

NON-PUBLICATION ORDERS

BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

NZTDT 2023-28

RARO TE MANA O TE
UNDER THE

the Education and Training Act 2020
(**the Act**)

MŌ TE TAKE
IN THE MATTER OF

of a charge referred to the Tribunal

I WAENGA I A
BETWEEN

**COMPLAINTS ASSESSMENT
COMMITTEE (CAC)**

Kaiwhiu | Prosecutor

ME
AND

Evan BALL

Kaiurupare | Respondent

Nohoanga | Hearing
Hei Māngai | Appearance

15 December 2023, AVL (Teams)
Evan McCaughan, for the CAC
Roger Philip, for the respondent.

Decision on liability, penalty and non-publication orders

Date: 19 January 2024

Tribunal: Catherine Garvey (Deputy Chair), Demian Shaver, Kura Tuhura
(Members)

INTRODUCTION

[1] Mr Ball has 30 years teaching experience, including around 22 years at Napier Boys High School until his resignation in June 2021. The disciplinary charge relates to two separate incidents in March 2020 and April 2021. The parties agreed a Summary of Facts and the Tribunal heard the charge by Audio Visual Link on 15 December 2023. An indication of the Tribunal's decision was given to the parties on 18 December 2023. This decision now sets out the reasons for the Tribunal's findings.

The CHARGE

[2] The particulars of the charge read as follows:

1. The CAC charges that EVAN BALL, registered teacher, of Napier, between March 2020 and April 2021:
 - a. On or around 24 March 2020, threatened the use of force against two home-stay students, [REDACTED] and [REDACTED], and used a belt to make contact with the hands of [REDACTED] and [REDACTED]
 - b. On or around 11 June 2021, grabbed and pushed a student, [REDACTED], in class.
2. The conduct alleged in paragraph 1 amounts to serious misconduct pursuant to section 378(1) of the Education Act 1989 and section 10 of the Education and Training Act 2020 and Rule 9(1)(a) and/or (b) of the Teaching Council Rules 2016 or alternatively amounts to conduct which otherwise entitles the Disciplinary Tribunal to exercise its powers pursuant to section 500 of the Education and Training Act 2020.

Facts

[3] The following is derived from the Summary of Facts dated 4 October 2023, written evidence from Mr Ball and oral confirmation of factual matters by Mr Ball and counsel at the AVL hearing.

[4] Until the events that form the basis of particular 1(a), Mr Ball said that he and his family regularly hosted school and tertiary-aged international students in their home. In March 2020 two students were staying with the family and attending Napier Boys High School. On 23 March 2020 the Government announced that a level 4 lockdown in response to the COVID-19 pandemic would commence on 25 March 2020. On 24 March the two home-stay students wished to see a fellow international student before he left New Zealand, and went to meet him. On learning where the students were Mr Ball contacted them and directed that they return home, which they did. It was accepted that the students had not appreciated that they were acting outside of the Alert Level 3 rules issued by the Government.

[5] Following the above events, the Summary of Facts states:

[6] [Mr Ball] explained to the boys why they must obey the government's rules and when rules were broken he would in the past discipline his son with a belt by striking his son's hand. He stood up, took off his belt, and told the boys to put their hands out if they would like to try the experience. He told them that he would need to "discipline" them. The boys refused to put their hands out. Mr Ball repeated two more times that the boys needed to put their hands out, but they refused. The boys felt confused and intimidated by Mr Ball.

[6] After then working together to prepare a recreational space at the house for use during lockdown, the boys and Mr Ball returned to the kitchen where he again raised their breach of the rules. The Summary of Facts records:

[9]...Again, he told the boys to put out their hands. When they did so, he dropped the belt down onto each of their hands with minimal force.

[7] Mr Ball then acted as if nothing had happened, and he considered the matter at an end, unaware that the boys were in fact upset. Mr Ball referred to emotional farewells at the airport on 26 March 2020 when the students returned home early due to the pandemic.

