

BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

NZTDT 2022/40

I RARO I TE MANA O TE | Education and Training Act 2020
UNDER THE (the Act)

MŌ TE TAKE | IN THE MATTER of a charge referred to the
Tribunal

BETWEEN | I WAENGA I A COMPLAINTS ASSESSMENT
COMMITTEE (CAC)
Kaiwhiu | Prosecutor

AND | ME KYLIE MICHELLE LEPPER
(Registration 359687)
Kaiurupare / Respondent

Tribunal Taraipiunara	J O'Sullivan (Chair), R McInerney, M Johnson (Members)
Hearing Te Rongonga	AVL, 22 May 2023
Representation Hei Māngai	R. Scott, Harbour Chambers for the CAC J. Brown, NZEI for the Respondent

DECISION OF THE TRIBUNAL

19 January 2024

Introduction | Whakataki

[1] The respondent is charged by the Complaints Assessment Committee (**CAC**) with serious misconduct, and/or conduct otherwise entitling the Tribunal to exercise its powers, for holding a three-year-old child by the hand or arm and hitting him on the head at least once with a plastic spade. The key part of the allegation is that:

Miss Lepper had already asked Child A a number of times that day to stop hitting and pushing his friends. Child A had also been asked by another child not to come near them. Child A then ran up to that child and hit him on the head with a yellow plastic spade, causing the other child to be upset and to run away.

Miss Lepper approached Child A in the outside area near the sandpit and knelt down to his level, asked Child A to give her the spade (which he did) and then—while using her left arm to hold him by the hand or the arm—was seen by Relief Teacher D to strike him lightly on the head with the same yellow spade between one and five times. As she was doing this, Miss Lepper told him “That’s what it feels like, how do you like it”?

Miss Lepper’s voice had been loud enough to attract the attention of Relief Teacher D, who was about 15-20 metres away at the time.

[2] The CAC alleges that the respondent engaged in serious misconduct as defined by s 10 of the Education and Training Act 2020 and rules 9(1)(a), (j) and/or (k) of the Teaching Council Rules 2016 or alternatively that the alleged conduct amounts to conduct which otherwise entitles the Disciplinary Tribunal to exercise its powers pursuant to section 500 of the Education and Training Act 2020 (the **Act**).

Summary of decision | Whakarāpopoto o te whakataunga

[3] In summary, we have found the charge of serious misconduct proved and impose a penalty including censure, annotation and conditions. We have made non-publication orders. Cost orders have been made to take effect on 29 February 2024, but the parties have been granted to leave to address us further on costs and if they do so, we may amend the order before it takes effect.

Agreed summary of facts Whakarāpopoto whakaae o ngā meka

[4] The parties have agreed a summary of facts which records that:

Miss Lepper is a provisionally certificated early childhood teacher. She was first certified on 19 September 2016.

At the time of the events outlined below, Miss Lepper was employed as a provisionally certificated early childhood teacher at BestStart Educare Ltd located in the suburb of St Andrews in Hamilton (**BestStart St Andrews**).

Miss Lepper was formally dismissed from BestStart St Andrews on 6 April 2021, with immediate effect. Her practising certificate expired on 19 September 2022 and has not been renewed.

BestStart St Andrews is an Early Childhood Learning Centre licensed for 92 children, including up to 25 aged under two years. It provides care for these children out of four age-specific rooms, one for infants and toddlers (the Pukeko room), two for those aged between two to four years (the Kiwi and Tuatara rooms) and an area for older children.

Miss Lepper's work environment

At the time of the events outlined below on 26 March 2021, Miss Lepper was working out of the Kiwi room at BestStart St Andrews.

BestStart St Andrews has a Providing Positive Guidance Centre Specific Procedure which identifies techniques to be used in the Centre. Included in this is the statement "Children will not be shouted at or spoken to in a disrespectful manner. Teachers will use a respectful tone to communicate to children framing positively". Also included in this is the statement "Children will be removed from a situation or activity if behaviour is inappropriate. Verbal communication or assistance from another teacher will be given to assist moving a child out of a situation to place them in a safe area if required".

As part of her ongoing performance management, since at least January 2021, Ms Lepper had been working on developing her use of tone and voice with children, and also working on how she talked and engaged with parents and teachers at BestStart St Andrews to enhance the professionalism of her conversations. Her manager was having regular one on one meetings with her to support her through the performance improvement process.

