

BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

NZTDT 2024/24

RARO TE MANA O TE
UNDER THE

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

MŌ TE TAKE
IN THE MATTER OF

I WAENGA I A
BETWEEN

**COMPLAINTS ASSESSMENT
COMMITTEE (CAC)**

Kaiwhiu | Prosecutor

ME
AND

SAMUEL BLOW
Kaiurupare / Respondent

Nohoanga | Hearing 2 August 2024 (on the papers).

Hei Māngai | Appearance E McCaughan, Kayes Fletcher Walker, for the CAC.

Respondent in person

Decision of the Tribunal

27 September 2024

Tribunal Members: James Gurnick
Simon Walker
Ross Brown

Introduction

[1] The Complaints Assessment Committee (**CAC**) has charged the respondent that on 15 February 2023 he used unreasonable physical force on a student and that the conduct alleged amounts to serious misconduct pursuant to s 10 of the Education and Training Act 2020 (**the Act**) and any or all of r 9(1)(a) and/or 9(1)(k) of the Teaching Council Rules 2016 (**the Rules**).

[2] In the alternative, the CAC alleges the conduct amounts to misconduct otherwise entitling the Tribunal to exercise its powers under s 500 of the Act.

[3] The summary of facts is agreed and is set out below:

- 1 [The respondent] was first registered as a teacher in 2018. His current practising certificate expires on 5 February 2026.
- 2 At the time of the incident discussed below, [the respondent] was working a social sciences teacher at Hamilton Boys High School, Hamilton (**HBHS**), which has a roll of approximately 2000 students.

Incident: on 15 February 2023 [the respondent] used unreasonable physical force on a student

- 3 On 15 February 2023 [the respondent] was teaching a Year 10 class. The relevant student, Student A, was 13 years old at time of the incident.
- 4 [The respondent] was teaching a lesson about the Roman Colosseum, and discussing how gladiators fought with each other. He told the boys that gladiators would sometimes be chained together, and have to fight to death. Student A stood up and jokingly asked [the respondent] if he “wanted to go”. [The respondent] initially said no but then Student A came to the front of the classroom and [the respondent] agreed to “fight” with him.
- 5 [The respondent] and Student A grabbed each other’s arms in a mock gladiator tussle.
- 6 Another student recorded part of the playfight on video.¹
- 7 The video shows [the respondent] holding Student A by his right wrist. [The respondent] then tries to strike Student A across his head and Student A ducks away. While continuing to hold him by the wrist, [the respondent] and Student A continue play fighting. [the respondent] then slaps Student A on the side of his head and then again at the back of his neck and head and pulls him forward towards him. Student A then taps [the respondent’s] hand with his free hand, looks away and as he is looking away [the respondent] slaps Student A on the head again. The incident then comes to an end.
- 8 Another student, Student B, subsequently got hold of the video, and edited the video by placing sounds in the background as a joke. Student B then sent it to Student A who thought it was funny. Student B then uploaded the video onto TikTok unaware of the effects it would cause.
- 9 The following day [the respondent] was made aware the video was on TikTok. The video was also published on the “Stuff” news website with an accompanying story on 17 February 2023.² The video blurred the faces of [the respondent] and Student A.

¹ A copy of the edited footage uploaded to Tiktok will be made available to the Tribunal.

² <https://www.stuff.co.nz/national/300809692/teacher-stood-down-for-slapping-student-in-gladiatorial-reenactment>. A copy of the story is attached to this Summary of Facts.

10 The next time [the respondent] saw the class he apologised and stated he should have never touched Student A. He apologised to Student A in front of the class and shook Student A's hand. Student A accepted the apology.

11 On 20 February 2023 Student A's mother advised HBHS's Assistant Headmaster by phone that:

- (a) [The respondent] was Student A's favourite teacher; and
- (b) She and Student A had "a good laugh at the video at dinner" and that she was sorry that the teacher was in trouble.

