

Complaints Assessment Committee (CAC) v Jennifer Anne Sullivan

NZTDT 2018-91

Registered teacher Jennifer Anne Sullivan was referred to the Disciplinary Tribunal for holding a two-year-old's face and force feeding him.

The result: the Tribunal censured her and imposed conditions on her practising certificate in relation to professional development and informing prospective employers. Ms Sullivan was also ordered to contribute to the CAC and Tribunal's costs. Non-publication orders are in place for the child's name.

On 1 August 2019 the Tribunal released its decision following a hearing on the papers. The CAC alleged that in November 2017 Ms Sullivan force fed a two-year-old child while the child was seated at a table. Ms Sullivan used one of her hands to firmly hold the child's head, and to squash open his mouth. The child resisted by letting out a loud cry, screaming "no" and moving his head from side to side. Using her other hand, Ms Sullivan forced a forkful of food into the child's mouth.

The incident was witnessed by another teacher who described the level of force used as "a 4 out of 5." Ms Sullivan admitted the conduct and said that it had occurred after great negotiation with the child, and after a discussion with his mother. There had been a pattern of difficulties with the child's eating, and Ms Sullivan had agreed with the child's mother that she would ensure he ate one forkful of food. Ms Sullivan stated that she was embarrassed about what had happened and that she was in the wrong.

The CAC submitted that Ms Sullivan's conduct amounted to serious misconduct and that the appropriate penalty be censure and conditions. The CAC acknowledged that the use of force was not motivated by anger, an intention to hurt the child, or frustration. It can therefore be distinguished from the more intentional violent act such as a kick or hit, and although serious, it was a single incident. The CAC also noted that Ms Sullivan had taken responsibility for the incident and had reflected on her actions.

While Ms Sullivan did not make submissions for the Tribunal it noted that she had engaged professionally and took her explanations in to account. The Tribunal also believed that she could still make a positive contribution to the profession.

The Tribunal decided that the conduct was likely to adversely affect the child's well-being, reflected adversely on the respondent's fitness to teach and was likely to bring the teaching profession into disrepute.

The Tribunal imposed the following orders:

- a. The respondent is censured under s 404(1)(b);
- b. It is a condition on her practising certificate that she:
 - a. Within 12 months of the date of this decision complete the Incredible Years Teaching programme;
 - b. For the next 12 months from the date of this decision, to show a copy of this decision to any prospective employer.

Ms Sullivan was also ordered to contribute to the CAC and Tribunal's costs.

The child's name is subject to a non-publication order.



BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

NZTDT 2018-84

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 **JENNIFER ANNE SULLIVAN**

Respondent

TRIBUNAL DECISION

1 AUGUST 2019

HEARING: Held at Wellington on 26 March 2019 (on the papers)

TRIBUNAL: Theo Baker (Chair)
Nikki Parsons and Dave Turnbull (members)

REPRESENTATION: Mr Evan McCaughan for the CAC
The respondent did not participate

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 22 November 2018, the CAC alleged that on occasions in November 2017 the respondent held a two-year-old's face (Child A) and force fed him.
3. The CAC contends 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 (o) of the Education Rules 2016¹ (**the Rules**); or conduct that otherwise entitles the Disciplinary Tribunal to exercise its powers under s 404 of the Act.

Evidence

4. Before the hearing the parties conferred and submitted and Agreed Summary of Facts (**ASF**). The summary before the Tribunal was not signed by the respondent and counsel for the CAC, but once a minute was issued seeking clarification, a signed ASF was duly submitted. The ASF is set out in full:

AGREED SUMMARY OF FACTS

Introduction

1. *Jennifer Sullivan is a fully certified early childhood teacher. She first gained a provisional practising certificate in September 2006, going onto a full practicing certificate in August 2010.*
2. *Ms Sullivan was previously employed at Canopy Kidz Limited. She was then employed as Head Teacher at Whitby Educare Ltd for about four years, until her resignation from that position on 19 January 2018. Following this, Ms Sullivan took up a position as a teacher at Whitby Educare, until she fully resigned in February 2018.*
3. *From 24 to 27 November 2017, several staff of Whitby Educare raised concerns over Ms Sullivan's practices. One of the concerns was that Ms Sullivan had force-fed a child. The other concerns did not amount to serious misconduct, and*

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.

are not discussed further in this summary.