[8] Both students complained about the incident to Napier Boys High School, with [REDACTED] emailing staff on 26 March and [REDACTED] emailing staff on 2 April 2020. Staff advised the Headmaster on 3 April 2020. Mr Ball was shocked to receive a phone call from the Police advising of a complaint (which Mr Ball understood was passed on by the school

to the Police). He received written confirmation on 7 April 2020 that Police would be taking no further action.

[9] Following an investigation, Mr Ball received a written warning from the Board of Trustees on 31 July 2020, effective for 12 months. Mr Ball accepted this outcome.

[10] The second incident particularised in the charge occurred in school. The Summary of Facts describes that the student involved was behaving in a disruptive manner and was sent to work outside of the classroom by Mr Ball. When he was allowed to return, the Summary of Facts describes the following:

[20]... [REDACTED] carried his desk and chair back in and was told to go and sit in a different spot from his usual spot. Mr Ball pushed the desk out of [REDACTED] hands and it dropped on the ground.

[21] In an angry tone of voice Mr Ball told [REDACTED] to sit at the back of the class. [REDACTED] could not see any other seats at the back of the class other than his previous seat. [REDACTED] said words to the effect of “well there’s no seats left, Sir, so I’m just going to have to sit in my one.”

[22] Mr Ball then grabbed [REDACTED] by the back of the neck and pushed him towards where [REDACTED] normally sat. [REDACTED] said “ow stop.” The push was hard enough to cause [REDACTED] to stumble forward a couple of steps. To [REDACTED], the level of force used in the push was approximately 4 or 5 on a scale of 1 to 10.

[11] The student disclosed the incident to a staff member the following day and an investigation was commenced by the school. Mr Ball denied the allegations but declined to meet, citing stress. He resigned on 3 June 2021. Upon Mr Ball’s resignation the Headmaster made a mandatory report to the Teaching Council disclosing both incidents. Mr Ball co-operated with the CAC’s investigation, acknowledging the incident with the homestay students and stating that he could not recollect the conduct now contained in particular 1(b) but did not wish to challenge the allegation. Mr Ball gave a voluntary undertaking not to teach which remained in place between 17 June to 24 September 2021.

[12] Mr Ball did not return to teaching immediately, in part due to injury and in part due to uncertainty over this proceeding. He secured a fixed term position in 2023 and has been relief teaching since completing that role. Mr Ball confirmed that he intends

to seek a permanent position on resolution of this proceeding.

Discussion | Whakawhiti kōrero

[13] Section 10 of the Education and Training Act 2020 outlines the requirements for serious misconduct. As is established, the test is conjunctive meaning one of the elements of s10(1)(a) must be met, as well as a breach of rule 9 of the Teaching Council Rules 2016. “Mere” misconduct may be made out if one of the limbs of section 10 are met, but no breach of rule 9 is found. The two incidents in the charge are distinct, and the charge was pleaded separately and cumulatively. While the CAC’s written submissions suggested that the incident with the home-stay students arguably met the threshold for serious misconduct, this was not pursued in oral argument. Counsel conceded that it was misconduct simpliciter, and but-for the incident described in particular 1(b) may not have led to disciplinary proceedings.

[14] Section 10(1)(a) refers to:

- (a) conduct that adversely affects or is likely to adversely affect one or more students;
- (b) conduct that reflects adversely on the teacher’s fitness to practise as a teacher;
- (c) conduct that brings or is likely to bring the teaching profession into disrepute.

[15] Conduct by a teacher that occurs in their domestic sphere as is the case with particular 1(a) may not have a direct or likely adverse effect on students.¹ To be “likely” to have such an effect, there must be a real or appreciable risk of this.² The homestay students attended Napier Boys High School. They separately made complaints to the school, which were investigated as an employment matter leading to a written warning. The matter cannot be considered wholly domestic or unrelated to Mr Ball’s position as a teacher at the school the students attended, and we are satisfied that the conduct adversely affected or was likely to adversely affect the students.

[16] We also consider that Mr Ball’s conduct reflects adversely on his fitness to

¹ Eg *Complaints Assessment Committee v Teacher Z* [2020] NZTDT 17/9/2020 at [17].

