Decision Summary Jennings

- All identifying details in this case, except the name of the respondent, have been suppressed.
- The respondent, Kenneth Mark Jennings, has been censured. His practising certificate has expired and, should he apply to teach in New Zealand again, his practising certificate suspended until he has completed a professional development programme approved by the Education Council's manager teacher practice.
- The Teachers' Register has been annotated to reflect this decision.
- The Complaints Assessment Committee (CAC) of the Education Council charged Mr Jennings with serious misconduct for slapping a year 7 student on the cheek.
- It brought this complaint to the New Zealand Teachers Disciplinary Tribunal, which is an independent entity, for a decision.
- The Disciplinary Tribunal has also ordered Mr Jennings to pay 60 percent of the cost of the hearing.

NZTDT 2016/14

BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

IN THE MATTER	of the Education Act 1989
AND	
IN THE MATTER	of a charge referred to the New Zealand Teachers Disciplinary Tribunal
BETWEEN	**COMPLAINTS ASSESSMENT COMMITTEE**
AND	**KENNETH MARK JENNINGS**
	Respondent

HEARING:	held in Auckland on 17 August 2016 (on the papers)
TRIBUNAL:	Ms Theo Baker (Chairperson)
	Mr Stuart King and Mr David Hain (Members)
COUNSEL:	Ms Gaeline Phipps presented written submissions on behalf of the Complaints Assessment Committee
	The Tribunal received no representations by or on behalf of the respondent

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DECISION OF TRIBUNAL

DATE: 26 September 2016

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1. At the time this notice of charge against Mr Jennings (the respondent) was referred to this Tribunal, he was a teacher with full registration. His practising certificate expired on 4 April 2016. According to his last correspondence with the Education Council (the Council), he was living in Canada.

2. In March 2016 the Complaints Assessment Committee (CAC) referred to this Tribunal a charge of serious misconduct.

3. The allegation of wrong-doing is contained in particular 2 of the Notice of Charge:

> *On or about 15 June 2015, at the School, Mr Jennings slapped a year 7 student on the cheek.*

4. The School is referred to in the body of the charge as [redacted].

5. The respondent did not appear or provide any response to the charge. We are satisfied that the CAC made appropriate efforts to notify him of the charge and this hearing. The basis for this is discussed below.

The evidence

6. We considered affidavit evidence of the following witnesses filed by the CAC:

[redacted]

- Katie Laidlaw
- Vicki Kirker

7. [redacted] was a student at the School in 2015. He produced two records in Te Reo (exhibit A), as well as a translation into English (exhibit B).

8. Exhibit B is reproduced in full:

> ***Translation 3557***
> ***Issued in Wellington, New Zealand on 12 February 2016***
>
> *[Translated from Maori]*
>
> *[page 1]*
>
> ***Interview of*** [redacted]
>
> *Monday 15 June 3.15pm.*

Interviewer: [redacted]

I interviewed [redacted] *who was extremely upset. He was in tears. I settled him down before asking him about what had happened earlier.*

When we ([redacted] *class) went to the carving room,* [redacted] *and I were playing around. Our class had nearly finished, it was time to clean up and we hid. Then* [redacted] *called out to me to go to him and he hit me – on my head (at this point* [redacted] *demonstrated to me the nature of the hit – a slap on the cheek).*

I then walked to [redacted] *classroom and stayed there. I wasn't there long when* [redacted] *came and then we both went to* [redacted] *office.*

Interview of [redacted]

Monday 15 June 3.15pm.

Interviewer: [redacted]

I interviewed [redacted] *who was extremely upset and confused. It was plain to see that the boy was traumatised as if something quite terrible had happened to him. He was in tears and his cheeks were all red from anger and embarrassment. At the time I thought, oh dear, this poor child. It was as though someone had taken away his self-confidence. Those are the heartfelt feelings that I had for him at the time. Eventually I let him know that I was here to help him. At that point he settled down and I turned to writing his version of how the unfortunate earlier incident had unfolded.*

[signed]

Written by [redacted] *17th June 2015*

9. [redacted] was a student at the School at the time of these events. He produced a copy of a record of his interview on 16 June 2015. He said that (at the time of these events) they were doing carving, and [redacted] thought it was boring. They decided to be silly and [redacted] started hiding from the respondent. It was during clean-up time. The respondent told [redacted] to get back and said, "I'm pissed off with you". He then did a big arm swing and slapped [redacted] around the back of the ear/head. He hit his "bad ear". [redacted] started crying, got angry and left. The respondent breathed a deep breath because he was angry. [redacted] stuck up for [redacted] and said to the respondent, "You are a bully! That's child abuse!". [redacted] said that there were six (students) there: [redacted] and himself.

