BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

NZTDT 2019-24

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	**SHARON WILLIAMS**
	Respondent

TRIBUNAL DECISION
19 OCTOBER 2019

HEARING: Held at Wellington on 27 June 2019 **(**on the papers)

TRIBUNAL: Theo Baker (Chair)
Kiri Turketo and Maria Johnson (members)

REPRESENTATION: Ms R Kós for the CAC
Mr W Spence and Mr D Fleming for the respondent

1. The Complaints Assessment Committee (CAC) has referred to the Tribunal a charge of serious misconduct and/or conduct otherwise entitling the Tribunal to exercise its powers. The charge was that Sharon Williams (**the respondent**):

   a) In March 2017, inappropriately physically restrained Child K; and

   b) On or about 23 November 2017, grabbed Child K by the wrist and dragged him;

   c) On or about 23 November 2017, spoke inappropriately to Child K.

2. It was alleged that the conduct amounts to serious misconduct pursuant to s 378 of the Education Act 1989 (**the Act**) and rr 9(1)(a) and/or (f) and/or (o) of the Education Rules 2016[1] **(the Rules**) or conduct otherwise entitling the Disciplinary Tribunal to exercise its powers under s 404 of the Act.

3. The Tribunal convened on 27 June 2019 via Skype to consider the charge based on the papers that had been filed, that is an agreed summary of facts and submissions from each party.

4. In an interim decision issued on that date we recorded that we found the factual allegations in the charge were supported by the evidence, but that we were not satisfied that the conduct amounted to serious misconduct.

5. Under s 404(1)(c) we imposed a condition on the respondent's practising certificate that within 12 months she complete a suitable programme of professional development relating to managing children who have serious behavioural issues. We did not make any other orders.

6. We invited further submissions on the question of costs and name suppression, which we have now received.

Evidence

7. Before the hearing the parties conferred and filed an Agreed Statement of Facts (**ASF**), signed by their representatives.

8. According to the ASF, the respondent has been a fully registered teacher since January 2005 and her current practising certificate is due to expire in 2020. She was Head Teacher at [Kindergarten A] [near] Auckland until she resigned in January 2018.

[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.

At the time the facts were agreed, she was a relief teacher there.

First incident – March 2017

9. Student K was a four-year-old boy who had previously been stood down from attending the kindergarten because of his behaviour. He returned in 2017. One day in March 2017 when children were called to the mat, Student K did not come. The respondent specifically instructed him to come. She moved over towards him, but he moved away dodging and running, weaving his way around other children away from the respondent.

10. As Student K was running the respondent reached out with one hand and grabbed him by the arm and pulled him towards her, lifting him onto her knee. The boy squirmed and kicked, and she put her arms across him and pulled him into a secure hold.

11. Student K lifted his legs to push himself forwards and kicked at the respondent who continued to pull him in and sat down to stop him kicking her. During the struggle she said to Student K that if he behaved like that he would have to go home and that he would not be able to come back as they would not have that kind of behaviour here. The incident lasted around five minutes and then the boy settled down. He remained at the Kindergarten until picked up by his mother at the usual time.

Second incident – November 2017

12. On 23 November 2017 Student K reacted when another child snatched a block away from him and walked away. Student K got up and yelled at Student C and threw blocks at other children.

13. The respondent took Student K by the arm or wrist and dragged him out of the room to the outside area. She then blocked him from coming back inside, standing in the doorway. She told him that she would not put up with his behaviour, that he did not deserve to come in if he was going to behave this way and that he would not be allowed back inside. Student K cried and yelled “No”. Another teacher took Student K away to calm down.

14. Fifteen minutes later, during mat time, each child was called to stand up and say a sentence in Te Reo Māori before they had lunch. When Student K stood up, the respondent brought up the earlier incident and told him that she would not put up with his behaviour and that it needed to stop, or he would have to stop coming to the

kindergarten.

Ms Williams' response

15. In an interview about the November incident, the respondent said that in order to move Student K, she put her arms under his armpit to assist him to stand and he dropped to the ground, leaving her holding one arm. She said she bent down to assist him to stand with both hands, but he jumped almost off the ground and she stumbled. She then walked him to the outside deck and reasoned with him in a low voice.