Events on 26 March 2021

On Friday 26 March 2021 at around 1.30pm Miss Lepper and Teacher B were outside in the garden and sandpit area of BestStart St Andrews with approximately 20 children aged between two to four years. Miss Lepper had been digging in the garden and about ten children were helping her with this.

Present at BestStart St Andrews that day was three-year-old Child A. Child A usually had a support person with him to help the staff at BestStart St Andrews manage his challenging behaviour. He also had a behaviour management plan in place that all staff were aware of and have reviewed to provide guidance to manage his challenging behaviours. On 26 March 2021 Child A's support staff member was covering work in another area of the Centre while Child A was outside with Miss Lepper and Teacher B.

Miss Lepper had already asked Child A a number of times that day to stop hitting and pushing his friends. Child A had also been asked by another child not to come near them. Child A then ran up to that child and hit him on the head with a yellow plastic spade, causing the other child to be upset and to run away.

Miss Lepper approached Child A in the outside area near the sandpit and knelt down to his level, asked Child A to give her the spade (which he did) and then—while using her left arm to hold him by the hand or the arm—was seen by Relief Teacher D to strike him lightly on the head with the same yellow spade between one and five times. As she was doing this, Miss Lepper told him "That's what it feels like, how do you like it"?

Miss Lepper's voice had been loud enough to attract the attention of Relief Teacher D, who was about 15-20 metres away at the time.

When Child A responded to Miss Lepper that he did not like this, Miss Lepper explained that that was how his peers were feeling when he hurts them. Child A then went off to play with his friends, seemingly unfazed.

Procedural history

Relief Teacher D reported her concerns at seeing Miss Lepper hitting a child to Sarah Buchanan, the Centre Manager for BestStart St Andrews, on the day of the incident. Ms Shannon Saville, the Area Manager for BestStart Centres, was notified and an investigation commenced.

On 26 March 2021, Miss Lepper was spoken to about this incident. She followed that initial conversation up on 27 March 2021 with an email stating her actions were very out of character and unprofessional, expressing how truly sorry she was for what she had done and acknowledging that her actions should have been strictly verbal and not physical.

Miss Lepper was initially suspended while BestStart St Andrews completed their investigation. At a meeting with Ms Saville on 30 March 2021 Miss Lepper said she had never hit a child before and didn't think she had been yelling at Child A. She acknowledged she didn't ask for help, explaining that she didn't get another staff member to assist as she wasn't feeling great that day, should have had the day off but came in to be there for the Centre. She said her reaction was without thinking and she acknowledged it was not right.

BestStart St Andrews terminated Miss Lepper's employment on 6 April 2021 upon completion of their investigation.

On 11 April 2021 Ms Saville filed a mandatory report to what is now the Teaching Council of Aotearoa New Zealand (the Teaching Council). She also notified Oranga Tamariki who subsequently contacted the New Zealand Police.

On 29 June 2021 the Triage Committee of the Teaching Council of Aotearoa New Zealand (the **Triage Committee**) referred the allegation against Miss Lepper to the CAC. Shortly thereafter an investigator was tasked to investigate the allegation on its behalf. The Triage Committee also invited Miss Lepper to provide a response to the mandatory report that had been filed with it.

In her 21 September 2021 response to the Triage Committee, Miss Lepper acknowledged that she had lightly tapped the child on the head, asked him how that felt and told him "that feeling he was feeling was how his friends felt when he kept hurting them". She said her actions were instinctive, occurred after the child had run up to another child and hit him on the head so hard that he left a mark and upset them, and that following her actions the child she had spoken to was not upset in any way and was happily playing after the incident. She expressed wholehearted regret for her actions, and that there was no excuse for them.

In her response to the Triage Committee, Miss Lepper also indicated that—at the time of the incident—she had personal things going on at home, had been struggling for many months with anxiety and was on medication and was in a constant state of worry about what she was doing as a teacher. On the day of the incident, she said she had had a panic attack on the way to work and earlier that day had spoken to both her manager and the two staff members she was working with at BestStart St Andrews about this. Miss Lepper advised the Teaching Council that she misses teaching and has since been working on her mental health in the hope that she can come back to it.

