

BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

NZTDT 2021/49

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 **ASHVINDAR ASISH KAUR**
Respondent

TRIBUNAL DECISION

30 June 2022

HEARING: Held at Wellington on 18 March 2022 (by Microsoft Teams)

TRIBUNAL: Ian Murray (Deputy Chair), Neta Sadlier and Simon Walker

REPRESENTATION: Mr McCaughan and Mr Faull for the CAC
The Respondent is self-represented.

Charge

1. The Complaints Assessment Committee (CAC) has referred a charge of serious misconduct and/or conduct otherwise entitling the Tribunal to exercise its powers to the Tribunal. In a Notice of Charge dated 3 November 2021, the CAC alleged that the respondent “physically assaulted Child M by grabbing his arm to move him causing injury to Child M’s arm and /or shoulder.”
2. 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)(1)(a), (n), and/or (o) of the Education Rules 2016 as drafted before the amendments on 18 May 2018 (the Rules); or conduct that otherwise entitles the Disciplinary Tribunal to exercise its powers under s 404 of the Act.

Factual basis for decision

3. Before the hearing the parties conferred and submitted an Agreed Summary of Facts (ASF), signed by the respondent and counsel for the CAC. The ASF is set out in full:

Introduction

1. Ashvindar Asish Kaur was registered as a teacher in 2015. Ms Kaur's provisional practising certificate expired on 1 July 2017.
2. Ms Kaur was employed at ChoiceKids Childcare at Roscommon Road, Clendon Park (**ChoiceKids**) between 8 June 2015 and 5 April 2017.
3. At the time ChoiceKids was one of the eight ChoiceKids Early Childhood Education Centres operating in South Auckland. ChoiceKids was licensed for up to 90 children, was privately owned and was established in 2011.

Allegation: That on or around 29 March 2017, Ms Kaur physically assaulted Child M, aged approximately 2 years old, by grabbing his arm to move him causing injury to his arm and/or shoulder

4. On or around 29 March 2017, Ms Kaur was working at ChoiceKids in the toddler's room, together with other teachers. CCTV cameras were operating in this room, which recorded the incident described below.
5. At around 1 pm, the children had had their lunch, and were due for their afternoon nap.
6. Ms Kaur and one of the other teachers walked around the room, gathering the children and directing them towards the mat at the end of the room to get them ready for their afternoon nap.
7. Ms Kaur was gathering the children and directing them towards the mat.
8. At around 1:09 pm, Ms Kaur grabbed a child passing by her in the play area by the arm and directed the child away from the play area, causing the child to collide with a second child. Ms Kaur then grabbed a toy out of the second child's hand and tossed it back onto the shelf, before grabbing the second child's arm near his shoulder and steering him towards the mat. Ms Kaur grabbed an item out of the first child's hand and tossed this towards the shelf, over the heads of several children. Ms Kaur then continued pointing at the children to go to the mat.
9. Shortly afterwards, at around 1:10 pm, Ms Kaur went to another area of the toddler's room to direct children towards the mat. Child M, who was approximately two years old at the time, was sitting on the mat. Child M stood up from the mat and began to walk past Ms Kaur towards another area of the toddler's room.

10. Ms Kaur grabbed Child M's left arm by the elbow, pulled him back several steps, forcefully turned him around by his arm (causing his arm to extend backwards at an awkward angle), and pushed him back towards the mat. Child M sat down on the mat and immediately cradled his left arm. Child M then went to sleep.
11. When Child M woke from his nap he was upset and was complaining of a sore arm or shoulder.
12. Another teacher reported the incident involving Child M to the manager of ChoiceKids on the same day. The manager then called Child M's mother to inform her that Child M had hurt his arm. Child M's mother arranged for her and Child M's father to pick up Child M.
13. When Child M's mother and father arrived at ChoiceKids, the mother noted that Child M was visibly in pain, sitting on a teacher's lap, and could not move his left arm. Child M was complaining to his mother of a "sore arm".
14. Child M's mother and father took Child M immediately to Takanini Urgent Care, where he was seen by a doctor. Child M was assessed to have a suspected contusion to the soft tissue in his left shoulder / upper arm. Child M's parents were told that Child M had stretched his acromioclavicular (AC) ligament in his shoulder. Child M's parents were advised that this was not a normal injury for a two-year-old to have and was more common in professional rugby players.
15. The doctor prescribed simple analgesia and an arm sling for support until no longer required.
16. At some stage after Child M was picked up from ChoiceKids, he

told his parents "Ashvindar hurt my arm."

