

BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

NZTDT 2022/20

KEI RARO I TE MANA O
Under

the Education Act 1989 (**the Act**)

I TE TAKE O
In the Matter of

a charge referred by the Complaints
Assessment Committee to the New
Zealand Teachers Disciplinary
Tribunal

KO
Between

**COMPLAINTS ASSESSMENT
COMMITTEE**

Kaiwhiu | Prosecutor/Referrer

ME
And

**[REDACTED] (Registration
[REDACTED])**
Kaiurupare | Respondent

TE WHAKATAUNGA Ā TE TARAIPUNARA
DECISION ON PENALTY, LIABILITY, COSTS. AND NAME SUPPRESSION

Dated 10 July 2024

NOHOANGA:
Hearing

26 February 2024 on the papers via Teams

TE TARAIPUNARA:
The Tribunal

Ian Murray (Tiamana Tuarua)
Demian Shaver raua ko Will Flavell (Ngā mema o te
Taraipunara)

**NGĀ ROIA ME NGĀ
KAIABWHINA:**
Representation

Evan McCaughan for Complaints Assessment Committee
Kahmil Dunn (Legal Adviser) for the Respondent

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 2 June 2022 the CAC alleged that Mr [REDACTED]:
 - a. Between 20 September 2016 and 21 September 2017, manually assaulted his son Child Z (aged 11);
 - b. On 21 September 2017, assaulted Child Z with a remote control.
2. The CAC contends that this conduct amounts to serious misconduct pursuant to 378 of the Education Act 1989 and Rule 9(1)(a), (n) and (o) of the Teaching Council Rules 2016 (the Rules); or conduct that otherwise entitles the Disciplinary Tribunal to exercise its powers under s 404 of the Act.

Summary of decision

3. We made concluded that the conduct amounted to serious misconduct and imposed the following penalty:
 - (a) Censure;
 - (b) Annotation on his registration for 12 months of this decision, the censure and the conditions imposed; and
 - (c) Conditions on his current and any subsequent practising certificate that he provide a copy of the Tribunal decision to his current teaching employer (if any).and advises any prospective teaching employers of the Tribunal decision (if he changes employer).

Evidence

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

"Introduction

- 1 Mr [REDACTED] has been teaching for approximately 13 years. He was first fully registered on 7 May 2012. His current practising certificate is due to expire on 15 March 2024.
- 2 At the time of the incident discussed below Mr [REDACTED] was working as [REDACTED] at [REDACTED], a primary school in [REDACTED]
- 3 His employer the Principal of [REDACTED] was aware of the charges as she gave permission for him to attend the Manukau District Court and provided him with an affidavit in his support.

Incident: that Mr [REDACTED]:

a. Between 20 September 2016 and 21 September 2017, hit his son Child Z (aged 11); and

b. On 20 September 2017, threw a remote control at Child Z.

- 4 On 11 March 2021, the Teaching Council received a Police vetting report dated 10 March 2021.
- 5 This report disclosed that incidents had occurred between September 2016 and September 2017 between Mr [REDACTED] and his son (**Child Z**), who was 11 years old at the time. Police had become involved after Child Z's teacher noticed bruising to his face.
- 6 This report disclosed that Mr [REDACTED] had pleaded guilty to two charges of assaulting a child (pursuant to s 194(a) Crimes Act 1961 – maximum penalty two years' imprisonment). He has no previous convictions. The Judge who sentenced Mr [REDACTED] described the offending as follows:

"On 20 September 2017, you were at home together with your son. You were upset at your son for underperforming at sports training, and you were yelling at him to get ready for a shower.

Your anger got the better of you, and you threw a remote control which you had in your hand at your son, striking him on the right side of his face, and on his cheek bone.

Because of that act your son suffered bruising and swelling to his face. When he went to school and his injury was noted he spoke of what occurred, and the Police were notified.

When spoken to by Police your son revealed that, between 20 September 2016 and 21 September 2017, he was often the front passenger in a vehicle together with you. You would often hit him during the drive home as punishment for misbehaving."

- 7 On 16 October 2018 Mr [REDACTED] was discharged without conviction in the [REDACTED] District Court. As part of the Judge's decision, it was noted that Mr [REDACTED] had completed a 20 week "Stopping Violence" programme with an organisation called "Man Alive".
- 8 Mr [REDACTED] name was also permanently suppressed.
- 9 A copy of the Judge's sentencing notes is attached, and forms part of this Summary of Facts.
- 10 Oranga Tamariki has advised that in October/November 2017 Mr [REDACTED] completed an 8 week parenting programme with Fonua Ola, an organisation which aims to "support Pasifika families to be safe and well for a better future".

Teacher's response to investigation

- 11 On 31 May 2021 Mr [REDACTED] advised the CAC "It was a matter of losing my cool for a brief moment as his dad, and acting in haste as I love my son with every fibre of my being. I will be forever conscious stricken and sorry to my son for this senseless act of behaviour."
- 12 Mr [REDACTED] declined to allow the CAC investigator to speak with his son. Mr [REDACTED] said that he wanted to protect his son from the CAC process as the whole court process was a stressful time for everyone involved. Mr [REDACTED] said he wanted to do this process himself. The investigator advised Mr [REDACTED] that he would respect his explanation for declining.