On receipt of her response to the Triage Committee, Miss Lepper was invited to engage with the Teaching Council's voluntary impairment process for teachers whose health and wellbeing issues may have impacted (or are impacting) on their conduct. Miss Lepper replied the following week, declining the invitation.

The Complaints Assessment Committee met on 25 July 2022. It concluded that Miss Lepper's conduct may possibly constitute serious misconduct and accordingly referred the matter to the Teachers Disciplinary Tribunal under s 497(5) of the Education and Training Act 2020.

The respondent's case | Te kēhi a te kaiurupare

[5] The respondent's position is that:

- (a) She accepts that her conduct was poor practice, and that the Tribunal will make an adverse finding. It is for the Tribunal to determine whether this conduct amounts to misconduct or serious misconduct.
- (b) The CAC's proposed penalty is supported. Miss Lepper would benefit from some training that develops skills relating to challenging student behaviour and mentoring to help her navigate the complex interplay between her health, personal issues, and her professional responsibilities.
- (c) Miss Lepper does not seek permanent name suppression. The CAC's application for permanent name suppression for child A is supported.
- (d) Matters heard on the papers typically attract a costs award of 40% of the costs of both the Tribunal and CAC.

The CAC's case | Te kēhi a te Komiti Aromatawai Whakapae

[6] The CAC position is that:

- (a) The conduct amounts to serious misconduct on the basis that:
 - (i) Rule 10(1)(a)(i): reasonable members of the public may reasonably conclude that the reputation and standing of the profession was lowered by the respondent's conduct. Further, the conduct breaches sections 1.3 and 2.1 of the Code.
 - (ii) Rule s10(1)(b): The respondent's conduct on 26 March 2021 meets the criterion in rule 9(1)(a) because it was unjustified or unreasonable physical force on a child or young, and meets rule 9(1)(j) as assault on a child carries a maximum penalty of 2 years' imprisonment.

(b) That a penalty ought to be imposed as follows:

(i) The respondent is censured.

(ii) That the Teaching Council is ordered to impose on any future practicing certificate issued the following conditions:

1. The Respondent engages a mentor who is provided with a copy of the Tribunal's decision and the mentor shall provide reports to the Teaching Council on the respondent's progress at quarterly intervals for a period of 12 months from the time she returns to teaching; and
2. The respondent must provide a copy of the Tribunal's decision to any current or prospective employer in the education field for a period of 2 years from the time she returns to teaching; and
3. The respondent must complete a programme approved by the Teaching Council that will assist with her management of challenging behaviour by young children in early childhood education within 18 months of returning to teaching.

Legal principles and standards | Ngā mātāpono ture me paerewa

Standard of proof

[7] The burden of proving the charge (on the balance of probabilities), falls on the CAC.

Serious misconduct

[8] Serious misconduct is defined in s 10(1) of the Act as 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] Under the equivalent provisions contained in the Education Act 1989, this Tribunal and the courts held that the test for serious misconduct is conjunctive, and the test remains so.¹

[10] The conduct must have one of the consequences specified in s 10(a)(i)-(iii) and must also be of a character or severity that meets the Teaching Council's reporting criteria.

Reporting criteria and the Code

[11] The reporting criteria for serious misconduct are set out in rule 9 of the Teaching Council Rules 2016 and require the employer to report *serious breaches* of the Code of Professional Responsibility | Ngā Tikanga Matatika (**Code**).

[12] Rule 9 includes (non-exhaustive) examples of conduct that are of the nature and severity to be a serious breach of the Code. The examples relevantly include:²

- (a) using unjustified or unreasonable physical force on a child or young person or encouraging another person to do so;
- (b) an act or omission that may be the subject of prosecution for an offence punishable by imprisonment for a term of three months or more; and
- (c) an act or omission that brings, or is likely to bring, the teaching profession into disrepute.

[13] Whether conduct is likely to bring the teaching profession into disrepute for the purposes of either s 10(1)(a)(iii) or rule 9(1)(k) turns on whether "*reasonable members of the public, informed and with knowledge of all the factual circumstances, could reasonably conclude that the reputation and good standing*" of the teaching profession was lowered by the behaviour of the teacher concerned.³ The approach reflects that whether there has been serious misconduct or misconduct simpliciter,⁴ or not, and the severity of any such misconduct is to be assessed by objective standards

¹ *Teacher Y v Education Council of Aotearoa New Zealand* [2019] NZCA 637 at [67].

