

BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

NZTDT 2023/03

UNDER
WĀHANGA

the Education and Training Act
2020

IN THE MATTER
MŌ TE TAKE
BETWEEN
I WAENGA I A

of a charge referred to the Tribunal

**COMPLAINTS ASSESSMENT
COMMITTEE (CAC)**
Prosecutor/Referrer | Kaiwhiu

AND
ME

JULIE ANNE RATHGEN
Respondent | Kaiurupare

Hearing | Te Rongonga

4 December 2023

Representation | Hei Māngai

E McCaughan counsel for the CAC
J Brown advocate for the Respondent

Tribunal panel | Pae Taraipiunara

T J Mackenzie (Deputy Chair), W Flavell, L
Evans

DECISION OF THE TRIBUNAL

TE MENETI O TE RŪNANGA RONGONGA TŌMUA I WHAKATŪRIA
7 February 2024

Introduction

[1] The Complaints Assessment Committee (CAC) has brought a charge of Serious Misconduct against Ms Rathgen. The charge is that Ms Rathgen yelled at and then struck a child whilst she was teaching at an Early Childhood Centre.

[2] Ms Rathgen has accepted liability for the charge. The parties are also agreed on the appropriate outcomes, although these are ultimately a matter for the Tribunal to determine.

[3] The Tribunal met to consider this matter on 4 December 2023. This is our decision on liability, penalty, publication and costs.

Facts

[4] The agreed facts are appended to this decision.

[5] After considering this matter, the Tribunal raised a query with the parties regarding what level of force was agreed (and therefore what basis we should be proceeding on). The reason for this is that the Summary of Facts notes that in regards to the physical force allegation, that a witness considered the force used to be an 8/10, with a smacking sound accompanying it. The Summary of Facts however also has the respondent's account of the force being a 2/3 out of 10. Obviously that is a significant difference.

[6] The parties have responded that there is not a particular agreement regarding the precise level of force used. But they both take a pragmatic approach: regardless of the force, on either account serious misconduct is made out. The CAC for instance would be content for the following basis to be proceeded with:

- Ms Rathgen used her flat palm to hit the top of Child A's head;
- The exact level of force used is unknown, but the hit was hard enough to make a sound;
- Afterwards Child A did not cry, but looked shocked.

[7] We do not see it as being productive or proportionate to try and determine the level of force with further evidence and are content to proceed on the pragmatic basis above.

Liability for the charge

Legal principles

[8] Although the charge is accepted, we will briefly consider that issue. Section 10 of the Education and Training Act 2020 defines "serious misconduct" as follows:

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

[9] Regarding the first aspect of this test (adverse affect(s)). In *CAC v Marsom* this Tribunal said that the risk or possibility is one that must not be fanciful and cannot be discounted.¹ The consideration of adverse effects requires an assessment taking into account the entire context of the situation found proven.

[10] The second limb (fitness) has been described by the Tribunal as follows:²

We think that the distinction between paragraphs (b) and (c) is that whereas (c) focuses on reputation and community expectation, paragraph (b) concerns whether the teacher's conduct departs from the standards expected of a teacher. Those standards might include pedagogical, professional, ethical and legal. The departure from those standards might be viewed with disapproval by a teacher's peers or by the community. The views of the teachers on the panel inform the view taken by the Tribunal.

[11] The third limb of the test (disrepute) is informed by the High Court decision in *Collie v Nursing Council of New Zealand*.³ The Court considered that the question that must be addressed is an objective one: 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 conduct of the practitioner. We take the same approach.

[12] Section 10(b) of the serious misconduct test refers to reporting criteria. The Court of Appeal (discussing the same wording from the former Education Act 1989) has affirmed that this reporting criteria limb creates a conjunctive test for serious misconduct.⁴ That is, one of the three limbs of (a), and one of the criteria from (b), must both be met for serious misconduct to be made out.

[13] The Teaching Council Rules 2016 describe the types of behaviour that

¹ *CAC v Marsom* NZTDT 2018/25, referring to *R v W* [1998] 1 NZLR 35.

² *CAC v Crump* NZTDT 2019-12, 9 April 2020 (referring to the test in the 1989 Act, which used different paragraph references).