16. In a letter dated 19 January 2018 the respondent accepted responsibility for her actions and in response said she could have handled the incidents differently. She stated she was aware there was a 'no restraint' policy.

17. The respondent said that her health was suffering at the time and this may have influenced her ability to cope. In a phone call to the Teaching Council on 19 March 2018 she said it was difficult to deal with a violent child with a history of family violence. She said her conduct occurred in a situation where she was trying to ensure the safety of other children and staff, but she acknowledged she could have handled it better.

Factual findings

18. The evidence to support the first allegation, that in March 2017 the respondent inappropriately physically restrained Child K is found above in paragraph 10; and the facts of the second and third allegations are in paragraphs 13 and 14. We are satisfied that the charge is established.

Serious misconduct

19. 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).

20. 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.

21. The criteria for reporting serious misconduct are found in r 9 of the Teaching Council Rules 2016 (**the Rules**).[2] 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. The CAC relies on rr (a), (f) and (o):

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):

…

(f) the neglect or ill-treatment of any child or young person in the teacher's care:

…

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

CAC submissions

22. The CAC submitted that the respondent's conduct met each of the three limbs of the definition of serious misconduct in s 378, and demonstrated a serious lapse of judgment.

23. It was also submitted that the conduct was a breach of the Teaching Council Code of Ethics for registered teachers which was in place at the time of these events.[3] The Code of Ethics was applicable at the time of the first incident, whereas the Code of Professional Responsibility which was introduced in June 2017 applies to the second incident.

24. The CAC submitted that the respondent's inappropriate physical contact with Student K on two occasions, and her inappropriate comments relating to him not deserving to

[2] The amendments made by the Education Council Amendment Rules 2018 do not apply to conduct before 18 May 2018. See Schedule 1 Part 2.

[3] The Council's Code of Ethics was replaced in June 2017 with the Code of Professional Responsibility.

come back inside, clearly breached professional boundaries. It was submitted that such behaviour is the antithesis of professional behaviour expected by a practitioner, and seriously calls into question the respondent's fitness to practice.

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

26. Reference was also made to *CAC v Teacher J* NZTDT 2017/27,[4] and *CAC v Rowlinson* NZTDT 2015/54.[5]

27. The CAC summarised the following principles from previous Tribunal decisions:

a) There is a wide range of conduct covered in cases in this area, and it is rare that two cases are identical. Each matter must be considered on its own facts.[6]

b) The use of force does not automatically constitute serious misconduct, and each case must be assessed against the relevant provisions on a case by case basis.[7] However even cases at the less serious end of the spectrum are regularly found to meet this threshold.

c) Incidents in such cases are often preceded by challenging behaviour on the part of the student. However, this does not justify the use of physical force. As made clear by s 139A of the Act, any use of physical force for the purposes of correctional punishment is not permitted.

d) A failure to comply with s 139A is relevant in determining whether a teacher's conduct constitutes physical abuse under r 9(1)(a).[8] ().

28. The CAC referred to the following cases:

- *CAC v Griffiths* NZTDT 2017/22;[9]
- *CAC v Carmen* NZTDT 2018/22,

[4] *CAC v Teacher J* NZTDT 2017/27, 2 January 2018
[5] *CAC v Rowlinson* NZTDT 2015/54, 9 May 2016
[6] *CAC v Teacher* NZTDT 2017/1, 6 March 2017 at paragraph 23
[7] *CAC v Teacher* NZTDT 2016/50, 6 October 2016 at paragraph 26
[8] *CAC v Taylor* NZTDT 2018/20, 16 November 2018
[9] *CAC v Griffiths* NZTDT 2017/22, 5 February 2018

- *CAC v Karklins* NZTDT 2016/38;
- *CAC v Usufono* NZTDT 2017/30;
- *CAC v Teacher* NZTDT 2016/26.

