the Rules.

4. At the hearing, the respondent explained that he was present to accept with honour and respect whatever our decision was.

5. Although not recorded in the minute of the pre-hearing conference, the parties confirmed that on that day an interim order for non-publication of the respondent's name had been made. The interim order was therefore confirmed at the hearing.

6. We issued an oral decision on 18 September 2019. This is the final written decision which includes appeal rights.

Evidence

7. Before the hearing the parties conferred and submitted and Agreed Summary of Facts (**ASF**). It was not signed by the respondent, but he confirmed at the hearing that he agreed with the summary. In particular, he confirmed that he had pulled the ear of two children.

8. We also heard from the respondent about his situation. This was relevant for our consideration of penalty, and is outlined below. The respondent freely answered

[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.

questions from the Tribunal. Mr McCaughan was offered the opportunity to question Mr Kaufusi but felt that relevant matters had been covered.

9. The first question is whether or not the CAC has proved the charge. The ASF is set out in full:

SUMMARY OF FACTS

Introduction

1. *Mr Kaufusi was first registered and provisionally certified on 9 October 2017. His current provisional practising certificate expires on 9 October 2020.*
2. *Mr Kaufusi has been employed as an ECE teacher at Kea Kids Childcare Centre Vine Street since April 2018 and works in the preschool room.*
3. *Kea Kids Childcare Centre Vine Street is an early childhood centre in Mangere East, South Auckland. The centre has two other teachers in the preschool room and 25 children are enrolled at the centre.*

   Allegations: that (a) on 30 May 2018 Mr Kaufusi grabbed and pulled the ear of a four-year-old child (Child R) and (b) in 2018 Mr Kaufusi grabbed and pulled the ear of another four year old child (Child K).
4. *On 30 May 2018 a witness observed Mr Kaufusi pulling the ear of a four year old child (**Child R**) in the classroom, when she was dropping her own four year old son (**Child K**) off at Kea Kids Childcare Centre. The witness noted that Mr Kaufusi pulled the ear hard enough that it appeared that the little boy was hurt.*
5. *On the evening of 30 May 2018, the witness asked Child K if any of the teachers had ever pulled his ear. The child replied that Mr Kaufusi had. When the witness asked how many times Mr Kaufusi had done this, Child K said "three or four times" and said Mr Kaufusi had pulled his ear because he had not been listening.*
6. *On 31 May 2018 the witness confronted Mr Kaufusi and asked if he had ever pulled Child K's ears. Mr Kaufusi denied ever doing it, but apologised to the witness.*
7. *Later that day the Centre Manager of Kea Kids met with Mr Kaufusi and asked him to explain what had happened. Mr Kaufusi said he was shocked at the witness's accusation. He denied ever pulling Child K's ear. He stated that he had only said sorry to the witness because she was yelling and crying.*
8. *Later that day, a meeting was held with the witness, the Centre Manager and Mr Kaufusi. During the meeting Mr Kaufusi repeatedly apologised to the witness and admitted to pulling Child R's ear, however he denied pulling Child K's ear.*
9. *On 1 June 2018 the Area Manager wrote to Mr Kaufusi advising him that she had commenced a formal investigation into his "positive guidance practice".*

10. On 6 June 2018 a disciplinary meeting was held with Mr Kaufusi, the Centre Manager and an external Centre Manager. At this meeting Mr Kaufusi denied pulling either Child R or Child K's ear.

11. On 6 June 2018 the Area Manager wrote to Mr Kaufusi advising of the outcome of the investigation. She stated that Mr Kaufusi's employment was to continue subject to the following conditions:

a. That Mr Kaufusi undergo supervision of his teaching practice for the next 3 months, with regular feedback provided to him by his mentor teacher and the Centre Manager.

b. Engagement in professional development in the areas of social competency and child protection.

c. Active participation in self-review with the teaching team.

d. Fortnightly written reflections provided to his Mentor teacher and the Centre Manager for feedback.