12 On 6 March 2023 the Headmaster of HBHS filed a mandatory report with the Teaching Council.

13 On 10 March 2023 the Headmaster advised [the respondent] by letter that:

- (a) He would receive a formal written warning – "any form of physical touching of students, even in a lighthearted way, is inappropriate, and must not occur".
- (b) The written warning would remain on his personal file for 6 months.
- (c) He would be subject to an "intensive programme" of classroom observations by a range of staff.
- (d) He would also be subject to a three-month performance management process.

14 On 4 April 2023 [the respondent] advised the CAC's Triage Committee that he wanted to express his regret and apologised for the situation that had arisen. He stated he had learnt an important lesson, and was committed to making the necessary changes to avoid any similar incidents happening in the future.

15 On 5 February 2024 [the respondent] advised the CAC:

- (a) Since the incident he had gone through five lesson observations with four different senior staff members, including the Headmaster and Deputy Headmaster.
- (b) He had been involved in several meetings with those senior staff members to discuss his classroom management.
- (c) He had attended a professional development day focused on Practical Classroom Management.³

16 [The respondent] provided copies of the five lesson observation forms, which included comments such as:

- (a) "An excellent lesson, well prepared and superbly executed."
- (b) "[The respondent's] lesson was well-sequenced, well-paced, and well-delivered. Boys were settled, attentive, and good, solid learning happened. One can't ask for anything more."
- (c) "The teacher's rapport with these students is exceptional. He treats them with respect and empathy and they reciprocate."

17 On 4 April 2024 at the CAC meeting, [the respondent] stated:

- (a) He acknowledged that the video looked "terrible", particularly as it started towards the end of the interaction with Student A, and he was much bigger than Student A.
- (b) However he emphasised that they were not trying to hurt each other and that it was not pre-planned.
- (c) He said that looking back it was the dumbest thing he'd ever done.

³ The respondent has subsequently provided a certificate prepared by Ross Communication Consultants Ltd confirming that he attended "Day One of the Practical Classroom Management Course – Setting up a restorative classroom environment" on 7 June 2023.

- (d) He had taken the Headmaster's comments to heart, and it had affected how he acted and spoke with his students, and that he was now more formal in his dealings with them.
- (e) He knew that he was not there as the students' friend, and that there needed to be a professional boundary between teachers and students.

Legal principles

The test for serious misconduct

[4] Section 10 of the Act defines "serious misconduct" as conduct by a teacher that:

- (a) adversely affects, or is likely to adversely affect, the well-being or learning of one or more students; or
- (b) reflects adversely on the teacher's fitness to be a teacher; or
- (c) may bring the teaching profession into disrepute; and
- (d) is of a character or severity that meets the Teaching Council's criteria for reporting serious misconduct.

[5] The Court of Appeal has confirmed that the test under s 10 is conjunctive.⁴

[6] In assessing whether a teacher's fitness to teach has been affected, the Tribunal in *CAC v Crump* emphasised the focus to be:⁵

[whether] the teacher's conduct departs from the standards expected of a teacher. Those standards might include pedagogical, ethical and legal. The departure from those standards might be viewed with disapproval by a teacher's peers or by the community.

[7] The criteria for reporting serious misconduct are found in the Rules.

[8] Relevantly, the CAC alleges that the relevant rules in this case are:

- (a) r 9(1)(a) – using unjustified or unreasonable physical force on a child or young person; and/or
- (b) r 9(1)(k) – an act or omission that brings, or is likely to bring, the teaching professional into disrepute.

⁴ *Teacher Y v Education Council of Aotearoa New Zealand* [2019] NZCA 637.

⁵ *CAC v Crump* NZTDT 2019/12 at [42].

[9] Rule 9(1)(k) will be satisfied if reasonable members of the public, informed of the facts and circumstances, could reasonably conclude that the reputation and standing of the profession was lowered by the conduct.⁶

[10] In *CAC v Teacher*, the Tribunal made the following comment regarding the use of physical force to any degree in the school environment:⁷

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 s 139A puts his or her status as a teacher in peril.