² *CAC v Marsom* [2018] NZTDT 25, 26/11/18 at [20], adopting the definition of “likely” used in the name suppression context in reliance on *R v W* [1998] 1NZLR 35 (CA).

practise on the basis that he showed poor judgment in dealing with the students living in his home; the public and private sphere were in this instance linked. We do not however consider that Mr Ball's conduct brings or is likely to bring the teaching profession into disrepute. A member of the public armed with the facts including the unfolding pandemic-related events and the remorse expressed by Mr Ball, is in our view unlikely to consider Mr Ball's actions impacts on the reputation of the teaching profession generally.

[17] Rule 9(1)(a) addresses the use of "*unjustified or unreasonable physical force on a child or young person or encouraging another person to do so.*" Mr Ball's evidence was that he had no intention to harm the students, that he was not violent or aggressive, that he used minimal force and that he was unaware of the students' distress until learning of the complaints. The CAC accepted that Mr Ball had no intention to cause harm the homestay students and that his discussion and demonstration of corporal punishment was a "*poorly conceived 'joke punishment'*". The Summary of Facts records that "*minimal force*" was used when Mr Ball dropped the belt into the palms of the students' hands which they were holding out. We do not find that Mr Ball used unreasonable or unjustified force and is not in breach of rule 9(1)(a) in this instance.

[18] Rule 9(1)(b) refers to "*emotional abuse that causes harm or is likely to cause harm to a child or young person.*" Limited submissions were made by the CAC regarding this (hence the clarification in oral submissions that a finding of serious misconduct was not sought). We refer to *CAC v Driver-Burgess aka Dovah*³ where the Tribunal accepted that the fact that a student is upset does not mean that the conduct alleged amounts to emotional abuse. Something more is required in terms of the intent behind the culpable conduct, such as conduct that is designed to humiliate, degrade, undermine or control the student. In the absence of such intent, we do not find Mr Ball's conduct offends rule 9(1)(b).

[19] Particular 1(b) involves the use of physical force on a student within a classroom and without justification (such as the need to avoid imminent harm to the student or another person). There is a clear prohibition on the use of physical force for correction or punishment under s98 of the Education and Training Act 2020, which guides how we must approach Mr Ball's conduct. While he says he does not recall the

³ [2019] NZTDT 69 at [24].

incident, the description in the accepted Summary of Facts refers to Mr Ball grabbing the student by the back of the neck. This suggests some element of aggression rather than merely shepherding the student towards his chair (such as a hand on the lower back). The Summary also records that the student was observed to be red in the face, and that the student disclosed the incident to another teacher the following day, indicating it was troubling to them.⁴

[20] Counsel referred us to three cases where the facts were at a similar level of severity. These were *CAC v de Kriek*⁵, *CAC v Grace*⁶ and *CAC v Taylor*⁷. We do not traverse the facts of those here but agree that Mr Ball's conduct is on par, although we note that he was not also charged with the use of inappropriate language (as was the case in *Grace*). His conduct was reactive and involved an unjustified use of force.

[21] We find that Mr Ball's conduct adversely affected or was likely to adversely affect the student, through being humiliated in the classroom and borne out by the complaint made. We also consider that it reflects adversely on his fitness as a teacher, given the high standards and self-restraint expected of teachers when faced with a variety of situations including disruptive student behaviour or perceived rudeness.

[22] The unjustified use of force means that Mr Ball's misconduct is categorised as serious by virtue of a breach of rule 9(1)(a).

Penalty

[23] Having found the charge proved, the Tribunal may impose one or more of the penalties set out under s500 of the Act. The principles of penalty in the professional disciplinary context are well established. The primary aim is not to punish the teacher; rather, as submitted by the CAC the disciplinary process is intended to meet the purposes of protecting the public, maintaining professional standards and maintaining public confidence in the profession. The penalty imposed should be the least restrictive that is appropriate in the circumstances and comparable with similar cases to ensure fairness and proportionality.

[24] Mr Ball's conduct is not at the highest end and there are no aggravating factors

⁴ Summary of Facts at [23]-[24].

⁵ NZTDT 2019/132.

⁶ NZTDT 2017/6.

⁷ NZTDT 2017/41.

on the evidence before us. We agree with the CAC's submission that our penalty should not prevent Mr Ball from teaching, and an appropriate penalty is censure and conditions albeit we do not consider conditions are required for two years as was the CAC's submission.