12. On 7 June 2018 the Centre Manager met with the witness and advised her that the investigation had been completed. On that same day, the witness made a report to the Police.

13. On 19 June 2018, the Area Manager submitted a mandatory report to the Teaching Council.

14. On 23 August 2018 Police spoke to Mr Kaufusi regarding the allegation. Mr Kaufusi denied assaulting either Child R or Child K. However, according to the Police he "acknowledged that he had previously admitted to the low level assaults of pulling their ears".

15. Police issued Mr Kaufusi with a formal written warning for the assaults on Child R and Child K (s 194(a) Crimes Act 1961) on 23 August 2018.

16. On 29 August 2018 Mr Kaufusi was issued with a formal warning letter from the Area Manager for "unsatisfactory positive guidance strategies towards two children enrolled in the Centre".

17. On 2 May 2019 Mr Kaufusi attended a meeting with the CAC. During that meeting Mr Kaufusi confirmed that on two separate occasions he had grabbed and pulled the ears of two different four year old children at the Centre. He stated that he now understood that this type of physical contact with children was wrong and that he had no right to touch children in this way.

10. At the hearing Mr Kaufusi explained that “on that day” children were running around, and he tried to call them back. He said he thinks he was tired. He reached out and grabbed the boy’s ear. He told us he did not mean to hurt the little boy. He said that on the second occasion, he did the same thing. Based on paragraph 17 of the ASF and on Mr Kaufusi’s admissions at the hearing, we are satisfied that the allegations in the charge are proved.

Serious misconduct

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

12. 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 Teaching Council's criteria for reporting serious misconduct*.

13. The criteria for reporting serious misconduct are found in r 9 of the Rules. Therefore the CAC must establish at least one ground under s 378 and one under r 9 for the test for serious misconduct to be met. For the 30 May incident, the CAC relies on rr 9(1)(a) and/or (k) of the post amendment Rules:

> ***Criteria for reporting serious misconduct***
>
> *(1) A teacher's employer must immediately report to the Teaching Council in accordance with section 394 of the Act if the employer has reason to believe that the teacher has committed a serious breach of the Code of Professional Responsibility, including (but not limited to) 1 or more of the following:*
>
> *(a) using unjustified or unreasonable physical force on a child or young person or encouraging another person to do so:*
>
> *…*
>
> *(k) an act or omission that brings, or is likely to bring, the teaching profession into disrepute.*

14. The date or dates of the conduct involving Child K, may be before 18 May 2018, and so CAC also relies on rr 9(1)(a) and/or (o) that were in place at that time:

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):

…

(o) any act or omission that brings, or is likely to bring, discredit to the profession.

CAC submissions

15. For the CAC, Mr McCaughan had filed some written submissions. He submitted that the respondent's conduct was unacceptable in any education environment, let alone a pre-school environment. As the respondent has also acknowledged, this type of physical contact with children was wrong and there was no justification for treating either child in this way. Mr McCaughan submitted that this represented a serious error of judgement and amounted to a breach of s 139A which prohibits the use of force for correction or punishment.

16. Mr McCaughan referred to the often-quoted statement in CAC v Teacher NZTDT 2014-49:

> *We repeat as we have said in a number of cases in the past that the use of physical force – even at a lower level…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.*

17. Mr McCaughan referred to another Tribunal decision of *CAC v Risuleo* NZTDT 2018/8,[2] which involved a primary school teacher who responded to a child who threw a felt pen to the ground by walking over to the child, grabbing his arm and pulling the child in the direction of where the felt pen had landed and instructing him to pick the pen up. His actions caused the boy to fall to the floor and hit his head. In finding serious misconduct, we noted:

> *There are circumstances in which it is reasonable to guide a young student's hand to a directed task. It is evident that the respondent used more force than was required, and may have been motivated by some frustration, but we find*

[2] *CAC v Risuleo* NZTDT 2018/8, 17 September 2018

this behaviour is conduct likely to bring discredit to the teaching profession, rather than physical abuse.