CAC submissions

[11] The CAC accepts that most of the cases involving assaults by teachers on high school students involve frustrated/angry teachers hitting students.⁸ The CAC accepts that is not the case here and that the respondent was “play fighting” with the student and there was no aggression or frustration involved. The CAC submits that the bulk of the cases are not useful by comparison.

[12] The CAC draws comparison in this case with *CAC v Teacher H*, which demonstrates one of the risks that can come from “play fighting” with a student and that there is the potential for it to quickly escalate into genuine fighting.⁹ In *CAC v Teacher H*, Teacher H was a deputy principal at a high school. On one occasion, Teacher H began playfighting with a year 12 student during a fund-raising activity. The playfighting got out of hand, leading to:

- (a) the student swearing;
- (b) Teacher H slapping the student in the back of the head;
- (c) the student punching Teacher H in the ribs; and
- (d) Teacher H using a “controlled left jab” to the student’s chin.

[13] Teacher H was immediately remorseful, and a successful restorative hui was subsequently held with the student and his family. Teacher H was stood down from his school management role for six weeks. He also started meeting with a mentor fortnightly,

⁶ *Collie v Nursing Council of New Zealand* [2001] NZAR 74 at [28].

⁷ *CAC v Teacher* NZTDT 2014/49, 20 May 2014.

⁸ For example, *CAC v Kriek* NZTDT 2019/132; *CAC v Grace* NZTDT 2017/6, 20 November 2017; *CAC v Taylor* NZTDT 2017/41, 8 November 2018.

⁹ *CAC v Teacher H* NZTDT 2019/119.

with a focus on “professional reflection and accountability”. The Tribunal found that the conduct amounted to serious misconduct.

[14] In relation to Teacher H’s fitness to practise, the Tribunal commented:¹⁰

Ordinarily, striking a student in this way raises significant issues about a teacher’s fitness to practise. This is so whether or not it results from a loss of self-control or in anger. While acting in such a way as a result of the loss of self-control or in anger might be regarded as increasing the likelihood of an adverse finding on fitness to teach, if there is no evidence that there was a loss of self-control or anger, so that the striking was deliberate, the inference must be that the striking was deliberate, so a similarly adverse finding must result. The respondent has not admitted a loss of self-control or anger so we must conclude that the “jab” and the “slap” were deliberate. We conclude that the incident does reflect adversely on the respondent’s fitness to practise.

[15] The Tribunal also noted that “entering into the play fight breached professional boundaries and we can see the consequences in what followed”.¹¹

[16] The Tribunal was surprised that Teacher H had only been stood down from his management role for six weeks. The Tribunal considered that the appropriate period would have been approximately two school terms. The Tribunal dealt with Teacher H by:

- (a) censure;
- (b) annotation of the register for a period of a year; and
- (c) a candour condition for a period of two years.

[17] The CAC submits that the respondent’s conduct reaches the threshold of serious misconduct in terms of the statutory criteria:

- (a) His conduct reflects adversely on his fitness to be a teacher. The footage shows the respondent physically restraining Student A by holding him by the wrist. Even if the behaviour was intended to be light-hearted, and there was no malicious intent, the respondent can be seen slapping Student A a number of times, including at the end of the video while Student A was looking away. The respondent failed to appreciate appropriate professional boundaries (that is, it is inappropriate to play fight with a student given the risk that such behaviour can lead to either “real” fighting, or can be misinterpreted by people viewing the incident).

¹⁰ CAC v Teacher H, above n 9, at [27].

¹¹ At [29].

- (b) The respondent's conduct may bring the teaching profession into disrepute. Teachers are expected to be role models. This incident was a poor reflection of how teachers should act in the classroom, and is not behaviour that would be expected by the public. The conduct involved an imbalance of power, both in terms of the parties' relationship and physical size. The respondent was not demonstrating appropriate behaviour to the class, despite his position of power and responsibility.
- (c) In terms of r 9(1)(a), the respondent's use of physical force on the student was both unjustified and unreasonable in the circumstances. There was no justification for the respondent acting with the student in such an unprofessional manner.
- (d) For the reasons set out above, the respondent's conduct also breached r 9(1)(k).