³ *Collie v Nursing Council of New Zealand* [2001] NZAR 74, at [28].

⁴ *Teacher Y v Education Council of Aotearoa New Zealand* [2018] NZCA 637.

must be reported by an employer as part of the serious misconduct test. The CAC relies on rule (9)(1)(k) as follows:

9 Criteria for reporting serious misconduct

(1) A teacher's employer must immediately report to the Teaching 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) using unjustified or unreasonable physical force on a child or young person or encouraging another person to do so:

(k) an act or omission that brings, or is likely to bring, the teaching profession into disrepute.

(other sections omitted)

[14] Here, the CAC relies on (a) and (k) (which we have italicised above).

Discussion

[15] As noted earlier, Ms Rathgen accepts that her actions constitute serious misconduct.

[16] We agree. We consider that her actions in shouting at the child and then striking the child meet all of the tests for serious misconduct. Whether the force used was at the higher or lower end of the scale does not affect this view, although we think it unlikely that the striking was as forceful as the witness considered it might have been.

Penalty

[17] When considering penalty the Tribunal will take into account the seriousness of the conduct, and what insight and responsibility is now present (if any). Penalties in cases of striking a child can often lend toward cancellation as a starting point because such conduct strikes at the very heart of all that is required in these relationships. Cancellation is not immutable however.

[18] In this case there are a number of features advanced to us in support of a penalty less than cancellation:

- a) Ms Rathgen immediately acknowledged her actions were wrong,
- b) She apologised to the child's mother
- c) She had reflected on the incident and had identified different strategies she could use in the future.
- d) She acknowledged the seriousness of her actions - she was "shocked and truly regretful".

- e) Ms Rathgen was supported by her employer, which dealt with the matter by way of a written warning.
- f) Ms Rathgen has fully participated in the investigative process.
- g) Ms Rathgen has engaged in counselling and several professional training seminars.

[19] We also note that new processes have been put in place at the Centre to create a less stressful environment.

[20] Ms Rathgen agrees with the penalties suggested by the CAC, which were as follows:

- I. Censure per section 500(1)(b) of the Act).
- II. A condition on Ms Rathgen's practising certificate that she is to advise her current and any future education employers of this decision for one year (per section 500(1)(c) of the Act).

[21] We consider that in the entire circumstances of this case that these are appropriate sanctions. We therefore order those penalties.

Publication

[22] We make permanent an order for non-publication of the name of Child A.

[23] Ms Rathgen has not sought an order for non-publication, nor have any associated parties. There are therefore no further orders.

Costs

[24] As is our standard approach in cases of this manner we direct that Ms Rathgen make a contribution of 40% of the costs incurred in this case.

[25] The CAC costs are

Costs of Complaints Assessment Committee \$1,618.94
Legal costs and disbursements for Tribunal proceedings
(GST exclusive)
\$1,375.00
TOTAL COSTS \$2,993.94

TOTAL COSTS SOUGHT (40%) \$1,197.58

[26] We consider the CAC costs claim to be reasonable. We order the amount sought above to be paid by Ms Rathgen.

[27] Tribunal costs are \$1455. 40% of \$1455 = \$582. We also order that amount.



T J Mackenzie
Deputy Chair
New Zealand Teacher's Disciplinary Tribunal /
Te Upoko Tuarua o Te Rōpū Whakaraupapa o Aotearoa

IN THE MATTER OF the Education and Training Act 2020

AND

IN THE MATTER OF an inquiry by the New Zealand Teachers Disciplinary Tribunal of the Teaching Council of Aotearoa New Zealand into the conduct of **JULIE RATHGEN**, of **CHRISTCHURCH**, Teacher (Registration No. **252800**)

SUMMARY OF FACTS

Introduction

1. Ms Rathgen was first registered in 2007. She has 15 years of teaching experience. Her most recent practising certificate expired on 4 November 2022. Ms Rathgen was employed as a head teacher at BestStart Nottingham Avenue, in Christchurch.
2. BestSmart Nottingham Avenue (**the Centre**) is an early childhood centre in Halswell, Christchurch and provides education and care for children between 3 months to 6 years.