CAC meeting

- 13 The CAC met to consider the matter on 5 May 2022. Mr [REDACTED] attended the meeting along with his support person.
- 14 At the CAC meeting, Mr [REDACTED] shared his reflections and development since the incident, including through the programs he attended, such as strategies on how to deal with his temper. He said that he had aimed to

rebuild himself as a dad, and that he took a toolbox full of skills and strategies back into the classroom. Mr [REDACTED] was asked about his relationship with his son and his expectations of him. Mr [REDACTED] described the change in approach he had taken to parenting Child Z, including becoming more accepting of the decisions Child Z made. Mr [REDACTED] also expressed being proud of Child Z's accomplishments.

- 15 The CAC considered that Mr [REDACTED] conduct may possibly constitute serious misconduct. On that basis, the CAC had no option but to refer Mr [REDACTED] conduct to the Tribunal”.

5. We must be satisfied on the balance of probabilities that the CAC has proved the particulars of the charge. In this case, Mr [REDACTED] through his guilty plea in the District Court, accepts that the conduct occurred. Accordingly, we find that the particulars of the charge are established.

Serious misconduct

6. Mr [REDACTED] strongly contested that his conduct amounts to serious misconduct, As a result the Tribunal must be satisfied that the established conduct amounts to serious misconduct (or conduct otherwise entitling the Tribunal to exercise its powers).

7. 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.*

8. The criteria for reporting serious misconduct are found in r 9 of the Rules. The CAC

relies on rr 9(1)(a) and (o) that were in place at the time of this conduct.¹

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):*
 - (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 profession.*

CAC submissions

9. The CAC argue that the respondent's conduct amounts to serious misconduct. The submissions focus on the criteria relating to fitness to be a teacher and bringing the teaching profession into disrepute. The CAC also argue that the reporting criteria are made out because this was a physical assault on a child and could have and was prosecuted as an offence with a maximum penalty punishable by at least three months' imprisonment.
10. The CAC argue that the respondent's conduct is similar to a number of cases which they set out and which we considered as part of our deliberations.
11. As a result, they submitted that it was serious misconduct.

Respondent submissions

12. The respondent's submissions were made on his behalf by Kahmil Dunn who is Australian based and is recorded as a legal advocate. It is not entirely clear what is meant by that terminology. Ordinarily, a person in the respondent's shoes can only be represented by a lawyer in a Tribunal of this kind. In the end, we accepted the submissions on behalf of Mr [REDACTED] with some hesitation.
13. Those submissions were to a degree unhelpful to Mr [REDACTED]. They were focused on

¹ Clause 3 of Schedule 1 of the Teaching Council Rules 2016 provides that possible serious misconduct by a teacher that occurred before 19 May 2018 must be reported and dealt with in accordance with the principal rules that were in force immediately before that date.

issues that were not always particularly helpful. The essence of the submissions was that the District Court, being a higher level authority than this Tribunal, had decided that the issue and as a result we could not make a finding of serious misconduct.

14. The submissions also argued that because there had been no conviction due to the discharge without conviction being granted, there was no basis for us to make a finding against the respondent because quoting the Teaching Council website, the presence of a criminal conviction needs to be reported to the Teaching Council and because there was no conviction here the matter should have been discontinued. There is also an argument made that because the behaviour occurred in the respondent's personal life and having been dealt with by the criminal court, the allegation of serious misconduct was not made out.
15. Further the submissions were strongly critical of the CAC for delays and procedural errors.

Our analysis

16. We must be satisfied that Mr [REDACTED] conduct meets at least one of the definitions of serious misconduct in s 378 of the Act, and that it is of a character or severity that meets the criteria for reporting serious misconduct contained in r 9.
17. We do not accept that any of the respondent's criticisms of the process adopted are relevant to the enquiry we need to undertake and accordingly put them to one side. We also reject the respondent's argument that the District Court decision has determined the issue and so we cannot and should not find serious misconduct.
18. Turning to the criteria for serious misconduct. We agree that the first criteria for serious misconduct cannot be made out because it took place outside the school environment. Logically that means the behaviour could not be likely to adversely affect the wellbeing or learning of any student.
19. We agree with the CAC that a physical assault on a child clearly reflect adversely on a person's fitness to be a teacher, whether or not they occurred in the teaching environment. Accordingly we reject the respondents argument. Notwithstanding the historical nature of the behaviour, this was an explosive loss of control and behaviour of that kind clearly adversely impacts on his fitness to be a teacher. The respondent's submission that the District Court decision had already decided the issue is

misconceived. The District Court was not looking at the issues that this Tribunal must decide. As a professional disciplinary tribunal our focus is different to a criminal Court.