10. In 2015 [redacted] was the [redacted] (principal) at the School. She produced a record of a whakapāhā hui with the five students apart from [redacted] (that is, [redacted].) According to this document, [redacted] (Board Chair) conducted the interview, and [redacted] was present. [redacted] herself was not present.

11. According to the record of the hui[redacted] said that the boys were playing around during the clean-up. [redacted] was hiding under the table. The respondent twice told him to get up. When [redacted] moved after the second time, the respondent slapped him around the head. The following words then appear in the record, "*([redacted]n puts his hand by his ear)* [redacted] *interjects with 'face'* [redacted] *corrects himself and said 'face')".*

12. The group was asked who saw the incident, and the answer was only [redacted], as the girls were cleaning up. [redacted] said that they heard a slap.

[redacted]There was an unsworn, unsigned affidavit before the Tribunal from [redacted] in which she said that in 2015 she was working an administrator at the School. Attached as exhibit A is a signed statement dated in handwriting *18/6/2015* and headed Tuesday 16th. She says that at approximately 2.50pm she was going to the photocopier and noticed [redacted] walking with his mate comforting him. She said that an unnamed student told her that [redacted] had been slapped across the face by [redacted]. She said that she went to [redacted]'s class and he was in a very distressed state. She took him to [redacted]

14. [redacted] also provided an affidavit. She said that she was working at the School in 2015. Her occupation is not recorded. She produced a copy of an email sent from her to [redacted] on Wednesday 17 June 2015. In it she said that on Monday afternoon at approximately 2:45 – 2:50 pm she was standing at the door of "our class" preparing the kids for home time. She described [redacted] marching in, breathing deeply. He went straight to his desk. She recorded, *"He was so upset then* [redacted] *said* [redacted] *hit* [redacted] *in the head* [redacted] *so* [redacted] *being a close friend to* [redacted] *he got mad and stormed off to go and see Mark".*

15. Ms [redacted] described [redacted] grabbing his bag and storming past her so she grabbed him and held him. She said his tears were flowing and wouldn't stop, and that the left side of his face was as red as a tomato. She asked [redacted], "*Where did he hit you?"* and he lifted his hand to his right side of his face. She said that she asked him 'again' *"on your face?!"* and he nodded his head.

16. In her affidavit, Katie Laidlaw, Case Co-ordinator for the CAC, produced a copy of the mandatory report dated 27 July 2015 from [redacted] to the Education Council. In this Ms [redacted] advised that the respondent was known as Mark, and that the parents of the student had complained to the police. On 20 July 2015 the respondent resigned.

17. The respondent's response of 11 August 2015 to the Education Council was also produced by Ms Laidlaw. This was the only statement from the respondent before the Tribunal. His description of the events in question is therefore produced in full:

This is my response to the allegations of me slapping a student across the face. I did not slap the child across the face and will explain what happened on that day.

On the 15th of June 2015 at approximately 2:20 in the afternoon I was teaching a class of six, year seven students in the technology room. This was the third class with these students and we were refinishing a desk from the new entrance's room. We were using a heat gun and paint stripper to remove the paint in preparation to sand and then repair the desk. I had told the class it was time to put the tools down and clean up. Most of the class was doing as they were instructed but one of the boys had decided to go to the back of the class and hide under a workbench. When I called him to join the class and help the rest clean-up he responded and came to the front of the class. It was at this time that the alleged slap took place. The child came to the front of the room and I could see he was distressed from being told what to do, as his face and walk were angry. I was concerned and as he barged past me and into an area where dangerous paint stripper and other children were cleaning up I put my arm out reached for him and directed him out of the area and to the front of the class. This was a fast movement and as I am tall I touched the top of his shoulder and back of his neck. At no time did I touch his face. The child was out of harm's way but now he was very angry and after a few seconds stomped out of the room. I followed him out and was told to f%& off and that he was going back to his homeroom class. I returned to the technical class and finished the class off.*

18. Ms Laidlaw also produced an email from the Detective Sergeant Grant Atkin advising that the police had decided not to charge the respondent on the basis that he had resigned from his teaching position and indicated he was to return to Canada and unlikely to return to New Zealand. The Detective Sergeant also confirmed that the respondent had left New Zealand on 12 August 2015.

