

**BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL**

**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**

**Complainant**

**AND**



**Respondent**

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**DECISION OF NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL**

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Tribunal: John Hannan (Deputy Chair), Stuart King, Kiri Turketo

Hearing: 17 April 2020

Decision: 24 June 2020

Counsel: C Paterson/A-R Davies for Complainant  
D King for Respondent

## Introduction

1. By a Notice of Charge dated 4 November 2019 the Complaints Assessment Committee (**CAC**) charged the respondent in accordance with section 401 of the Education Act 1989 with behaving in a manner amounting to serious misconduct in that on 21 March 2019 he:
  - (a) engaged in sparring with a year 12 student (student B);
  - (b) punched student B in the head;
  - (c) slapped student B on the back of the head.
2. The CAC alleges that this conduct amounts to serious misconduct pursuant to section 378 of the Education Act 1989 and Rule 9(1)(a), and/or (b), and/or (e), and/or (j) and/or (k) of the Teaching Council Rules 2016 ( Rules), or alternatively amounts to conduct otherwise entitling the Tribunal to exercise its powers under section 404 of the Education Act.
3. An agreed summary of facts has been prepared. This matter has been dealt with on the papers.
4. The respondent has applied for a permanent order prohibiting publication of his name or any details capable of identifying him.

## Facts

5. The agreed summary of facts is as follows.
  1. [REDACTED] is a registered teacher.
  2. [REDACTED] (**respondent**) has been charged with serious misconduct pursuant to s 378 of the Education Act 1989 and rule(s) 9(1)(a) and/or (b) and/or (e) and/or (j) and/or (k) of the Teaching Council Rules 2016.
  3. [REDACTED] is the deputy principal of [REDACTED] (**College**) and has been since [REDACTED].
  4. On 11 April 2019, a mandatory report was submitted to the Teaching Council by [REDACTED] the principal of the College. The mandatory report concerned the respondent's conduct toward a student on 21 March 2019.

### **Conduct**

5. On 21 March 2019, students in the College ██████████ and several teachers and other adults were stacking silage after school, to fundraise for the College's ██████████. They were not on the school grounds at the time.
6. The respondent started play-fighting with a year 12 student. While the student and the respondent were play-fighting:
  - a. The student swore;
  - b. The respondent slapped the student on the back of the head;
  - c. The student punched the respondent in the ribs;
  - d. The respondent used a controlled left jab to the student's chin.

### **Teacher's Response**

7. On the same night as the incident, the respondent apologised to the student, and told the Chairman of the ██████████ and the Chairman of the ██████████ what had happened. The respondent called the student's mother the next morning to apologise. A restorative hui was subsequently organised, as detailed below.
8. On 3 April 2019, in a statement to the College, the respondent admitted each of the aspects of the conduct referred to at paragraph 6 above, including that he punched the student, and slapped the back of the student's head. He maintained that the events occurred in the following order:
  - a. The respondent explained that the play-fight between himself and the student started when other students were play-fighting too.
  - b. However, the play-fight between the respondent and the student started to "get really rough." The respondent says he took several hits to the body and head from the student.
  - c. That was when the respondent "did a controlled left jab to [the student's] chin".
  - d. The student walked away swearing.
  - e. The respondent says that he asked the student to "please be respectful and not swear". This made the student swear more.
  - f. The respondent admits that he then "stupidly slapped [the student] in the back of the head".
9. The respondent organised and began attending EAP counselling as a result of the conduct and prior to the hui.
10. On 3 April 2019, the respondent participated in a restorative hui. This was attended by the student and his whānau, the College's Board of Trustees, a cultural advisor, the principal of the College, and the respondent's wife. At the hui, the respondent:
  - a. apologised for and expressed his regret at his actions;

- b. took responsibility for his actions; and*
- c. acknowledged that the incident should not have happened.*

11. *As a result of the hui, the respondent subsequently:*

- a. acknowledged his behaviour and apologised to all the College staff at a staff briefing;*
- b. took a step back from his management role at the College for six weeks while he rebuilt his mana. This included not speaking at assemblies, and not investigating incidents that occurred at College, especially those of a similar nature to the current matter.*

12. *The respondent started meeting with a mentor fortnightly, who is to assist the respondent with professional reflection and accountability.*

### **Additional Facts**

6. The respondent has provided an affidavit in support of his application for permanent name suppression. He says that when the incident occurred he was taken by surprise. He thought that he and the student were engaging in planned shadowboxing and was totally taken aback when he was the recipient of strong blows. One of these broke his ribs (he provides no medical evidence of this injury). He says his intention was to stop himself being hurt, not to attack the student.
7. He says that he is dedicated to his students and his out of character behaviour has distressed him. He undertook EAP counselling as a result and continues a mentoring relationship to further assist.