² Teaching Council Rules 2016, rules 9(a), (j) and (k) respectively.

³ *Collie v Nursing Council of New Zealand* [2001] NZAR 74 at [28]. Applied by the Tribunal in *CAC v Teacher C* NZTDT 2020/32 at [39].

⁴ If *any* one of the matters under limb (a) of the definition of serious misconduct are made out, the teacher's conduct will amount to misconduct, whereas if the conduct also meets limb (b), the conduct will meet the conjunctive test for serious misconduct; *Teacher Y v Education Council of Aotearoa New Zealand* [2018] NZDC 3141, 27 February 2018, at [64]. *Evans v Teachers Disciplinary Tribunal* [2020] NZDC 20062, 8 October 2020, at [42].

[14] The standards of behaviour expected of registered teachers are contained in the Code. The CAC submits that the relevant provisions of the Code are:

- (a) Section 1.3, which provides that teachers will maintain public trust and confidence in the teaching profession by demonstrating a high standard of professional behaviour and integrity;
- (b) Section 2.1, requiring teachers to work in the best interests of learners by promoting the wellbeing of learners and protecting them from harm.

[15] The CAC refers to an example from the Code as: of behaviour that do not promote learners' wellbeing and which may cause harm in the Code, as: "*inappropriate handling such as physical grabbing, shoving or pushing, or using physical force to manage a learner's behaviour.*"⁵ Further, as an example of conduct which does not demonstrate a high standard of professional behaviour and integrity: "*behaving in a way that damages the trust or confidence that my learners, their family and whānau, my colleagues or others have in me as a teacher, or in the profession as a whole*".⁶

[16] The CAC also referred us to the prohibition on the use of corporal punishment within early childhood services contained in s 24 of the Act:

(1) A person must not—

- (a) Use force, by way of correction or punishment, toward a child enrolled at or attending an early childhood service; ...

(2) In this section, **person** means an individual who—

- (a) Is employed or engaged by a service provider on behalf of an early childhood service...

Liability | Whakataunga Herenga

The Respondent's submissions

[17] The respondent submits it is for the Tribunal to determine whether this conduct was misconduct or serious misconduct. However, the respondent made submissions for the Tribunal to take into account in making its assessment.

Section 10(1)(a) matters

⁵ Education Council | Matatū Aotearoa, *The Code of Professional Responsibility: Examples in Practice* (2017) at 11.

⁶ As above, at 7.

[18] As to the adverse effect or likely adverse effect on the learner, the respondent submits that: “Child A said that he didn’t like being hit, but then went onto play with his friends seemingly unfazed. From this evidence, it is hard to determine whether there was an adverse effect on child A.” While this submission might be relevant to determining the level of adverse effect, the application of physical force to a child must be regarded as having an adverse effect in all but the rarest of cases. This is not such a case. That a child moves on to play is not convincing evidence of a lack of adverse effect but would be reasonably typical conduct for a child where there is no physical impediment to doing so.

[19] As to whether the conduct reflects adversely on the teacher’s fitness to be a teacher, the respondent submits that *“it is accepted that teachers should have a crisp understanding that physical force is not to be used as a means of regulating student behaviour and any use of force puts into question their fitness to be a teacher”*. This is a sensible concession, as the conduct by the respondent clearly reflects adversely on her fitness to be a teacher. Likewise, the respondent concedes that the public expect teachers to understand that force is not to be used to discipline children, and to do so brings the profession into disrepute.

Section 10(1)(b) – Character and Severity

[20] On the question of the character or severity of the conduct (i.e., s 10(2) of the Act), the respondent submits that the Tribunal has occasionally found that the use of force to a student is not of the character or severity to be serious misconduct and instead they have made a finding of misconduct. The respondent refers to the decisions of the Tribunal in *Treanor* and in *Rangihau*, and submits:⁷

In both of these cases light force was used against a student’s head for the purposes of correcting errant behaviour. The head is a vulnerable part of the body and in Māoridom the head is tapu, so any force against a person’s head will be inherently troublesome. Where the misconduct / serious misconduct tipping point is between *Treanor* and *Rangihau* is uncertain, but the degree of distress experienced by the student seems to be a factor. The misuse of force against a student’s head is the same character as that in *Rangihau* and *Treanor*, but the low level of force coupled with the fact that child A appeared unfazed may mean that the conduct was not of the severity to engage rule 9 and may be characterised as misconduct as in *Treanor*.