Serious misconduct

4. *On a date in November 2017, Ms Sullivan force-fed a child, [Child A].*
5. *[Child A] was between 2 and 2 ½ years old at the time. [Child A] was seated at a table. Ms Sullivan used one of her hands to firmly hold [Child A]'s head, and to squash open his mouth. [Child A] resisted by letting out a loud cry and screaming "no", and moving his head from side to side. Using her other hand, Ms Sullivan forced a forkful of food into [Child A]'s mouth.*
6. *The incident was witnessed by two other teachers, one of whom described the level of force as a 4 out of 5 - (1 = minimal; 5 = forceful).*
7. *On 8 January 2018, Duncan Lints, Centre Manager/Owner of Whitby Educare, raised the complaint with Ms Sullivan. He asked her if the incident had happened. Ms Sullivan replied "yes", and said she had held [Child A]'s mouth to feed him as he was being difficult. She said she had spoken with his mother, who also had concerns with his feeding. As a result of this meeting, Ms Sullivan was suspended on full pay.*
8. *On 15 January 2018, there was a Formal Disciplinary Hearing. In relation to the force-feeding incident, Ms Sullivan said she knew of the incident as soon as it was raised, and she would never try to deny it. She said she took ownership of what happened.*
9. *Ms Sullivan said it was one mouthful of food. She said that the child wasn't held down, but added that that did not make it right. She said it was a one-off incident. She said it had occurred after great negotiation with [Child A], and after a discussion with his mother. There had been a pattern of difficulties with [Child A]'s eating, and Ms Sullivan had agreed with the child's mother that she would ensure he ate one forkful of food.*
10. *Ms Sullivan said she did it with a fork, and that she held his mouth as she did not want him to get hurt. She said she was embarrassed about what had happened, that she was in the wrong, and that she did not think what she did was right.*

Information obtained by CAC

11. *On 20 February 2018, Ms Sullivan emailed Daniel Rakic, Teaching Council*

Investigator. Her email said:

Thanks for your response. I have nothing more to add as I have responded and given my response in the formal disciplinary meeting. Like I said it was one mouthful of food and I had been working with his mum around his eating and his other behaviours they were struggling with. The issues raised by the other staff were around my leadership not my relationships with tamariki or their whanau. My day to day interactions with the children were never in question. But after lots of reflecting I made the decision to resign and to take personal responsibility for my actions and did not want any negative fall out for the centre. I do love teaching but I got tied up with other issues that impacted on my ability to be a good teacher this is what I want to be again. So choosing to take some time to focus on my teaching again and do some relieving work is what I have decided to do for now.

Serious misconduct

5. We must be satisfied that the established conduct amounts to serious misconduct (or conduct otherwise entitling the Tribunal to exercise its powers).
6. 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.*

7. The criteria for reporting serious misconduct are found in r 9 of the Rules. The CAC relies on rr 9(1)(a), (n) and (o) that were in place at the time of this conduct.²

² 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.

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):*
- (n) *any other act or omission that could be the subject of a prosecution for an offence punishable by imprisonment for a term of 3 months or more:*
- ...
- (o) *any act or omission that brings, or is likely to bring, discredit to the profession.*

CAC submissions

8. The CAC submitted that the conduct breached the commitments under the Code of Professional Responsibility,³ in particular the commitment to “work in the best interests of learners by promoting the wellbeing of learners and protecting them from harm”.
9. It was submitted that the respondent was using physical force for the purpose of correcting the child’s behaviour and was therefore a breach of s 139A of the Act which says:

139A No corporal punishment in early childhood services or registered schools

- (1) *No person who—*
- ...
- (c) *is employed at an early childhood service (as defined in section 309); or*
- ...
- shall use force, by way of correction or punishment, towards any student or child enrolled at or attending the school, institution, or service.*

10. Mr McCaughan submitted that the conduct reflected adversely on her fitness to be a teacher and brought the teaching profession into disrepute (s 378(a)(ii) and (iii) and for similar reasons was conduct that brought or was likely to bring discredit to the teaching profession under r 9(1)(o).
11. It was submitted that the act of squeezing open the child’s mouth with a degree of force described as a 4 out of 5 may be considered “physical abuse” under r 9(1)(a),

³ The current Code of Professional Responsibility took effect from 30 June 2017

particularly given that it was a breach of s 139A. Mr McCaughan also submitted that the act constitutes an “assault”⁴ and therefore could have attracted a prosecution for an offence punishable by imprisonment for a term of 3 months or more and therefore met the criterion in r 9(1)(n).

12. Although the respondent appears to have been acting on instructions from the child’s parent, that was no excuse. As a professional, the respondent was obliged to advise the parent that she could not be involved in this sort of conduct.
13. Mr McCaughan submitted that the respondent’s conduct was broadly comparable in gravity to the conduct in *CAC v Usofono* NZTDT 2017-30,⁵ which involved a teacher twice grabbing a student by the collar and accidentally scratching his neck, and *CAC v Emile* NZTDT 2016-51, where a teacher pushed a child and we found that it did not amount to physical abuse.