### **Submissions for CAC**

8. Counsel for the CAC reminded the Tribunal of the elements which must be established here:
  - Serious misconduct, being conduct that adversely affects or is likely to adversely affect the wellbeing or learning of one or more students; or
  - Being conduct that reflects adversely on the Teacher's fitness to be a teacher; or
  - Being conduct that may bring the teaching profession into disrepute: and,
  - Is of a character or severity that meets the Education Council's criteria for reporting serious misconduct

9. The CAC referred to Rule 9 of the teaching Council rules 2016, and drew the Tribunal's attention to Rule 9(1)(a), using unjustified and unreasonable physical force, (b) emotional abuse of a young person, (e) breaching professional boundaries (j) any other act or omission that could be the subject of a prosecution for an offence punishable by imprisonment for a term of three months or more, and (o) any act or omission that brings is likely to bring discredit to the profession.
10. The CAC presents this matter as fairly straight forward. The respondent's conduct in sparring with the student, punching him and slapping on the back of the head was likely to affect the student's well-being. It could also likely negatively affect his emotional well-being in particular because it was in a public place. The student's reaction to the respondent's conduct demonstrates that the student was upset and angry as a result of the conduct. The respondent's conduct breached commitments made under the Code of Professional Responsibility, in particular the commitment to "work in the best interests of learners by protecting the well-being of learners and protecting them from harm".
11. The CAC similarly says that the respondent's conduct reflects adversely on his fitness to teach. It was not appropriate conduct with a student. The slap on the head was not an appropriate reaction to a student being aggressive and swearing. The public are entitled to expect teachers to have better instincts than this.
12. In relation to Rule 9 of the rules, CAC says that a physical play fight involving sparring is in itself unjustified and unreasonable physical force. But the situation escalated and the respondent's jab and slap were undoubtedly unjustified and unreasonable physical force. With respect to Rule 9(1)(c ) this behaviour breached professional boundaries. Sparring with a student, punching and slapping them in the head must be regarded as a breach of professional boundaries. And the CAC says that this was conduct likely to bring the teaching profession into disrepute.
13. The CAC referred to a passage from *Collie v Nursing Council of New Zealand* [2001] NZAR 74 at [28] in which Gendall J defined "bringing discredit to the profession". Gendall J said that the standard is an objective standard with the question being asked whether reasonable members of the public, informed of the facts and circumstances, could reasonably conclude that the reputation and good standing of the profession (in that case nursing) was lowered by the behaviour of the practitioner concerned. The CAC says that the respondent's behaviour clearly meets this test. Members of the public, informed of his conduct, would regard as conduct falling below acceptable standards.

14. The CAC also referred to section 139A of the Education Act which prohibits any teacher using force by way of correction or punishment towards any student.
15. References were made to a number of previous cases in which grabbing, tapping, slapping and hitting students have been held to amount to serious misconduct, for example NZTDT 2017/1, *CAC v Haycock*<sup>1</sup>, *CAC v Maeva*<sup>2</sup>, and *CAC v Allen*<sup>3</sup>. The CAC notes the observations in *CAC v Rangihau*<sup>4</sup> that it is incumbent on all teachers to have a clear appreciation of the prohibition on the use of force for correction and discipline under section 139A Education Act 1989.
16. The CAC says that with regard to the slap, while the force used was not at the most serious end of the spectrum, it was used for a corrective purpose, to rebuke the student for swearing.
17. Overall, the CAC submitted that the respondent's conduct is sufficiently serious to meet the threshold of serious misconduct.
18. Also, the CAC says that it is likely that the sparring, the punch and the slap occurred in a state of anger.
19. As to outcome, the CAC referred to a number of cases including *CAC v Rowlingson*<sup>5</sup>. It says that in cases involving the use of force towards students in high school where the conduct falls at the lower end of the spectrum in terms of seriousness, having regard to the nature of the force used and the lack of harm to the student, an appropriate outcome would be censure, and annotation of the register for one year.
20. The CAC says that the following are mitigating factors;
  - the conduct was not premeditated, but was an impulsive response to the student's behaviour;
  - the respondent admitted his conduct immediately after it occurred;
  - the respondent has shown insight and remorse, including apologising, and participating in a restorative hui with the student and their whanau;
  - the respondent has no disciplinary history;

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<sup>1</sup> NZ TDT 2016/2

<sup>2</sup> NZ TDT 2016/37

<sup>3</sup> NZ TDT 2015/15

<sup>4</sup> NZ TDT 2016/18 at [58]

<sup>5</sup> NZ TDT 2015/54

- the respondent stepped back from his management role for 6 weeks;
- the respondent has attended 3 sessions of EAP counselling;
- the respondent is meeting with a mentor fortnightly.