Subsequent events

17. Child M continued attending ChoiceKids following the incident.
18. On 5 April 2017 ChoiceKids met with Ms Kaur and dismissed her from employment and notified the Ministry of Education.
19. On 28 April 2017, the Teaching Council received a mandatory report from the management of Choice Kids Childcare, regarding the incident involving Ms Kaur on Child M.
20. On 18 September 2017 Police contacted the Teaching Council to advise that Police were investigating the incident. Ms Kaur signed an Undertaking Not to Teach on the same day.
21. Due to the incident being reported and investigated by Police, the CAC investigation was placed on hold pending the outcome of any Police action.
22. On 20 September 2017 Ms Kaur was interviewed by Police and gave a statement that was electronically recorded.
23. Ms Kaur stated during mat time Child M moved towards the toilet, at which point she took him by the arm and steered him back towards the mat. Ms Kaur said that she did not do anything to Child M and denied grabbing Child M too hard.
24. Ms Kaur was charged by Police with assaulting a child (under s 194(a) of the Crimes Act 1961, a charge with a maximum penalty of 2 years' imprisonment) on the same day. Ms Kaur subsequently pleaded not guilty to that charge.

25. On 26 September 2018, a trial in respect of the charge of assaulting a child was part-heard before Judge Patel in the Manukau District Court but was aborted as a result of industrial action on that day and due the illegibility of an exhibit.
26. On 21 January 2019, a further, full trial in respect of the charge of assaulting a child was heard before Judge Roberts in the Manukau District Court. At that trial, Ms Kaur gave evidence, stating that the incident recorded on CCTV had in fact occurred earlier in the day, around 9 am on 29 March 2017. Ms Kaur said that she had held Child M's hand and directed him towards the mat because he was running towards the toilet. Ms Kaur said that Child M had previously gone into the bathroom and blocked the basin, causing it to flood and him to slip over. Ms Kaur said that after the incident Child M was fine and was playing with the other children, but when Ms Kaur came back from her break at 11:30 she heard two teachers say that Child M had slipped in the toilet and fallen down while he was unattended.
27. On 21 January 2019, Judge Roberts found Ms Kaur guilty of the charge of assaulting a child, convicted Ms Kaur, and ordered her to come up for sentence if called upon within the next 10 months.
28. On 30 January 2019, Ms Kaur lodged an appeal against her conviction and sentence. This appeal was heard before Justice Fitzgerald in the Auckland High Court on 14 October and 14 November 2019. As part of the appeal Justice Fitzgerald watched the CCTV footage of the incident.
29. On 28 November 2019 Justice Fitzgerald found that Ms Kaur was properly found guilty of the charge in the District Court. However, the Judge quashed Ms Kaur's conviction for the purpose of remitting the matter back to the District Court to

allow Ms Kaur to apply for a discharge without conviction, after finding that Ms Kaur had not had an opportunity to make that application prior to being sentenced.

30. On 3 September 2020 Ms Kaur was granted a discharge without conviction by Judge Recordon in the Manukau District Court. The Judge recorded that Ms Kaur had provided evidence that she had completed the Fresh Minds Evidence Based Educative parenting programme.
31. After receiving notification from the Police that there was now a final outcome at Court, a response to the Teaching Council was requested from Ms Kaur, which Ms Kaur provided on 18 March 2021.
32. Ms Kaur stated that she didn't hurt Child M, rather he was already injured. She also incorrectly claimed that the doctor's report was dated a day before the incident. Ms Kaur said that the issue had been created after Ms Kaur resigned from her employment with ChoiceKids, and ChoiceKids was required to pay her four weeks' leave. Ms Kaur stated that the issue then appeared, she was not paid her leave balance, and that the management of ChoiceKids was aware that Ms Kaur knew about inappropriate activities at ChoiceKids which were being hidden from the Ministry of Education (such as opening a childcare centre before it had been inspected by the Ministry's inspection). Ms Kaur said that ChoiceKids had manipulated the case against her for those reasons.
33. On 6 May 2021, the Teaching Council sent a draft investigation report to Ms Kaur. On 30 June 2021, Ms Kaur advised that she did not wish to make a written response to the draft report.
34. The CAC met on 23 September 2021 to consider the

allegations. Ms Kaur was invited to attend, but did not attend the CAC's meeting.