Submissions as to penalty

[18] The CAC submits in terms of penalty that the primary motivation regarding the imposition of orders in professional disciplinary proceedings is to ensure that three overlapping purposes are met:

- (a) protecting the public through the provision of a safe learning environment;
- (b) maintaining professional standards; and
- (c) maintaining public confidence in the profession.¹²

[19] In imposing a penalty, the CAC submits the Tribunal must arrive at an outcome that is fair, reasonable and appropriate in the circumstances. The Tribunal is also required to ensure that any penalty is comparable to those imposed on teachers in similar circumstances.

[20] The CAC submits that whether it is necessary to cancel a teacher's registration in order to discharge the Tribunal's disciplinary obligations will often turn on the teacher's rehabilitative prospects and the degree of insight he or she has demonstrated into the causes of the behaviour.¹³

¹² CAC v *McMillan* NZTDT 2016/52.

¹³ CAC v *Adams* NZTDT 2018/11, 13 September 2018 at [25].

The respondent's conduct

[21] The CAC acknowledges that:

- (a) The respondent co-operated with the school's investigation, as well as the CAC's investigation.
- (b) The next time he taught the particular class, he apologised to Student A in front of the class.
- (c) He received a formal written warning from the headmaster that "any form of physical touching of students, even in a light-hearted way, is inappropriate, and must not occur".
- (d) He was placed on a performance management plan involving multiple lesson observations by other members of staff.
- (e) He provided copies of the observations to the Teaching Council, which were complimentary about his performance.
- (f) He has attended a professional development day focused on practical classroom management.
- (g) At the CAC meeting on 4 April 2024, he acknowledged that the video looked "terrible", particularly as it started towards the end of the interaction with Student A, and he was much bigger than Student A. He said that looking back, it was the dumbest thing he had ever done and he appreciated that he was not there as a student's friend, and that there needed to be a professional boundary between teachers and students.
- (h) He has also provided a letter from his headmaster dated 29 May 2024 stating:
 - (i) he is actively engaged with the school support process, "demonstrating a sincere willingness to listen, grow, and improve his professional practice";
 - (ii) classroom observations show that he has "responded positively to constructive feedback" and has "successfully fostered positive learning environments"; and
 - (iii) the school continues to fully support the respondent.

[22] On that basis, the CAC submits that it is appropriate to:

- (a) censure;
- (b) impose conditions to apply for two years from the date of the decision to the respondent's current practising certificate and any subsequent practising certificate with the respondent to provide a copy of the Tribunal's decision to any current or prospective teaching employer; and
- (c) annotation of the censure and conditions for a period of one year.

[23] The CAC submits that given the nature of the incident and the fact that the respondent was not acting out of frustration and/or anger and has taken the above steps, the CAC does not consider that conditions requiring the respondent to undertake mentoring and/or further professional development is required to further reduce the risk of a similar incident occurring in the future.

Submissions on behalf of the respondent

[24] We did not receive any formal submissions on behalf of the respondent. A letter of support to the Teaching Council dated 25 July 2024 was provided by Head of the Faculty of Social Sciences at the high school. As head of social sciences, she oversaw the respondent in a professional and educational capacity. She stated that the respondent was held in high regard by her, his curriculum subject manager and his colleagues and described the respondent as an impressive relational teacher who is both trusted and respected by his students. He possesses the ability to inspire and motivate even the most reluctant student to achieve at the highest level that he can. His students are engaged, settled and clearly comfortable in his classroom. The respondent is described as displaying concern for everyone with whom he interacts. He is an empathetic and dedicated teacher who cares deeply about his students and his colleagues. He is collegial, co-operative and is a much-valued member of the faculty.

[25] We were provided with the respondent's 07/2024 class feedback survey results across four classes, which assessed how satisfied the students were with their learning in the respondent's class. The average across the four classes was an 8 out of 10.