19. The next exhibit was an email dated 15 September from 'M Jennings' [redacted] to Ms Laidlaw saying:

Dear Katie
I do plan to return to New Zealand for the following year at this point, I'm sorry that I can not be more specific but my mothers health and support are still being assessed.
First I am planning on renewing my teaching certificate and second yes I am in Canada but can be reached by phone if that is something the board is interested in doing.
Please let me know if this is acceptable so we can arrange a time to talk.
Sincerely
Mark

20. A further email dated 15 October 2015 to Ms Laidlaw was also produced. It is from the same email address. It reads:

Thank you for the letter and I will wait for a time for the phone call if necessary. I am still planning on being back in New Zealand and continue teaching but it still depends on my parents health as to when I return.
Sincerely Mark Jennings

21. There followed a series of emails from Ms Laidlaw to 'M Jennings' respectively dated 18 December 2015 (1:12pm), 18 December 2015 (1:15pm), and 15 January 2016 in which Ms Laidlaw sought a response from him and reminds him that the CAC are meeting on 29 January. She followed up with two further emails, dated 1 February and 1 March 2016. Ms Laidlaw advised that she received no response to any of these emails.

22. In her affidavit, Ms Vicki Kirker, Disciplinary Tribunal Co-ordinator, advised that she had sent by email advice of the pre-hearing teleconference and checklist, but no response was received. Notice of a hearing was also sent to the same email address.

Submissions

23. The Tribunal was assisted by the submissions of counsel for the CAC, Ms Phipps. She appropriately acknowledged that it is for the CAC to prove the charge. She submitted that based on the evidence of the children concerned, and the corroborative evidence of [redacted] who observed the consequences of the assault on the student's face, that the Tribunal should be satisfied that the conduct occurred.

24. Ms Phipps further submitted that the conduct was serious misconduct under rules 9(1)(a) and 9(1)(f) of the New Zealand Teachers Council (Making Reports and Complaints Rules 2004, which provide that the criteria for reporting serious misconduct include the physical abuse of a child or young person, and ill-treatment. She referred to the useful summary in NZTDT 2006/10:

Having regard to the aspects of the legislation which we have highlighted, it would seem that a teacher is guilty of serious misconduct whenever his or her behaviour affects or is likely to adversely affect the wellbeing or learning of a student or students and/or otherwise reflects adversely on that teacher's fitness to be a teacher. The emphasis in that enquiry is on the teacher's character and fitness to teach. Part of the enquiry may be whether the behaviour under consideration is criminal, but that is by no means an end of the enquiry. A much wider examination of a teacher's character and fitness to teach is called for. The wider enquiry involves asking whether the behaviour under consideration will contribute to or detract from the safety or wellbeing of students, and the quality of the teaching or learning environment. Finally, it is necessary to establish not only that the teacher's behaviour is of a type that might properly be categorised as serious misconduct, but also that, in terms of its character and severity, it meets the criteria for reporting, which means in effect that it must fall within one or more of the categories referred to in Rule 9.

25. Ms Phipps also referred to three cases that are of assistance to the Tribunal. In summary:

Rowlingson NZTDT2015/54 which involved a robust kick to a student's bottom in circumstances where there was difficulty controlling the class and the teacher was concerned that the student was presenting a danger to himself. There was no evidence of harm to the student. The penalty was censure and annotation of the register.

Simpson NZTDT2015/50 in which a teacher admitted grasping a student by the clothing, lifting him from his seat and carrying him out of the class. The penalty was censure and a condition on his practising certificate requiring him to enrol in and successfully complete a professional development course focusing on appropriate classroom management.

Teacher NZTDT2013/26 which was a more serious case where the teacher cuffed a student across the back of his head four or five times, and was stopped by the

intervention of another student. This teacher was censured and various conditions imposed on his practice.