35. The CAC considered that Ms Kaur's conduct may possibly constitute serious misconduct (as defined in s 378 of the Education Act 1989). On that basis, the CAC had no option but to refer Ms Kaur's conduct to the Tribunal under s 401(4) of the Education Act.

4. We must be satisfied on the balance of probabilities that the CAC has proved the charge. In this case, the respondent was found guilty by the District Court of assault on a child and while she was ultimately discharged without conviction, in our view the District Court's finding of guilt beyond reasonable doubt has not been undermined and is sufficient proof of the charge. Additionally, in our view, the admissions in the summary of facts also provide an adequate basis to establish the charge. Accordingly, we find that the charge is proved.

Serious misconduct

5. It is for the Tribunal to 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).

Criteria for reporting serious misconduct

- (1) *A teacher's employer must immediately report to the Education 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) *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 teaching profession...*

Analysis

- 8. We must be satisfied that the respondent's conduct meets at least one of the definitions of serious misconduct in s 378 of the Act, as well as being of a character or severity that meets the criteria for reporting serious misconduct contained in r 9.
- 9. The Tribunal has considered the use of force by teachers on a number of occasions. *CAC v Grace*¹ and *CAC v Taylor*² are representative of the orthodox position we have taken on physical force against children. Ordinarily this type of conduct will be serious misconduct but, as with all cases, we are required to make a fact specific analysis of the amount of force used and the context in which it was used.³
- 10. The starting point is s 139A of the Act which has prohibited the use of force by teachers for the purposes of correction since July 1990.
- 11. Turning to the two-stage test in s 378 and rule 9.⁴ The first criteria is the effect of the behaviour on students. Because the incident occurred in the childcare environment, involving a child in the respondent's care, and caused physical injury, we are satisfied that the respondent's conduct was undoubtedly likely to adversely affect the wellbeing of child M.
- 12. While the incident involved a momentary loss of control, nonetheless the

¹ *CAC v Grace* (NZTDT 2017-6).

² *CAC v Taylor* (NZTDT 2017-41).

³ See for example *CAC v Teacher* NZTDT 2016-50.

⁴ *Teacher Y v Education Council of Aotearoa New Zealand* [2018] NZDC 3141 at [64].

respondent used significant force against a child. Such a response by a teacher and the obvious loss of self-control reflects adversely on the respondent's fitness to be a teacher.

13. The test for deciding whether a teacher's actions are likely to bring the teaching profession into disrepute is informed by the conclusions of the Court in *Collie v Nursing Council of New Zealand*.⁵ It is an objective test and requires consideration of whether reasonable members of the public informed of the facts and circumstances, could reasonably conclude that the reputation and good standing of the profession is lowered by the respondent's actions.
14. Ordinarily the use of physical force against a being will bring the teaching profession into disrepute. This was our conclusion in *Taylor and Grace*. However, that is not always the case.⁶ It goes without saying that we must make a fact specific decision on the particular facts of this case.
15. In deciding whether the behaviour in question by the respondent may bring the teaching profession into disrepute, we considered significant force was used causing physical injury to a young child in the respondent's care. As a result, we concluded that a reasonable member of the public informed of the facts and circumstances, would reasonably conclude that the reputation and good standing of the profession was lowered by the respondent's actions.
16. Turning to our analysis of Rule 9, it was clear that the conduct was physical abuse of a child or young person, could be an offence punishable by imprisonment for a term of 3 months or more, and was an act or omission that brought discredit to the teaching profession. As a result, the criteria for reporting serious misconduct is made out.