Allegation (a) On 8 June 2021 Ms Rathgen yelled at a learner

3. On 8 June 2021, between 1:00pm and 1:15pm, Ms Rathgen was in the Toddlers room at the Centre. While Ms Rathgen was in the Toddlers room putting the children to sleep, a reliever teacher heard Ms Rathgen repeatedly yelling at Child A (aged 3 years, 7 months), including telling the child to "go away".
4. The reliever teacher estimated that on a scale of 1-10, the volume used increased each time Ms Rathgen told Child A "to go away", increasing from a 5/10 to 10/10.

Allegation (b) On 8 June 2021 Ms Rathgen used unreasonable physical force against a learner

5. While Child A was standing on the opposite side of a shelf, Ms Rathgen stood up, reached over the shelf, and with an angry expression, used her flat palm to hit the top of Child A's head. The reliever teacher described the force of the hit as 8/10, and sounding similar to as if Ms Rathgen had smacked Child A's bottom.
6. Following the incident, Child A did not cry, but looked shocked.

Ms Rathgen's response

7. On 14 June 2021, a disciplinary investigation meeting took place between Ms Rathgen and the Centre Manager. Ms Rathgen's support person was also present.
8. Prior to that meeting Ms Rathgen wrote a letter reflecting on the allegations:

- a. Allegation (a): Ms Rathgen said that the noise in the room was increasing, with Child A being the main disruptor. She repeatedly asked the children playing in the area to be quiet, and suggested they play with the dinosaurs. Ms Rathgen acknowledged that she was getting frustrated because Child A kept coming back, when she had asked them to stop. Ms Rathgen accepted that she raised her voice to a volume of 5/10, which was not considered an appropriate strategy to manage situations of this nature.
 - b. Allegation (b): Ms Rathgen admitted to reaching over the shelving unit and tapping Child A's head in response to Child A making a high pitched screech. She described the force used as between 2-3/10.
9. Ms Rathgen acknowledged that tapping Child A's head was unacceptable. She described her actions as an "involuntary and automatic reaction" to Child A deliberately making a high-pitched noise. She acknowledged that as soon as she had done it, she knew it was wrong, and she had been reflecting on how she could have handled the incident better.
10. During the meeting Ms Rathgen acknowledged that she had tapped Child A hard enough to make a sound, which had given Ms Rathgen a fright.
11. BestStart issued a written warning to Ms Rathgen, which would remain valid for 12 months.
12. Ms Rathgen subsequently advised the CAC that:
 - a. She had apologised to Child A's mother.
 - b. She acknowledged that she had made some decisions in haste in a noisy classroom environment.
 - c. She now realised that she should have had another teacher present to assist.
 - d. She had subsequently attended two counselling sessions offered via the ELP scheme.
 - e. She had also attended a session provided by the Education Hub regarding dealing with children with challenging behaviours.
 - f. She was "shocked and truly regretful for the way [she] reacted".

CAC meeting

13. On 27 October 2022, at the CAC meeting, when Ms Rathgen was asked about the incident with Child A, she explained that Child A was being "naughty" and "cheeky". She said Child A was jumping between two shelves, one of which was the barrier of the sleep area where other children were asleep. When asked if Child A could have

been hurt, Ms Rathgen said Child A could not have hurt himself, the main concern was about him behaving in a way that was annoying other children who were sleeping. Ms Rathgen said she had tried redirection strategies to engage Child A on this day, including setting up dinosaurs and cars, but he was not interested.

14. When asked about Allegation (a), Ms Rathgen said her voice was escalating when she was telling Child A to "stop".
15. She said her voice may have unintentionally been getting louder and higher. Ms Rathgen said she mostly had a levelled, quiet voice with the children.
16. When describing Allegation (b), Ms Rathgen said she was sitting on the floor and Child A was jumping up and down. She had put her hand out to stay stop, however her hand collided in the middle Child A's head. She said it was an "involuntary, automatic movement". She said after her hand made contact with Child A's head, they were both shocked.

Registered 2006.

Ja Rathgen

18.8.2023

S K Gill
Counsel for the CAC

SK Gill

18.08.2023