### **Submissions for Respondent**

21. Counsel for the respondent says that his actions were caused by his desire to prevent injury to himself and he immediately acknowledged responsibility for what happened. Counsel accepts that the sparring/ play fighting was unjustified and unreasonable physical force towards a student but says it was a game that got out of control.
22. Counsel disputes that the actions could constitute emotional abuse.
23. Counsel submits that not all use of force will necessarily comprise serious misconduct. She says that it is speculative to assert that the actions occurred in a state of anger; she says the respondent was concerned to defend himself from actions by the student that went beyond play fighting and moved into an attack.
24. The respondent also disputes that the situation arose from his actions or that it had an element of "tit for tat".
25. Counsel concludes that this was a one-off out of character action and the respondent did all he could to remedy the situation. While censure is appropriate there is no need for the register to be annotated.

### **Decision**

#### ***Did the respondent's actions adversely affect, or were they likely to adversely affect, the wellbeing or learning of one or more students?***

26. Striking student B adversely affected that student's welfare. This element is established.

#### ***Did the respondent's actions reflect adversely on his fitness to be a teacher?***

27. Ordinarily, striking a student in this way raises significant issues about a teacher's fitness to practice. This is so whether or not it results from a loss of self-control or in anger. While acting in such a way as a result of the loss of self-control or in anger might be regarded as increasing the likelihood of an adverse finding on fitness to teach, if there is no evidence that there was a loss of self-control or anger,

so that the striking was deliberate, the inference must be that the striking was deliberate, so a similarly adverse finding must result. The respondent has not admitted a loss of self-control or anger so we must conclude the “jab” and the “slap” were deliberate. We conclude that the incident does reflect adversely on the respondent’s fitness to practice.

***Did the Respondent engage in conduct that may bring the teaching profession into disrepute?***

28. Applying the *Collie* test of whether reasonable members of the public, informed with knowledge of the factual circumstances, could reasonably conclude that the reputation and good standing of the profession would be lowered, we consider that a reasonable member of the public fully aware of the context, would be likely to see the profession in a lesser light either because the respondent struck blows as a result of loss self-control or anger, or hit the student quite deliberately.

***Was the Conduct of a Character or Severity that meets the Education Council's Criteria for reporting Serious Misconduct?***

29. The conduct was deliberate unjustified and unreasonable use of force on a young person. We do not conclude that it amounted to emotional abuse of student B. It was an act or omission which could be the subject of a prosecution for an offence punishable by imprisonment for a term of three months or more. Entering into the play fight breached professional boundaries and we can see the consequences in what followed. Given our conclusion on whether this was conduct which could bring the teaching profession into disrepute, we must also conclude that that element of the criteria for reporting serious misconduct is satisfied.

30. Accordingly the charge of serious misconduct is established.

**Penalty**

31. The Tribunal has considered all available options as set out in section 404 of the Education Act.

32. 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

circumstances. If rehabilitation appears a reasonable possibility that will be a highly relevant consideration.

33. The Tribunal takes into account the considerations of the protection of the public, the maintenance of professional standards and the appropriate penalty. Ordinarily it will also need to have regard to whether there are realistic possibilities for rehabilitation, noting any rehabilitative steps that the teacher concerned may already have embarked upon, and considering whether the circumstances of the misconduct and of the teacher suggest rehabilitation is a real possibility.
34. In the present case we think the respondent's behaviour was surprising, and serious, coming from such a senior and long-serving teacher. It went beyond a moment of stupidity. While the respondent has engaged in remedial or rehabilitative steps, we think the 6 weeks stand-down from his leadership role scarcely reflects the seriousness of the incident. The professional members of the panel consider that it would have been appropriate for the respondent to step down for 2 terms. But this Tribunal is not a position to impose such an outcome. It is completely incompatible with the role of a member of the Senior Management Team of a school to resort to violence in this way. It raises serious doubts about the respondent's judgment. Our concern is that the use of deliberate pugilistic violence of any kind within a school is clearly against current policies and legislation, cannot be tolerated and must be clearly denounced.
35. The respondent's unblemished prior record and steps to achieve reconciliation stand to his credit to mitigate against a more serious penalty than that which we have determined is appropriate.
36. We consider that an appropriate outcome to reflect the relative seriousness of this matter is censure, annotation of the register for a period of one year, and a condition that the respondent gives a copy of this decision to his current employer and to the principal of his current employer, and to any future employer for a period of 2 years from the date of this decision

#### **Application for non-publication order**

37. The CAC requests an order prohibiting publication of the name of student B and any details capable of identifying the student. This is appropriate, and the Tribunal orders that there is to be no publication of the name of student B and any details capable of identifying him.