[21] In *Treanor*, the CAC had submitted to the Tribunal that that the conduct amounted to misconduct rather than serious misconduct. The teacher was provisionally registered and inexperienced. The Kura was a composite rather than an early childhood centre, so while the ages of the children are not noted in the decision, they would have been children older than the child in the present case. The conduct involved Ms *Treanor* walking along a line of girls

⁷ CAC v *Treanor* NZTDT 2019-39.

who were performing, and, using her hand, she pushed student C and student B on the back of their heads to get them [to] apply more effort to their performance[s]. We find the decision of limited assistance, given the different facts, older children involved, the character of the conduct, and the different circumstances. We note that in *Rangihau* the conduct was sufficiently serious as to amount to serious misconduct.

The CAC submissions

[22] In the CAC's submission, a finding of serious misconduct is consistent with prior Tribunal decisions which reiterate that the use of physical force against children is unacceptable, even where the degree of force falls within the "lower level" of physical misconduct. The CAC submits the force was applied for corrective purposes.

[23] The CAC submits that the respondent's behaviour can be differentiated from that which was held not to amount to serious misconduct in *CAC v Mitchell* for several reasons:

- (a) The Tribunal in *Mitchell* concluded that the respondent's use of force in that case was intended to prevent the child from hitting the respondent. In other words, it was a misguided attempt to move the child away and prevent continuation of the child's behaviour rather than the use of force for the purpose of correction or punishment.
- (b) The Tribunal emphasised the difference between physical force deployed in anger or frustration as opposed to the use of force to direct a child. While the latter description applied in *Mitchell*, the respondent's conduct in this case reflected her own frustration.
- (c) The Tribunal specifically distinguished the conduct in *Mitchell* from instances where a child is struck or pushed. In the present matter, although the striking of the child on the head has been characterised by the respondent as "light tapping," the fact remains that conduct of this nature is wholly different from a situation where a child is lifted and placed in a different position to move them away, as was the case in *Mitchell*.

[24] The CAC noted that in *Evans v New Zealand Teachers Disciplinary Tribunal*, the District Court held that if one of the matters in the definition of serious misconduct (now in s 10(1)(a)) is made out, then "*it is a question of whether or not the second limb is met that determines whether conduct is 'serious misconduct' or rather misconduct simpliciter. If the second limb ... is also met, then the conjunctive test elevates misconduct to serious*

misconduct.”⁸ Having regard to the definition of serious misconduct in s 10(1)(a), the CAC’s position is that reasonable members of the public may reasonably conclude that the reputation and standing of the profession was lowered by the respondent’s conduct. The CAC refers in particular to the young age of Child A and his inherent vulnerability, a factor that was relevant to the Tribunal finding in *Chen* of serious misconduct in that case. In *Chen*, the Tribunal observed the “*forceful conduct ... cannot be tolerated towards children of such vulnerable age*” and noted the importance of ensuring the protection and safety of children. The CAC also referred to the prohibition on physical conduct for the purpose of correction on children in early childhood under section 24 of the Act.

[25] The CAC submits that respondent’s conduct breaches sections 1.3 and 2.1 of the Code because:

- (a) It demonstrates a lack of the high standard of professional behaviour and integrity expected of professionals in the respondent’s position. Consistent with the guidance on this section, the respondent’s conduct damaged the trust and confidence of her colleagues as shown by their reporting it to her manager and the fact that the respondent was immediately suspended and subsequently dismissed from her employment at BestStart St Andrews because of this incident.
- (b) It evinces a failure to work in the best interests of learners by promoting their wellbeing and protecting them from harm. The striking of a very young child – even in circumstances where the respondent describes it as “*gentle tapping*” – is the very behaviour identified in the guidance to the Code as conduct that does not promote learners’ wellbeing and which may cause harm.

Analysis | Wewete

[26] Miss Lepper had already asked Child A a number of times that day to stop hitting and pushing his friends. Child A had also been asked by another child not to come near them. Child A then ran up to that child and hit him on the head with a yellow plastic spade, causing the other child to be upset and to run away. Miss Lepper approached Child A in the outside area near the sandpit and knelt down to his level, asked Child A to give her the spade (which he did) and then—while using her left arm to hold him by the hand or the arm—was seen by Relief Teacher D to strike him lightly on the head with the same yellow spade between one and five times. As she was doing this, Miss Lepper told him “That’s what it feels like, how do you like

⁸ *Evans v New Zealand Teachers Disciplinary Tribunal* [2020] NZDC 20062 at [42].

it”? Miss Lepper’s voice had been loud enough to attract the attention of Relief Teacher D, who was about 15-20 metres away at the time. This would be scary for the child.