29. The CAC submitted that while the physical contact was preceded by the student not following instructions (to come to the mat on the first occasion) and throwing blocks at other children (on the second occasion), the use of force was initiated by the respondent and was a wholly inappropriate response, arising from her anger with the student. The respondent intentionally grabbed Student K's arm or wrist and dragged him outside as a measure to control and remove the student. It was submitted that there could be no suggestion that Student K posed a threat to his own safety or the safety of others in respect of the first incident, and in respect of the second incident his conduct did not necessitate a physical response, let alone taking him by the arm or wrist and dragging him from the room.

30. It was submitted that the facts were similar to *CAC v Carmen*, and arguably more serious because there are two occasions where the respondent has inappropriately handled the student by grabbing him and dragging him by the wrist/arm area.

Respondent submissions

31. For the respondent, Mr Fleming submitted that the particulars did not amount to serious misconduct. He submitted that for a finding of serious misconduct, the teacher's conduct must actually have been serious, and the statutory criteria should not be applied so widely as to effectively deem all misconduct to be serious misconduct. Mr Fleming submitted that although the incidents involved the use of force, it was not used by way of correctional punishment, but to prevent a student causing physical harm to himself or others. In relation to the first incident, Student K was running and weaving around other children which is why the respondent took his arm. She then held him securely to stop him kicking her.

32. In November 2017 Student K was yelling and throwing items at other students. Her actions were a response to a perceived safety issue, but not by way of correctional punishment. She accepts in hindsight she could have handled the situation differently.

33. Mr Fleming said that the cases referred to by the CAC were of little assistance because they involved angry responses to deviant behaviour, rather than actions taken in order to minimise risk of harm.

34. Mr Fleming submitted that the behaviour did not amount to physical abuse or ill treatment, because unlike other cases the respondent did not strike Student K or deliberately drop him to the floor. While force was used, it was used out of a genuine and reasonable concern for safety, and to the extent she believed necessary to address this concern.

35. Mr Fleming submitted that the behaviour did not adversely affect the wellbeing of Student K and that he settled after five minutes, remained at the kindergarten and was collected at the usual time. Similarly, Student K had calmed down within 15 minutes of the second incident. Mr Fleming submitted that there was no evidence to suggest that his wellbeing was affected in any material sense, let alone to a degree that would warrant a finding of serious misconduct.

36. It was submitted that failing to choose the best option in difficult situations described in the Statement of Facts does not amount to a general lack of fitness to be a teacher. At most, it may demonstrate a skill gap that could be addressed through means such as professional development and dealing with difficult behaviours. Mr Fleming referred to a letter of support from the respondent's employer who retains faith in her fitness to teach.

37. It was submitted that the conduct would not likely bring the teaching profession into disrepute or discredit to the profession, and Mr Fleming referred to *CAC v Teacher B* NZTDT 2017/7,[10] where we had found that the likelihood of further harm to students was material to our decision in finding that the conduct did not reach that threshold. Mr Fleming submitted that the respondent's conduct was not as serious as Teacher B's.

38. Finally, Mr Fleming submitted that each incident must be assessed on its own merits, and that two incidents which occurred eight months apart cannot properly be aggregated to create a finding of serious misconduct if either incident, viewed on its merits would not justify such a finding. He referred to *CAC v Teacher* NZTDT 2016/50,[11] a case which involved two allegations of use of physical force and the Tribunal finding that the first incident "Could not amount to abuse in its own right, and nor did it lend any weight to whether or not the second particular amounts to serious misconduct."

[10] *CAC v Teacher B* NZTDT 2017/7, 2 August 2017
[11] *CAC v Teacher* NZTDT 2016/50

Discussion

39. We agree that the respondent's reaction to the child ignoring instructions was not appropriate. We can see that his actions in weaving about through other children might have posed a risk to his classmates, but it is not clear to us why she first took him and put him on her knee, and whether that was an appropriate response. Once there, the kicking became an issue that might not have arisen. We understand that she wanted to protect herself from harm once he started kicking but we query whether there were other strategies she could have used, including asking for another teacher to take over, given he was now very angry with her. It would have been helpful to see the Kindergarten restraint policy referred to and see what protocols were in place for situations like this.

40. Although the CAC submitted that the respondent acted out of anger, that is not an agreed fact in the ASF, and we infer from the respondent's submissions that it is not accepted. Mr Fleming submitted that the cases referred to by the CAC were distinguishable because the teachers in those cases acted out of anger.