38. The respondent has applied for an order permanently prohibiting the publication of his name and any details capable of identifying him. The reasons for this application are the potential impacts of publication on the health of his wife and daughter. The respondent notes that the community in which he works and in which the family lives is relatively small.

39. The respondent has provided an affidavit attaching extensive medical evidence of the health conditions suffered by his wife and daughter.

40. A letter from the family's GP dated 27 March 2020 [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

41. [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

42. The GP says that he is concerned that publication of the respondent's name will have a marked negative effect on health of both his wife and his daughter. [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

43. Extensive evidence is provided [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

44. The CAC acknowledged the medical evidence establishes that there is a real appreciable risk that members of the respondent's family and in particular his wife will likely suffer adverse [REDACTED] effects if his name were to be published. Consequently the CAC says that it abides the Tribunal's decision on permanent name suppression

45. Section 405 (6) of the Education Act provides that the Tribunal may make an order prohibiting publication of the name or particulars of the affairs of any person if the Tribunal is "of the opinion that it is proper to do so, having regard to the interest of any person... and to the public interest".
46. The default position is that Tribunal hearings are to be conducted in public and that the names of teachers who are the subject of disciplinary proceedings are to be published. This reflects the principle of open justice which applies to the Tribunal's proceedings.
47. A balance must be struck between open justice considerations and the interests of a party who seeks name suppression. The Tribunal has previously stated that a "high threshold" must be met before an order will be made for name suppression; *CAC v Adams* NZTDT 2018/11. But on the other hand the threshold is not as high as that which applies to such applications in the criminal context, and the statutory test is whether the Tribunal considers it "proper" to order non-publication in the circumstances, taking the relevant competing interests into account. This is a two-stage process; refer *CAC v Finch*<sup>6</sup>. Once the Tribunal has concluded that it is "proper", it may exercise its discretion to order nonpublication.
48. In order to justify a conclusion that it is proper to order name suppression there must be a real risk that publication will significantly adversely affect a teacher's rehabilitation or recovery from a mental illness or other serious impairment, or that in other ways the teacher (or in appropriate cases their family) will be affected in a serious way, beyond the ordinary embarrassment, distress, anxiety and shame which will afflict any teacher who is the subject of a published disciplinary decision, or which may afflict the teacher's family. The evidence must provide sufficiently detailed information about the condition(s) suffered by the teacher (or family members) which might cause such particular adverse effects. A bare assertion by a teacher that a condition exists or that they will suffer beyond the norm will usually not be sufficient. If the condition relied on is a medical condition, appropriate specialist evidence may be required.
49. The evidence put forward by the respondent satisfies the Tribunal that publication of his name is likely to have an adverse effect on the health of both his wife and his daughter of sufficient seriousness as to go beyond the ordinary distress and

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<sup>6</sup> NZTDT 2016/11

embarrassment which the family of any teacher found to have engaged in professional misconduct will suffer.

50. The material provided satisfies the Tribunal to the necessary degree that a non-publication order is proper, and we exercise our discretion to make such an order. This is on the basis of protecting the respondent's wife and daughter against the potential adverse health impacts that publication might cause.
51. We also consider that in order to protect the privacy of the family it is appropriate to order that there be no publication of the medical conditions suffered by the respondent's wife and daughter.

### **Orders**

52. The Tribunal orders as follows:
- (a) The respondent is censured;
  - (b) The register is to be annotated for 1 year from the date of this decision;
  - (c) It will be a condition of the respondent's practising certificate that;
    - a) He forthwith advises his employer, and the principal of the College, of this decision and provides a copy of it to them;
    - b) For a period of 2 years from the date of this decision he provides a copy of this decision to any prospective future employer.
  - (d) No person is to publish of the name of the respondent, or any details capable of identifying him.
  - (e) No person is to publish the name of student B or any details capable of identifying student B.
  - (f) This decision is to be redacted accordingly, including by removing the details of the medical conditions suffered by the respondent's wife and daughter.

## Costs

53. 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 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.
54. In the present case the respondent has agreed a summary of facts. We think in all the circumstances it is appropriate to set costs at 40% of the actual and reasonable costs of the CAC and of the Tribunal.
55. We have a schedule of the Tribunal's costs, set at \$1145. 40% of that sum is \$458. The respondent is ordered to pay \$458 towards the Tribunal's costs.
56. We do not have a schedule of the CAC's costs. The respondent is ordered to pay 40% of the CAC's actual and reasonable costs. In the event that agreement cannot be reached on the amount of actual and reasonable costs, the Tribunal delegates to the Deputy chair the fixing of the actual and reasonable costs and the relevant dollar amount.

**Date:** 24 June 2020



John 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.