Discussion

[26] We have seen the video footage and considered the summary of facts. We are not satisfied that the conduct amounts to "misconduct" or "serious misconduct". The respondent was teaching a lesson about the Roman Colosseum and discussing how gladiators fought

with each other. He told the boys that gladiators would sometimes be chained together and have to fight to death. The student involved stood up and jokingly asked the respondent if he “wanted to go”. The respondent initially said no but then the student came to the front of the classroom and the respondent agreed to “fight” with him. We interpret the use of the word “fight” to mean a mock gladiator tussle.

[27] Without repeating the detail, the student and the respondent performed a mock gladiator tussle with each other with the respondent slapping the student on the head as their hands became free.

[28] Another student videoed the interaction. A third student subsequently got hold of the video and edited it and then uploaded the video onto TikTok.

[29] There was no complaint by the student or any student involved in that class. On 20 February 2023, the student’s mother advised the school’s assistant headmaster by phone that the respondent was the student’s favourite teacher and that she and the student had a good laugh at the video at dinner. The student’s mother apologised that the respondent was in trouble.

[30] When we looked at the test for misconduct and serious misconduct under s 10 of the Act:

- (a) The incident did not adversely affect or was not likely to adversely affect the well-being or learning of one or more students. There is no evidence that the student involved was adversely affected at all. To the contrary, he laughed about it with his mother at dinner.
- (b) We do not consider the actions reflected adversely on the respondent’s fitness to be a teacher. While we agree in an ideal world that physical boundaries between students and teachers ought to be maintained, we do not consider the interaction in this particular context of the respondent teaching a lesson about the Roman Colosseum and discussing how gladiators fought with each other as being unacceptable. The interaction was not disciplinary in nature nor was the force used by way of correction or punishment towards the student, which we acknowledge is prohibited pursuant to s 98 of the Act.
- (c) We do not consider in the context that the actions may bring the teaching profession into disrepute.

[31] Having considered that the conduct does not meet any of the three limbs provided for in s 10(a)(i)–(iii), we are not therefore required to consider whether the conduct is of a character or severity that meets the Teaching Council's criteria for reporting serious misconduct.

[32] In our view, the conduct can be no different to a rugby coach engaging with a student showing them how to tackle. Another example might be a drama teacher interacting with a student to give them guidance as to how to be positioned on stage or how to act out a particular scene.

[33] The only comparative case the CAC referred to us was *CAC v Teacher H*,¹⁴ where the deputy principal at the high school on one occasion began playfighting with a year 12 student during a fundraising activity.¹⁵ The playfighting got out of hand leading to the student swearing; Teacher H slapping the student in the back of the head; the student punching Teacher H in the ribs; and Teacher H using a controlled left jab to the student's chin. That case is very different to this case.

[34] We record that this case is not to be viewed as a precedent to justify physical interaction between teachers and students. There will be occasions where physical interaction between a teacher and student is justified. Having regard to the particular facts of this case and the footage, we do not find that the charge has been made out. In reaching that view, we have also considered the views of the student and his mother and have had regard to the respondent's actions following the incident and after the matter was referred to the Teaching Council.

Decision

[35] For the reasons set out above, we dismiss the charge.

[36] We reiterate the steps the respondent has taken since the incident which signal to us how dedicated he is to improve his professional development to provide the best teaching experience for his students. We do not consider there are any conditions required.

Costs

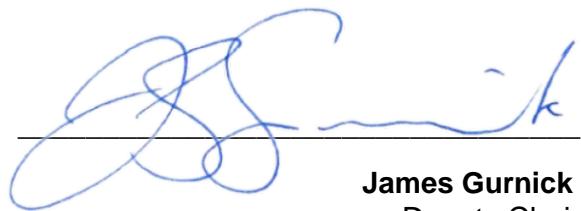
[37] In circumstances where we have dismissed the charge, we do not consider that costs are appropriate. No costs order is made.

¹⁴ Above at [12] to [16].

¹⁵ *CAC v Teacher H*, above n 9.

Non-publication

[38] No applications for non-publication orders were made given the video footage was uploaded to the internet. We therefore make no non-publication orders.

A handwritten signature in blue ink, appearing to read "James Gurnick".

James Gurnick
Deputy Chair
New Zealand Teachers Disciplinary Tribunal