41. On the second incident we have more sympathy for the respondent removing the boy when he was throwing blocks. We appreciate the need to protect other children from harm. This is comparable to *Teacher B.*[12]

42. We are critical of the way in which the respondent spoke to him immediately after the incident. We do not think it was necessary or appropriate to tell him he might not be allowed back to the kindergarten in what seems to have been a highly-charged situation. It would seem that she must have been at least frustrated, if not angry with him at this point. We are more concerned about her revisiting the incident 15 minutes later, when he stood up to say his sentence in Te Reo Māori.

43. We agree that some aspects of the respondent's conduct might have adversely affected the wellbeing of Child K, but we did not find that it amounted to physical abuse, neglect or ill-treatment. Although not best practice, in the circumstances of this case, we did not think that it reflected adversely on the respondent's fitness to practise or that reasonable members of the public fully informed of the facts and circumstances would consider it brings discredit to the profession or that it brings the profession into disrepute. Therefore, it is not "of a character or severity that meets the Teaching

[12] Above, note 9

Council's criteria for reporting serious misconduct" and so the second part of the definition of serious misconduct under s 378 is not met.

44. In summary, we have made some adverse findings about the respondent's conduct and characterise as misconduct, rather than serious misconduct.

Penalty

45. Although we have made no finding of serious misconduct, we may exercise our powers under s 404 of the Act "following a hearing of a charge of serious misconduct, or a hearing into any matter referred to us by the Complaints Assessment Committee".

46. The respondent has acknowledged that in hindsight, she could have handled things differently. We think it would be useful for her to have some further professional development and so under s 404(1)(c) we imposed a condition on the respondent's practising certificate that within 12 months she complete a suitable programme of professional development relating to managing children who have serious behavioural issues.

Costs

47. xxx

> *(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.*

Non-publication

48. Even though there was no application for name suppression, when we issued an interim decision on 27 June 2019, we invited further submissions on the question of costs and name suppression. This was on the basis that no finding of serious misconduct had been made.

49. 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*, [13] 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

[13] *CAC v Jenkinson* NZTDT 2018-14 at paragraph 33

protect the public.[14] The primary purpose behind the open justice principle in a disciplinary context is the maintenance of public confidence in the profession concerned through the transparent administration of the law.[15]

50. 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.*

51. 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.

52. In *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".*[16]

CAC submissions

53. The CAC referred us to several cases:

a) In *CAC v Griffiths*[17] we found the teacher's use of force was inappropriate but did not amount to serious misconduct. We declined the respondent's application for name suppression, noting that disciplinary proceedings are stressful, but there is nothing in the information provided (which included a letter from her doctor, the contents of which were suppressed) that persuaded us that the respondent's

[14] *CAC v McMillan* NZTDT 2016-52 at paragraph 45
[15] *CAC v Teacher* NZTDT 2016/27 at paragraph 66
[16] *Y v Attorney -General* (2011] NZCA 676
[17] Above, note 9

interests outweighed the public interest in not suppressing her name.

b) In *CAC v Teacher* 2016/50[18] the teacher's use of force on a student was found to be at the level of misconduct. The teacher's name was suppressed on the basis that the student may be identified.

c) In *CAC v Teacher B*[19] where we found misconduct, we granted name suppression on the basis that publication would lead to the identification of the student (in a small rural school with a high level of parental support and involvement), and the impact publication would have on the mental health of the teacher's daughter;

54. The CAC submits that, as a matter of principle, there is a public interest in the Tribunal process and open justice, despite our findings that the threshold of serious misconduct has not been reached. The above cases are authority for the proposition that a name suppression should not automatically be granted where a finding of serious misconduct has not been made. Rather, the question of name suppression is a separate inquiry determined on the merits of the application.

55. The CAC argued that in the present case, there are not particular matters relied upon that would justify the order being made.

56. Further, the CAC submitted, publication is associated with the core functions of disciplinary regimes and it is important for members of the public to be aware of a teacher's conduct in the future and in other endeavours even if a finding of serious misconduct has not been established. The CAC submitted that it has a deterrent aspect that is appropriate for the respondent herself and for others. It is appropriate that any future employer is aware of this decision.