18. We also said that in that case we did not consider that cancellation would ordinarily be the appropriate penalty, given that "the respondent's conduct falls into the lower end of the scale of seriousness". That teacher wanted to de-register, and so we placed some conditions on his practice should he decided to return to teaching.

19. In the present case, Mr McCaughan submitted that the conduct was a breach of the respondent's commitment under the former Code of Ethics for Certified Teachers to promote the physical, emotional, social, intellectual and spiritual wellbeing of learners, and under the current Code of Professional Responsibility, which took effect from June 2017, a teacher's commitment to "work in the best interests of learners by promoting the wellbeing of learners and protecting them from harm".

20. 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.

21. As for the second part of the test for serious misconduct, Mr McCaughan conceded that it is arguable whether the present conduct amounted to "physical abuse" (as set out in the pre-May 2018 version of the Rules).

22. Mr McCaughan submitted that, 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.[3]

Respondent's position

23. The respondent made it clear that he was remorseful for his actions and that he would accept and respect the Tribunal's decision.

Discussion

24. We accept the CAC submissions. We find that each incident of ear-pulling was in contravention of s 139A of the Act and meets all three limbs of the definition of serious misconduct in s 378. It was likely to adversely affect the well-being and learning of one

[3] The test adopted from the High Court in *Collie v Nursing Council of New Zealand* [2001] NZAR 74

or more students, reflects adversely on the respondent's fitness to be a teacher, and brings the teaching profession into disrepute.

25. Although we agree that the respondent's actions are not in the most serious category of physical abuse, we still find they meet the criterion in r 9(1)(a) of the pre-May 2018 Rules. We also find that it amounts to unjustified or unreasonable physical force on a child as stipulated in the new post-May 2018 Rules. In *CAC v Maeva* NZTDT 2016/37[4] we found that a teacher pulled a student's ear while getting him to his feet. There was no evidence that he was harmed by this. We also found that she had hit a student on the back and on the leg, although there was no evidence that there was a significant degree of force. We found that the teacher's conduct amounted to physical abuse. In concluding that the ear incident amounted to serious misconduct, we noted:

> *We agree with the CAC that the incident of ear-pulling amounts to serious misconduct. We acknowledge that the student was not physically harmed by this, but that does not make it acceptable. A student might laugh out of embarrassment or bravado. A particular student might be used to rough and tumble or perhaps has experienced similar discipline before. Again, that doesn't mean it is right. Student A has the same rights as any other child in the classroom to learn without having his ear pulled. Although in this particular case, the degree of force might not have been great, we see it as a demeaning way of treating a student, carrying with it a risk of physical and emotional harm. It has no place in the education of children and young people*.

26. In the case of Child R, we find that the conduct that occurred on 30 May 2018 was the use of unjustified and unreasonable force as set out in r 9(1)(a) of the post-amendment Rules.

27. We also find that in each instance the conduct is likely to bring discredit to the profession under the pre-amendment r 9(1)(o) and the post-amendment r 9(1)(k). In particular, we find that reasonable members of the public, informed of the facts and circumstances, could reasonably conclude that the reputation and standing of the profession is lowered by the respondent's behaviour.[5] Both incidents viewed together gave an impression that this may have been a pattern of behaviour.

[4] *CAC v Maeva* NZTDT 2016/37, 24 May 2017
[5] The objective standard set out in *Collie v Nursing Council of New Zealand.* [2001] NZAR 74 at [28]

Penalty

28. In *CAC v McMillan*[6] 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.*

29. Section 404 of the Act provides:

> ***404 Powers of Disciplinary Tribunal***
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> *(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:*

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

(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.

30. In oral submissions, Mr McCaughan noted that since the respondent's admission to the CAC, he has not recanted from that and he has been in regular communication with Mr McCaughan, who described the respondent as being consistently "upfront about the matter" and "humble and respectful in an open way".