Charge

26. We would have expected the bundle of documents to contain direct evidence that the notice of charge was served on the respondent, as required by rule 22 of the New Zealand Teachers Council (Conduct) Rules. We mean no criticism of the CAC and acknowledge that it is appropriate that reasonable efforts are made to expedite this matter, and do not want unnecessary time or expense spent in proving all aspects of compliance. However, where a respondent is not participating in a process, we do want to be satisfied that he was aware of it. This is especially so where there has been no contact following the laying of the charge.

27. Exhibit "A" of Ms Kirker's affidavit was a copy of an email in which she said, "As you are aware, the Complaints Assessment Committee (CAC) of the New Zealand Teachers Council has laid a charge against you with the New Zealand Teachers Disciplinary Tribunal." The rest of the email is about the proposed teleconference on 12 May at 10.00am and refers an attached respondent checklist and the ability to apply for name suppression. The respondent and counsel for the CAC were then advised the pre-hearing conference was being rescheduled to 16 May.

28. Exhibit "E" of Ms Kirker's affidavit is a copy of an email to the respondent attaching a minute from the pre-hearing conference, and advising that the hearing had been set down for 19 July 2016. In fact the hearing took place on 17 August 2016. In the present case, we acknowledge that reasonable efforts were made to inform him of this charge and the fact that there was going to be a hearing, and are satisfied that he was aware of these matters.

Discussion of the evidence

29. Rule 37 of the New Zealand Teachers Council (Conduct) Rules 2004 provides:

> ***Evidence***
> *At a hearing, the Disciplinary Tribunal may receive as evidence any document, record, or other information that may in its opinion assist it to deal effectively with the matter before it, whether or not the document, record, or information would be admissible in a court of law.*

It is still up to the Tribunal to decide what weight the evidence has and how useful it is in dealing with the matter.

30. Given the respondent's lack of participation in the proceedings after his email on 15 October 2015, it was appropriate this matter proceeded by way of sworn affidavits, rather than putting witnesses to the inconvenience and possible stress of attending a hearing. The Tribunal also appreciates that such a process may be costly to all parties. The difficulty is that where there are inconsistencies between the CAC's witnesses, the Tribunal has no opportunity to question the witnesses in order to establish which facts are provide. Submissions on the facts might have assisted.

31. As counsel for the CAC rightly acknowledged, the onus remains with the CAC to satisfy the Tribunal that the facts are proved. In this instance the Tribunal must be satisfied (on the balance of probabilities) that the respondent slapped a year 7 student on the cheek.

32. The student's name is not mentioned in the charge. Various statements from staff and students at the school refer to the respondent slapping or hitting [redacted], but none of them say what school year he was. In the respondent's letter dated 11 August 2015 to the Education Council (exhibit 2 of Ms Laidlaw's affidavit), he says that he was teaching year seven students, but does not mention any of their names. In Ms [redacted]s report to the Education Council, (exhibit 1 of Ms Laidlaw's affidavit) she refers to a year 7 student but she does not mention the student's name. Therefore we have inferred that [redacted] is the year 7 student referred to in the charge.

Students' statements

33. The evidence of the students was provided in different forms. [redacted] annexed notes of interview made by [redacted]. It is a combination of statements made by both of them. His key statement is, *"Then [redacted] called out to me to go to him and he hit me – on my head"*. The next part of the sentence is in the third person, *(at this point [redacted] demonstrated to me the nature of the hit – a slap on the cheek)*, and we assume this statement is made by [redacted]. The original māori version is not signed, but the English translation has been signed by [redacted]. However, [redacted] has said in his affidavit that he made a statement on 15 June, that a copy of the statement is annexed and it is true and correct. There is no affidavit from [redacted].

34. [redacted]'s statement was annexed to a sworn affidavit, in which he confirmed that the contents of the statement were true and correct. In that statement, he says that the respondent did a big arm swing and slapped [redacted] around the back of the ear/head, and

that he hit [redacted]'s "bad ear". There is no further evidence from any witness about whether [redacted] had any difficulty with his ear.

35. The other student evidence was gathered at a hui where five students were present. The problem with interviewing witnesses in the presence of other witnesses is demonstrated in the record of this hui, produced by [redacted], who was not present. When [redacted] describes the respondent hitting [redacted] about the head, [redacted] interjects and says, "Face", and so [redacted] corrects himself. It then transpires that [redacted] did not actually see the event.