[25] Mr Ball has consistently expressed remorse for his conduct in relation to both particulars of the charge. In an affidavit to the Tribunal Mr Ball stated:

To conclude, I am very sorry that all three boys felt I was unkind and/or unprofessional. I care deeply for all students. I am sorry for the rest of my classes that year that I had to leave and hope that they were resilient and able to pick up after the unsettled period. I am willing and able to carry through with mentoring and/or appropriate professional development.⁸

[26] He has outlined the impact these matters have had on him, including the loss of a longstanding teaching position, a significant loss of income, and a high degree of stress accompanying the complaint and disciplinary process with which he has engaged, including attending the AVL hearing and answering questions from the Tribunal with candour. [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

The most recent letter concludes:

Again, in my professional opinion I am not aware of anything to suggest [Mr Ball] is not fit to teach. My sense is he is a passionate teacher with a strong sense of commitment to quality within his work.

[27] From a professional perspective Mr Ball indicated when asked that he has not undertaken any further relevant professional development since leaving Napier Boys High School, and had not completed the Ministry of Education's mandatory module on the use of physical restraint. Mr Ball did provide a very supportive letter from the Principal at St Joseph's Māori Girls College where he was employed for a fixed term in 2023 and considered fit for a permanent position had he sought this. This report commends Mr Ball's willingness to learn, preparedness to listen; notes that he is a team player and has a genuine interest in student wellbeing. The Principal confirms

⁸ Affidavit of Evan Ball 8 November 2023 at [21].

awareness of the charge and notes “*I am comfortable that [Mr Ball] is a man of integrity and manaaki.*”⁹

[28] We consider that censure and conditions are appropriate, taking into account the nature of the charge, and balancing the evidence that Mr Ball is keen and competent to teach but has not undertaken re-training specific to the events that brought him here. Conditions requiring such re-training are appropriate and Mr Ball acknowledged his willingness to do this.

Non-publication orders

[29] Section 501(6)(c) of the Act enables the Tribunal to make orders for the non-publication of the name and identifying particulars of the teacher charged, particulars of the case, or any other person. The Tribunal may also prohibit publication of any report or account of any part of the proceedings: s501(6)(a). The Teaching Council Rules 2016 also require the Tribunal to consider protection from publication for certain witnesses and vulnerable people including a child or young person. The Tribunal is satisfied that it is proper to prohibit publication in the interests of their privacy and the absence of any public interest in publication of their names.

[30] An application for a permanent order was made on behalf of Napier Boys High School, supported by a letter from the Principal dated 23 October 2023. The CAC adopted a neutral position in relation to this application. For the school it was submitted that publicity might have a negative impact in the following ways:

- (a) stigmatisation of the institution, with risk of harm to the school’s reputation.
- (b) potential enrolment decline.
- (c) impact on student and staff morale and wellbeing, due to unwarranted attention from peers and the community.
- (d) safety concerns – that the school may become a “*focal point for negative attention.*”

[31] For a school to attain an order for non-publication there should be evidence of a real risk of some harm being caused: *CAC v Taylor*¹⁰. In this case, while no doubt genuinely held, the concerns put forward are not supported by evidence to indicate a likely risk of stigmatisation, enrolment decline, or a lowering of morale. Social media

⁹ Letter from Georgina Kingi, Kaiwhakahaere Taurima, St Joseph Māori Girls College, 21/7/23.

¹⁰ NZTDT 2019/92.

may produce negative comments, but whether this happens or causes harm to the school's reputation is speculative, and we do not consider there is any appreciable risk. The students identified in particular 1(a) of the charge left New Zealand in March 2020 and the student in particular 1(b) has completed secondary school. Mr Ball has not taught at Napier Boys High School since mid-2021, and there is no evidence of other concerns over his long tenure at the school. The Summary of Facts outlines that the complaints were promptly investigated on both occasions. We therefore consider that any risk of harm is minimal.