31. That is also the impression that we formed of the respondent. When invited to address us, he said that, as he tells his children, "We are free to choose our actions, but we are not free from the consequences of that choice". He said that he wants to learn from this.

32. The respondent spoke with some emotion about his passion for teaching young children and how he misses them. He said that their image stays with him. He is clearly delighted when some of his former pupils see him in the community and call out to him. He spoke with humility and gratitude of their forgiveness of his actions.

33. The respondent explained that following these events, he complied with the conditions of his employment, as set out in paragraph 11 of the Summary of Facts above. After about three months, he went off work because of illness, and his job was not kept open for him. He is currently on a benefit.

34. When asked what he would do differently now, (when managing children who are not responding to his directions) the respondent said that he has to be more resourceful, to distract them and give them something else to do. If he felt angry, he would call another colleague to take over, to give himself a chance to cool down.

35. Although the respondent had had some initial difficulty acknowledging his wrongdoing, we appreciate Mr McCaughan's point that since admitting fault at the CAC meeting, the respondent has been consistent. In our view, the respondent demonstrated some insight into his behaviour, and he has learned from this experience. We believe that he has a great contribution to make to the teaching profession and we encourage him to return.

36. We imposed the following penalty:

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

b) Under s 404(1)(e) the register is to be annotated for two years from the date of our oral decision on 18 September;

c) It is a condition on the respondent's practising certificate for two years from the date of our oral decision on 18 September that:

i. Before he is granted full registration, he has done some more training or a course in positive behaviour guidance;

ii. He provides a copy of the Tribunal's decision to any current, future or prospective employer;

iii. He informs the Teaching Council of the name of a mentor or supervisor with whom he can talk and receive support. That person may be in education or through his church.

Costs

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

38. We ordered the respondent to pay 40% of the CAC's actual and reasonable costs under s 404(1)(h). This amounts to $1,621.57.

39. In recognition of the respondent's current lack of employment, we did not make an order for a contribution towards the Tribunal's costs under s 404(1)(i)

Non-publication

40. The respondent asked for name suppression on the basis that it would be difficult for him to get further teaching positions with this finding of serious misconduct against him.

41. Section 405(3) of the Act provides that hearings of this Tribunal are in public. This is consistent with the principle of open justice, which as we noted in *CAC v Jenkinson*, [7] is a "fundamental tenet of our legal system." While protection of the public is an important function of open justice, the presumption exists regardless of any need to protect the public. [8] The primary purpose behind the open justice principle in a disciplinary context is the maintenance of public confidence in the profession

[7] *CAC v Jenkinson* NZTDT 2018/14 at paragraph 33
[8] *CAC v McMillan* NZTDT 2016/52 at paragraph 45

concerned through the transparent administration of the law.[9]

42. Section 405(3) 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.*

43. 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 exercise our discretion to make such an order.

44. The CAC referred to *NZTDT 2016/27,* in which we acknowledged what the Court of Appeal said in *Y v Attorney-General:*

> *While a balance must be struck between open justice considerations and the interests of a party who seeks suppression, "[A] professional person facing a disciplinary charge is likely to find it difficult to advance anything that displaces the presumption in favour of disclosure".*[10]

45. We declined the application for name suppression on the basis that the respondent has advanced no proper ground. It is important that other early childhood education centres are aware of these incidents. As noted above we believe that the respondent has an important contribution to make to early childhood, particularly in his community, but his employers need to be aware of this disciplinary finding and ensure that the respondent is supported by his colleagues and children are kept safe. That outweighs any privacy interests of the respondent.

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[9] *CAC v Teacher* NZTDT 2016/27 at paragraph 66
[10] *Y v Attorney -General* (2011] NZCA 676

46. We extended the interim order for non-publication to enable the respondent to get his affairs in order. That order expires on 18 October 2019.

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).