36. In [redacted]'s affidavit, she refers to [redacted] saying that the respondent hit [redacted], and then to [redacted] storming off to go and see the respondent. This would imply that [redacted] was not even present when the alleged hit occurred. It would have been helpful to clarify this matter in the affidavit evidence or to hear from witnesses.

Staff statements

37. The evidence of [redacted] was provided as corroboration of physical abuse. [redacted] affidavit is not signed and the annexed signed statement is dated either 16 or 18 June 2015. She did not say what date the incident occurred. She recorded that she accompanied [redacted] to his classroom.

38. This is different from the affidavit sworn by [redacted] who said in her email to [redacted] that [redacted] marched in, breathing deeply and went straight to his desk. She makes no reference to [redacted] accompanying him. In the circumstances, we are inclined to prefer her evidence and disregard [redacted]'s. We do not think a great deal turns on it.

39. [redacted] said that [redacted]'s tears were flowing and wouldn't stop, and that the left side of his face was as red as a tomato.

40. We are satisfied that [redacted] was very upset. We are also satisfied that the left side of his face was red, but we are not satisfied that this was as a result of the slap from the respondent. She said in her statement that [redacted] lifted his hand to his right side of his face, and confirmed on questioning that it was his face.

The respondent's evidence

41. The respondent has not provided any evidence in these proceedings. We have considered the account he provided in his letter annexed to the affidavit of Katie Laidlaw

as set out above. The statement was made in the knowledge that there was a complaint about his conduct and we consider that it is reliable.

Findings

42. In summary, of the six students present, [redacted] says he was hit on the head. [redacted] has said that [redacted] demonstrated that it was a slap on the cheek. [redacted] says that the respondent slapped [redacted] around the back of the ear/head. [redacted] (who we think was present) initially said head, but then changed it to cheek when prompted by [redacted], who did not see anything but heard a slap.

43. Had Mr Jennings chosen to participate in the proceedings, we would have had an opportunity to explore his account further, but the weight of the evidence is against him.

44. We are satisfied on the balance of probabilities that the respondent hit Neha somewhere about his head and that it is more likely than not that this was a slap to his cheek. This is based on the evidence of [redacted] who both reported [redacted]s description of what happened. We consider [redacted]'s description of where contact was made to be more reliable than that of the other students, who saw, rather than felt the incident.

45. We are not satisfied that any redness on his left cheek was related to this slap. This is because he demonstrated that the slap was on his right cheek, when speaking with [redacted].

46. We have no hesitation in finding that the slap on the cheek amounts to serious misconduct.

Penalty

47. We impose the following penalty:

a) The respondent is censured under to section 404(1)(b).

b) The respondent's practising certificate has expired. Should he apply to teach in New Zealand again, his practising certificate is suspended until he has completed a professional development course to be approved by the Education Council of Aotearoa New Zealand Manager Teacher Practice (or other suitable representative of the Council), that course to focus on appropriate classroom management. This condition is imposed under section 404(1)(c) and (d).

c) Under section 404(1)(e), the register is to be annotated to record the above.

Costs

48. We order the respondent to pay 60% of the costs of conducting the hearing, under section 404(1)(i). Counsel for the CAC is to provide a schedule of costs within 14 days of the date of this decision. These will be considered along with the Council's costs.

Suppression orders

49. The CAC sought name suppression for the students and the kura on the basis that it would lead to identification of the students.

50. This in turn raised questions for the Tribunal about naming of the teachers including the respondent. Further submissions were therefore sought.

51. For the CAC, it is submitted that the kura is the only one of its type in the area. It has a small role, and therefore it is likely that identification would lead to identification of the students involved. The principal also wanted the name of the area suppressed. There are many teachers with the same surname as the respondent, and so naming him would not lead to the students' identity being known.

52. The Tribunal makes the following orders under section 405(6)(c)

    a. non-publication of any details which might lead to the identification of the students. In particular:

        i. the names of the students

        ii. the names of the teachers, except the respondent

        iii. the name of the kura

        iv. the name of the province or town

    b. non-publication of the respondent's email address.

Theo Baker

Chair

NOTICE

1 A person who is dissatisfied with all or any part of a decision of the Disciplinary Tribunal under sections 402(2) or 404 of the Education Act 1989 may appeal to a District Court.

2 An appeal must be made within 28 days of receipt of written notice of the decision, or within such further time as the District Court allows.

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