Penalty

17. In *CAC v McMillan*,⁷ we summarised the role of disciplinary proceedings

⁵ *Collie v Nursing Council of New Zealand* [2001] NZAR 74.

⁶ *CAC v de Kriek* NZTDT 2019/132 is an example of a case where low level physical force was not found to bring the teaching profession into disrepute.

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

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.

18. 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.*

19. In *CAC v Teacher*,⁸ we commented that:

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.

20. We were concerned that the respondent minimised her conduct over an extended period of time. This troubled us so that we seriously considered cancellation. However, belatedly she is starting to show some insight and remorse. As a result, we do not consider that cancellation of her registration is necessary.

21. We want to impose a penalty that acknowledges the seriousness of what occurred but one that will also assist the respondent to re-enter the teaching profession as she has said she wants to. The Tribunal considers it is appropriate to make the following orders:

- a. That she is censured (section 404(1b);
- b. That the following conditions are imposed on any practising certificate subsequently issued to Ms Kaur for a period of 2 years following the Tribunal's decision (s 404(1)(c));
 - i. To provide a copy of the Tribunal's decision to any prospective teaching employer.
 - ii. To practise under the guidance of a mentor approved by the Manager of Teaching Practice at the Teaching Council, which may also stipulate the form of mentorship and the provision of mentorship reports or updates

Costs

22. The CAC did not seek costs under s 404(1)(h). The rationale for that decision was set out as follows:

In this case Ms Kaur was prosecuted in the District Court, was found guilty, and was initially convicted by Judge Roberts. Had the matter been considered by the Tribunal at that stage, no costs order would have been made. However Judge Roberts' sentencing decision was overturned on appeal, and Ms Kaur was subsequently discharged without conviction.

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

Therefore, while this matter is not a conviction referral, nevertheless in all the circumstances of this case the CAC has decided not to seek reimbursement of its costs.

23. This was a responsible approach to take and we agree with it. Accordingly, we make no order for costs.

Non-publication

24. The respondent is currently not teaching but wishes to return to the profession in the future. She has sought name suppression on the basis that publication will “affect my confidence level and I can be judged on that basis rather what I can prove to be. I would like to gain my confidence level back and therefore it is a request to give me one opportunity to work again with name suppression”.

25. Section 405(3) provides that hearings of this Tribunal are in public. This is consistent with the principle of open justice. The provision 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:

(a) an order prohibiting the publication of any report or account of any part of any proceedings before it, whether held in public or in private:

(b) an order prohibiting the publication of the whole or any part of any books, papers, or documents produced at any hearing:

(c) an order prohibiting the publication of the name, or any particulars of the affairs, of the person charged or any other person.

26. In deciding if it is proper to make an order prohibiting publication, we must consider the relevant individual interests as well as the public interest.

27. As we noted in *CAC v Finch*,⁹ we apply a two-stage approach. The first stage involves an assessment of whether the particular consequence is "likely" to follow. This simply means an "appreciable" or "real" risk. If we are so satisfied, our discretion to forbid publication is engaged and we must determine whether it is proper for the presumption in favour of open justice to give way to the personal circumstances on which suppression is sought.
28. There is no onus on the applicant and the question is simply whether the circumstances justify an exception to the fundamental principle.¹⁰ In essence we must strike a balance between the open justice considerations and the interests of the party who seeks suppression.¹¹
29. Obviously, we accept that publication may affect the respondent's confidence but that is the ordinary consequence of an adverse disciplinary finding. But we do not consider that the impact on the respondent is sufficient to overcome the presumption of publication and justify suppression.
30. As a result, we do not consider it appropriate to order non-publication of the respondent's name.



Ian Murray
Deputy Chair

⁹ *CAC v Finch* NZTDT 2016/11

¹⁰ *ASB Bank Ltd v AB* [2010] 3 NZLR 427(HC) at [14].

¹¹ *Hart v Standards Committee* (No 1) of the New Zealand Law Society [2012] NZSC4 at [3].

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. Sections 356(3) to (6) apply to every appeal under these sections as if it were an appeal under section 356(1).