[27] When Child A responded to Miss Lepper that he did not like this, Miss Lepper explained that that was how his peers were feeling when he hurts them. So, a vulnerable 3-year-old child voiced that they did not like what the teacher did, by hitting him and using a loud voice.

[28] While we are told that Child A then went off to play with his friends, “seemingly unfazed”, we do not consider that this means the conduct had no adverse impact.

[29] The respondent’s use of force was, we find, for “corrective purposes”. This is made clear by what the respondent said to Child A after striking him, saying “that feeling he was feeling was how his friends felt when he kept hurting them.” Further the corrective, if not punitive element, is evidenced in the use of her voice against a three-year-old, raised loud enough to attract the attention of Relief Teacher D, who was 15-20 metres away at the time. Simply raising a voice at a child of that young age can have an impact on them and combined with the striking of the child (albeit lightly), the corrective element is in our view obvious.

[30] He tapu o te upoko is a well-known and widely held belief in tikanga Māori that the head is tapu. The significance and sensitivity of the head of a person is recognised in many cultures. The head is also a more vulnerable part of the body physically. Unwanted touching of the head and face for many people is received as particularly intrusive to their person.

[31] Inherent in the unacceptability of use of force for corrective purposes is the likely adverse impact on learners and their experience of the learning relationship and environment, of the use of force for corrective purposes. It is an approach add odds with good modern teaching practice. The full extent of impact on a particular learner may be difficult to gauge and may not be known until some time later. But we consider it is inevitable that use of force for corrective purposes in an educational setting has an adverse effect to some degree, whenever it is occasioned.

[32] It is of no mitigation to say that a very small child had been hitting other children: that is something that can be expected of small children who are learning how to regulate themselves and to interact with others. This type of behaviour is very common in small children and the profession expects teachers working with children in this environment to use appropriate management techniques. We agree that the respondent’s conduct on 26 March 2021 meets the criterion in rule 9(1)(a) because it was unjustified or unreasonable physical force on a child or young person. As in *CAC v Teacher C*, the respondent could have redirected Child A or sought assistance.

[33] While we understand the respondent herself was under some pressure at the time due to personal difficulties, this does not detract from the unreasonableness of her conduct and the force applied. As we observed in *Chen*, it is expected that teachers act professionally, and this includes the requirement they recognise when they are not coping and take steps to address their stress.

[34] As will be clear, consider that the nature of the respondent's conduct in this case was *likely* to adversely affect the wellbeing or learning of the student involved, that it also reflected adversely on her fitness to be a teacher as resorting to this conduct demonstrated a lack of appropriate skills and management of herself as a professional, and that it is also conduct that may bring the profession into disrepute as it falls well below the standard expected from modern teaching professionals.

[35] We also conclude that the character of the conduct meets the criteria for reporting, as the application of corrective force on a 3-year-old child was unreasonable and unjustified. Further, the severity of the conduct, being repeated hitting (albeit lightly) to the head of a very young child, for corrective purpose and with a raised voice, also meets reporting criteria.

[36] In reaching that conclusion, we have taken into account the reporting criteria for serious misconduct are set out in rule 9 of the Rules and provides non-exhaustive examples of serious breaches. These include using unjustified or unreasonable physical force on a child or young person, which we consider the conduct here to clearly meet: there was no excuse for the corrective force used. Another example provided is an act or omission that brings, or is likely to bring, the teaching profession into disrepute. We consider that this conduct falls far from the standard expected from an Early Childhood teacher and fits within this example also.

[37] For completeness, as the CAC notes, rule 9(1)(j) does not require that the teacher has been convicted or sentenced; all that is required is that the conduct *could* attract a prosecution for an offence punishable by at least three months' imprisonment. Section 194(a) of the Crimes Act 1961 provides that everyone is liable to imprisonment for a term not exceeding two years who assaults any child under the age of 14 years. The respondent's intentional act of applying force to three-year-old Child A meets the definition of assault for the purposes of s 194(a) of the Crimes Act 1961 such that the conduct is in our view serious misconduct for the purposes of rule 9(1)(j).⁹

⁹ Section 2 of the Crimes Act defines "assault" as: "The act of intentionally applying or attempting to apply force to the person of another, directly or indirectly ..."