57. The CAC would not oppose name suppression if it is needed to protect the identity of Student K and/or the kindergarten but noted that the respondent is no longer employed by the kindergarten.

Respondent submissions

58. For the respondent, Mr Fleming sought orders that would prevent publication of the names or any identifying particulars of;

[18] Above, note 7
[19] Above, note 10

a) The respondent's name;

b) The kindergarten;

c) Child K.

59. The grounds relied on are:

a) Impact of publication on the respondent would be disproportionate to the Tribunal's finding;

b) The outcome ordered by the Tribunal could have been agreed at the CAC stage (that is at the time the CAC were deciding how to dispose of the mandatory report);

c) Publication of the respondent's name would erode the value to the respondent of other decisions made by the Tribunal;

d) Identification of the respondent could lead to identification of Child K;

e) Identification of the [Kindergarten A] could lead to identification of the respondent and/or Child K;

60. Referring to *CAC v Kippenberger* NZTDT 2016-12,[20] Mr Fleming submitted that suppression orders may be granted where identification of a teacher would be likely to have a "disproportionately adverse impact". He said that the question for the Tribunal is not whether the impact on the teacher would be out of the normal range, but rather whether it would be "disproportionate to the teacher's conduct".

61. Mr Fleming advised that the respondent is now seeking a permanent position. If employers learn that she was accused of serious misconduct, they may be reluctant to employ her. He says that if she is inhibited in her ability to obtain permanent employment merely because she was charged, the impact on her would be disproportionate to her actual conduct.

62. In an affirmation the respondent has set out the impact of these disciplinary proceedings on her. She explained that on being told of the findings of the Kindergarten's investigation in late 2017/early 2018, she did not feel able to continue in her role as Head Teacher and so she resigned and since then has worked as a reliever. This has resulted in a substantial loss of income which she detailed in her

[20] *CAC v Kippenberger* NZTDT 2017-12, 18 January 2018

affirmation. She is concerned that if her name is published, it will be hard for her to get employment.

63. Mr Fleming also referred to *CAC v Teacher S* NZTDT 2018-5[21] where we made orders for non-publication of the teacher's name on the basis that the teacher's behaviour did not constitute serious misconduct, the outcomes ordered could have been ordered at the CAC stage and had the matter been disposed of then, the decision would not have been published.

64. Mr Fleming said that a search of the Tribunal's website returns a summary of results which shows only the name of the case and the charge made. Therefore, a search could believe that the person had committed the acts described in the charge.

65. In support of the ground that publication of the respondent's name could lead to identification of Child K, Mr Fleming referred to an affirmation of the respondent in which she described [Town B] as a small community [near] Auckland. At the time of the incidents, children from around 53 families attended the Kindergarten. Many of the families are Maori and many are involved in the local marae. This includes Student K, who know attends the local school. The respondent says that if her name or that of the Kindergarten were published, he would be easily identified.

Discussion

66. It has been helpful to hear from counsel for the parties and reflect on the principles particularly where there has been a finding of misconduct, as opposed to serious misconduct.

67. As a preliminary comment, we note that traditionally, many professional disciplinary proceedings were not held in public.[22] Before amendments to the Teachers Council (Conduct) Rules 2004, effective from 1 July 2014, the default position was that hearings were to be in private,[23] with the ability to apply for part or all of the hearing to be in public.[24] Therefore, the CAC's statement that publication is associated with the core functions of disciplinary regimes may be overstating the position. However, it is true that in recent years most, if not all, professional bodies conduct their disciplinary

[21] *CAC v Teacher S* NZTDT 2018-5, 21 August 2018
[22] See, for example, the Nurses Act 1977, s 43(7) Psychologists Act 1981, s 33(7)
[23] Rule 31 Teaching Council (Conduct) Rules 2004, pre-2014 amendment
[24] Rule 33 Teaching Council (Conduct Rules) 2004, pre-2014 amendment

hearings in public.[25]

68. Dealing with the grounds for application, Mr Fleming submits that the impact of publication would be disproportionate to the wrongdoing. In Kippenburger we said:

> …it is not difficult to have sympathy for a teacher's family in circumstances such as this. But the fact that a teacher has a family who may well be embarrassed by the publication of his or her name in connection with professional disciplinary proceedings is not in itself a ground for making an order unless in the circumstances are such as to demonstrate that publication will have disproportionately adverse impact, if for example medical evidence were available demonstrating that the teacher's spouse or children were more than usually vulnerable and would be affected in a way which was disproportionate to the teacher's conduct.