20. The test for deciding whether a teacher's actions are likely to bring the teaching profession into disrepute has been set out by the Court in *Collie v Nursing Council of New Zealand*.² 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 Mr [REDACTED] actions.
21. We accept that often physical assaults on children would have a tendency to bring the teaching profession into disrepute, although we obviously must make a fact specific assessment in each case. In this case, while we accept the conduct was unacceptable and inappropriate, because of the significant time period since the behaviour and that it occurred in his personal life, we were convinced that his behaviour would have the required effect on reasonably minded members of the public.
22. In the end, it was unnecessary for us to decide whether the behaviour was of such a character that it may bring the teaching profession into disrepute because the second criteria in s 378 was already established.
23. Moving on to our analysis of Rule 9, it was clearly physical abuse of a child or young person and because it resulted in criminal charges (notwithstanding the discharge without convictions) it obviously amounted to the criminal conduct envisaged by the reporting rules so that the criteria for reporting serious misconduct is also made out.
24. So we find Mr [REDACTED] committed serious misconduct,

Penalty

25. In *CAC v McMillan*,³ we summarised the role of disciplinary proceedings 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

² *Collie v Nursing Council of New Zealand* [2001] NZAR 74.

³ NZTDT 2016/52, 23 January 2017, paragraph 23.

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.

26. Section 500 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 497(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 Teaching Council in respect of the costs of conducting the hearing:*
 - (j) *direct the Teaching Council to impose conditions on any subsequent practising certificate issued to the teacher.*

27. The CAC do not seek cancellation but seek a censure, annotation and conditions requiring the respondent to advise current and future employers of this decision for a period of 12 months.

28. The respondent argues no penalty is appropriate. Mr [REDACTED] argues that a censure is

not required and could impact on his employment prospects, which will impact on his son. Mr [REDACTED] argues that conditions are not appropriate because of his compliance with prior conditions and his commitment to rectifying his mistakes so that providing the Tribunal's decision to current employers is disproportionate and unnecessary. He also argues it would be wrong to impose a condition that he provide the decision to prospective teaching employers because that could impact and hinder his ability to secure employment and would be inconsistent with the principles of rehabilitation and the need for a teacher to have the opportunity to reintegrate into the profession.

29. The respondent also argues that annotation of the Register would be unduly harsh and inconsistent with the principles in relevant cases of the Tribunal. Mr [REDACTED] argues that he has been engaged in professional development and remediation efforts and annotation would serve no purpose and would hinder his prospects of reintegration into the teaching profession.
30. We agree with the CAC. We reject Mr [REDACTED] arguments as meritless. The purposes of professional disciplinary proceedings include protection of the public. Mr [REDACTED] is essentially asking us to impose no penalty and to a degree hide his serious misconduct by not annotating the Register and by not requiring him to inform employers, current or future. Those submissions do not promote the public protection principles of this type of proceeding.
31. We consider that the conditions sought by the CAC are proportionate and a rational response to the serious misconduct in this case. Accordingly, we impose the following conditions and direct that they be applied to any renewed practising certificate that the respondent obtains:
- (a) Censure;
 - (b) A condition for a period of 12 months imposed on Mr [REDACTED] current or any renewed practising certificates that he advise current and future employers of this decision;
 - (c) Annotation of the conditions and censure to the Register for a period of 12 months.

Costs

32. The CAC sought a contribution of 40% of its costs under s 500(1)(h).
33. The respondent argues that due to delays and mishandling of the case by the CAC, no costs should be ordered. The CAC refute those allegations.
34. The Tribunal has previously indicated that such a level of costs will ordinarily be appropriate in cases determined on the papers. We see no reason to depart from our usual approach. We reject the respondent's submissions as unsupported by any evidence and in any event, they do not justify us to depart from the usual rule.
35. Therefore, the Tribunal orders Mr [REDACTED] to pay 40% of the CAC's actual and reasonable costs under s 500(1)(h) and the Tribunal's costs under s 500(1)(i).
36. CAC costs are \$6,268.94 and Tribunal costs are \$1,615. So, Mr [REDACTED] share is \$2,507.58 and \$646.00 respectively. Total costs \$ 3,153.58.

37. **Non-publication**

38. Section 501 (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.*

39. Mr [REDACTED] was granted suppression of his name in the District Court. He argues that non-publication of his name is necessary to prevent a breach of the District Court

suppression order. The CAC responsibly accept that suppression is appropriate.

40. We agree. Also suppression has ordered in analogous cases involving assaults on family members⁴ and so we consider it would have been appropriate to order non-publication of Mr [REDACTED] name to prevent identification of his son.
41. For these reasons, we grant an order preventing publication of the respondent's name and identifying details. We also suppress his son's name as well.



Ian Murray
Deputy Chair

⁴ *CAC v Teacher* NZTDT 2018-105 and *CAC v Teacher V* NZTDT 2020-2.

NOTICE - Right of Appeal under Section 504 of the Education and Training Act 2010

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. Clause 5(2) to (6) of Schedule 3 applies to an appeal under this section as if it were an appeal under clause 5(1) of Schedule 3