The respondent

14. Although the respondent did not put forward any final submissions to the Tribunal, she communicated with the CAC and Tribunal professionally. In an email dated 11 January 2019, the respondent said, “I had my say at the last meeting and I feel I have defended the reason why the event took place. The notes taken are an accurate account of this and I have faith that a fair decision and outcome will come on your part”.
15. In a further email to Mr McCaughan she set out a conversation she had had with the child’s mother about a range of behavioural challenges at home, including mealtimes. This has been briefly captured in the ASF. She said, “Because [the boy’s mother] was implementing what we had decided to work on together and she asked I said I would do the same at the Centre. In hindsight huge error of judgment. I did it on that day; it was one mouthful and then after a huge meltdown on [the boy’s part] he chose to finish his lunch...When mum picked him up that afternoon I said that I didn’t feel comfortable doing it and that is why it was a one-off event. I went against my better judgement to support a family that was clearly struggling...I have had a year to reflect on this one minute of my 20 years as a teacher. I know it was wrong but I totally take ownership of what I did and never denied what I did.”

⁴ Defined in s 2 of the Crimes Act 1961 as the “intentional application of force to the person of another”.

⁵ *CAC v Usofono* NZTDT 2017-30,

Discussion

16. We agree that acting on a parent's instructions does not justify or excuse conduct that any reasonable teacher would know was unacceptable.
17. We accept that this conduct was a breach of s 139A of the Act as outlined above. It is fortunate that the behaviour was not sustained and was a brief incident. However, we question why there was any need to "correct" this behaviour at all. This "method" has no place in any teaching environment in this century.
18. We find that it was conduct that was likely to adversely affect the child's well-being, reflects adversely on the respondent's fitness to teach and is likely to bring the teaching profession into disrepute. It meets the test in *Collie v Nursing Council of New Zealand* [2001] NZAR 74⁶ that reasonable members of the public fully informed of the facts and circumstances would find that the reputation of the profession was lowered by the respondent's conduct.
19. We also agree that although not the most serious example, it does amount to physical abuse under r 9(1)(a). We do not need to make a finding under r 9(1)(n), and instead rely on rr 9(1)(a) and (o).

Penalty

20. In *CAC v McMillan*⁷ 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.

⁶ Applying the test in *Collie v Nursing Council of New Zealand* [2001] NZAR 74 at [28]

⁷ NZTDT 2016/52, 23 January 2017, paragraph 23.

21. 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.*

22. We said in *CAC v Teacher NZTDT 2014-49*⁸:

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 such as evident in this case – is unacceptable in New Zealand schools, and that any teacher who uses physical force contrary to section [139A] puts his or her status as a teacher in peril.

23. Mr McCaughan acknowledged that the use of force was not motivated by anger, an intention to hurt the child, or frustration. It can therefore be distinguished from the more intentional violent act such as a kick or hit, and although it was serious was a single

⁸ *CAC v Teacher NZTDT 2014-49*, 20 May 2014

incident.

24. Mr McCaughan also set out the acknowledgements that the respondent expressed at an early stage. She admitted the incident when the Centre Manager asked her about it; at the formal disciplinary hearing she took ownership of the incident and was embarrassed by her behaviour and she knew what she did was wrong; and as outlined in the ASF, she has done a lot of reflecting and takes personal responsibility for her actions.
25. We commend the respondent for her acknowledgement and reflections. She has demonstrated insight and understanding and we imagine she has learned a great deal from this experience. We believe she has a positive contribution to make to the teaching profession and we agree with the penalty proposed by the CAC, which was censure and a condition that she provide a copy of this decision to any employer. We add a further condition that we hope will support her in her return to full-time teaching.
26. We therefore make the following orders:
- a) The respondent is censured under s 404(1)(b);
 - b) It is a condition on her practising certificate that she:
 - i. Within 12 months of the date of this decision complete the Incredible Years Teaching programme;
 - ii. For the next 12 months from the date of this decision, to show a copy of this decision to any prospective employer.

Costs

27. The CAC sought a contribution of 40% of its costs under s 404(1)(h).
28. The Tribunal orders the respondent to pay 40% of the CAC's actual and reasonable costs under s 404(1)(h) and the Tribunal's costs under s 404(1)(i), The Tribunal delegates to the Chairperson authority to determine the quantum of those costs and issues the following directions:
- a) Within 10 working days of the date of this decision:
 - i. The Secretary is to provide the Chairperson and the parties a schedule of the Tribunal's costs
 - ii. CAC to file and serve on the respondent a schedule of its costs
 - b) Within a further 10 working days the respondent is to file with the Tribunal and

serve on the CAC any submissions she wishes to make in relation to the costs of the Tribunal or CAC.

29. The Chairperson will then determine the total costs to be paid.

Non-publication

30. There are no applications for non-publication. We make an order for non-publication of the child's name under s 405(6).



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).