69. In the present case the respondent has provided evidence of the impact of these disciplinary proceedings on her, but has not provided any evidence on the impact of publication on her or her family apart from the fact that prospective employers may form a negative view of her and be reluctant to offer her work.

70. We have not made it a condition of the respondent's practising certificate that she make any future employer aware of this decision (which is something we do in many cases, even where there is name suppression). However, it does not follow that we think that prospective employers should not be aware of it. We have found that the conduct reflects adversely on her fitness to be a teacher and directed her to undertake further professional development.

71. If the respondent is concerned that an employer might be aware of the charge that was laid against her but is not interested in the outcome, then she may need to pre-empt that by advising them of it. They can then make a fully informed decision as to whether this conduct is relevant to any potential offer of employment. We are not satisfied that publication will have a disproportionately adverse impact.

72. We appreciate the respondent's point that the outcome could have been agreed without referral to the Tribunal. However, s 401(4) of the Act provides that the CAC "must refer to the Disciplinary Tribunal any matter that the Committee considers may possibly constitute serious misconduct." It was entirely reasonable that the CAC

[25] See, for example, the Health Practitioners Competence Assurance Act 2003, s 95; Lawyers and Conveyancers Act 2006, s 238 and its predecessor Law Practitioner Act 1982, s 111; Veterinarians Act 2005, s 49; Social Workers Registration Act 2003, s 79

thought that this conduct might possibly amount to serious misconduct and therefore it was obliged to refer it.

73. The present case is different from *CAC v Teacher S*[26] where the CAC was obliged to lay a charge before the Tribunal because s 401(2)(d) provides that where the CAC finds misconduct but not serious misconduct, it may exercise its powers "by agreement with the teacher and the person who made the complaint or report or referred the matter". Had the school in that case been in agreement with the CAC's proposed course of action, the matter would have been disposed of without the need for the Tribunal to hear it.

74. Mr Fleming also argues that publication of the respondent's name would erode the value to the respondent of other decisions made by the Tribunal and notes that a search of the Tribunal's website returns a summary of result which shows only the name of the case and the charge made, it does not indicate that it is a charge rather than a finding.

75. We accept that a search of upcoming hearings refers only to the charge. The decisions are published in full. Before opening the decision there are some standard keywords of what the case is about. Anyone interested in the case may click on the decision and read it in full. We do not find the respondent's argument is a proper basis to suppress the respondent's name. The final decision and reasons are accessible.

76. On the question of identification of the child, the CAC notes that

    a) Identification of the respondent could lead to identification of Child K;

    b) Identification of the [Kindergarten A] could lead to identification of the respondent and/or Child K;

77. This is the ground that has given us the most pause for thought. We have decided given the small community that this conduct occurred in, that it is proper to suppress any details that might lead to the identification of Child K. Therefore, we make orders under s 405(6) for the non-publication of the following:

    a) Child K;

    b) The kindergarten this occurred in;

[26] Above note 21

c) The locality of the kindergarten. The fact that these events occurred near Auckland is not suppressed.

Costs

78. The CAC seeks costs of 40%. The CAC has filed an updated schedule of costs totalling $5,187.68. respondent has not objected to this.

79. The Tribunal orders the respondent to pay 40% of the costs of conducting the hearing, under section 404(1)(h) which comes to $2,075.07.

80. For hearings on the papers, the Tribunal Secretary usually submits a pro forma schedule of costs totalling $1,145, of which 40% is $458. The respondent is therefore directed to pay and the sum of $458 towards the Tribunal's costs under s 404(1)(i), unless the respondent files and serves submissions as to costs within 14 days of the of the date of this decision. If submissions as to the Tribunal costs are received from the respondent, the Tribunal delegates to the Chair the task of fixing the amount of the CAC's costs.

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).