[32] Mr Ball did not initially seek an order for non-publication of his name but supports the school's application. Mr Ball deposed that publication of his name would identify the school given his long association with it. The reasons for Mr Ball's application are:

- (a) a risk of undue hardship to the reputation of Napier Boys High School and its staff.
- (b) concern for his son who shares his surname and is a teacher in the same region. Mr Ball outlined his son's position in the community and his concern that "[m]y actions and disgrace should never reflect on his good name or his three daughters who attend his school."
- (c) A risk that publicity will impact his ability to return to a permanent position.
- (d) Concern for Mr Ball's wife.

[33] The power to order non-publication is to be used by balancing the principle of open justice and the public interest in court and tribunal proceedings, and the private interests of those for whom non-publication orders are sought. Mr Ball's application focussed only minimally on himself, with his concern being instead for his family and his former employer and colleagues. As noted we consider the risk to the school is minimal for the reasons already stated. We acknowledge that the complaints and the disciplinary process will have been very difficult for Mr Ball's family and the statement from his wife confirms this is so. No information was received directly from Mr Ball's son. There have been other matters before the Tribunal where a similar concern has been raised and in the absence of specific concerns that there is a real risk of harm, such a submission is not compelling. Nothing in Mr Ball's actions should or does reflect adversely on his family or their professionalism.

[34] We therefore decline Mr Ball's application. On balance we do not find that there

is a likely risk of harm beyond the ordinary consequences of publication of an adverse disciplinary finding.

Costs

[35] The Tribunal may make an order for costs against a party to the proceedings and an order for payment of a portion of the Tribunal's costs: s404(1)(h) of the Education Act 1989 and s500(1)(h) of the Education and Training Act 2020.

[36] The CAC filed a costs schedule setting out costs in the sum of \$1,618.94 for the investigation and prosecution costs in the sum of \$6,750.00 totalling \$8,368.94. Counsel sought a contribution of 40% of these from Mr Ball. The Practice Note of 1 April 2022 guides that in most cases where a charge is undefended, and the teacher is co-operative to conclude the matter a costs contribution of 40% is usual. The Tribunal of course retains discretion to alter this in the circumstances of each case. Mr Ball told the Tribunal that he would struggle to pay costs, referring to his reduced income and the "*huge cost*" of these proceedings "*financially, emotionally and socially.*" Mr Ball included affidavit evidence of his financial position including income and expenses, assets and liabilities and sought a reduction in contribution or a waiver of costs entirely. Mr Ball's evidence was of financial hardship as a direct consequence of these proceedings, with significant loss of income while he was not teaching and the need to sell property. An injury involving a prolonged hospitalisation in late 2021 contributed to this loss of income, rendering Mr Ball unable to work for some months and then limiting the nature of work he could undertake (that is, not physical labour).

[37] It is to Mr Ball's credit that he has co-operated fully with these proceedings. Although we proceeded with a Summary of Facts addressing all pertinent matters Mr Ball attended the AVL hearing, expressed his remorse and gave evidence of his personal circumstances.

[38] In the circumstances we consider that a reduction to a contribution of 30% is appropriate in the circumstances.

Orders

[39] Having found the charge proved to separately amount to misconduct and serious misconduct the Tribunal makes the following orders pursuant to s 500 of the Act:

- (a) Pursuant to s500(1)(b) Mr Ball is censured.
- (b) Pursuant to s500(1)(c) the following conditions are imposed on Mr Ball's practising certificate:
 - (i) Mr Ball is to promptly complete the mandatory online training module "Physical Restraint: Understanding the Rules and Guidelines".
 - (ii) Mr Ball is to undertake further appropriate professional development (either online or in person) in managing and responding to classroom behaviour within 12 months of the date of this decision.
- (c) Mr Ball is to notify his employer of this decision, for a period of 12 months from the date of this decision.
- (d) Mr Ball is to pay a contribution towards the costs of the Tribunal and CAC in the sums of \$436.50 and \$2,510.68 respectively.

[40] The parties have a right of appeal under s 504 of the Education and Training Act 2020. Any appeal must be made within 28 days after receipt of the written decision, or any longer period that the court allows.



C Garvey
Deputy Chair of the New Zealand Teacher's
Disciplinary Tribunal