[38] We accept the CAC submission that the respondent's conduct breaches sections 1.3 and 2.1 of the Code, and agree that the respondent's conduct damaged the trust and confidence of her colleagues, and failed to promote the wellbeing of the child. We add that this type of conduct could be expected to breach the trust placed in the respondent as a professional, by the whanau of the child.

[39] We find without hesitation that this conduct amounts to serious misconduct, and although only paragraphs (i), (ii) or (iii) of rule 10(1)(a) need to be met, we find that all three are here, as well as rule 10(1)(b) as the character and/or severity of the conduct meets the criteria for reporting serious misconduct.

Penalty | Whiu

[40] Having made an adverse finding of serious misconduct, the Tribunal was entitled to exercise its powers under section 500 of the Act. The Tribunal could do one or more of the things set out in section 500(1).

[41] The Tribunal has previously adopted the penalty principles identified in *Roberts v Professional Conduct Committee of the Nursing Council of New Zealand*.¹⁰ In *CAC v McMillan*, the Tribunal summarised the overlapping purposes of a penalty in professional disciplinary proceedings as the protection of the public, the maintenance of professional standards and accountability, and the maintenance of public confidence in the profession.¹¹

[42] In previous decisions the Tribunal has accepted as the appropriate sentencing principles those identified in *Roberts v Professional Conduct Committee of the Nursing Council*.¹² Justice Collins identified factors as relevant whenever an appropriate penalty is being determined in proceedings of this nature, including protection of the public, the setting of professional standards, where appropriate rehabilitation, consistency, the need to assess the practitioner's behaviour against the spectrum of sentencing options that are available. In doing so, the Tribunal must try to ensure that the maximum penalties are reserved for the worst offenders, to endeavour to impose a penalty that is the least restrictive that can reasonably be imposed in the circumstances and to assess whether the penalty it is to impose is fair, reasonable, and proportionate in the circumstances presented to the Tribunal, or not.

¹⁰ [2012] NZHC 3354.

¹¹ *CAC v McMillan* NZTDT 2016/52 at [21], citing *Dentice v Valuers Registration Board* [1992] 1 NZLR 720 and *Young v PCC* HC Wellington CIV 2006-485-1002, 1 June 2007.

¹² [2012] NZHC 3354 at [44]-[51].

[43] We carefully considered the submission of both the CAC and the respondent in the light of these principles.

[44] The respondent submitted the following in mitigation:

In mitigation, Miss Lepper quickly accepted responsibility for her conduct and has engaged with the Teaching Council process. At the time she was mentally unwell and had drawn this to her employer's attention on the day. While it is ideal that people should take leave on such days, we don't know why this didn't happen. Often there is a tension between people's wellbeing, the amount of sick leave that they have and the organisation's ability to get a reliever at short notice. In the ideal world, people would stay home when they are out of sorts, but the world is not ideal. In the early childhood sector, especially the commercial branch, the amount of sick leave people get sits near the statutory minimum which is rarely enough to meet the needs of someone experiencing mental illness. When coupled with the fact that relievers take time to organise and may be unavailable at the last minute, many people often turn up to work and soldier on even when they are at a low ebb. It is not until things go wrong, that they wish in hindsight that they didn't get out of bed that day.

[45] The respondent has expressed remorse and acknowledged that she could have dealt with the situation differently by seeking assistance from a colleague. The inherent vulnerability of three-year-old Child A is a relevant aggravating factor, as is accepted by both the CAC and the respondent. The respondent accepts that the force was used against child A's head and that this is also an aggravating feature.

[46] The respondent had been participating in one-on-one meetings with her manager as part of a performance management process and that she had the opportunity to seek assistance from her manager or her colleagues to help her manage her emotional state on 26 March 2021. Instead of taking this step, she instead resorted to the conduct that led to this charge. The respondent declined the offer to participate in the voluntary impairment process which would have provided her with an opportunity to address the underlying issues that she believes were contributing factors to the incident on 26 March 2021. We do not take this as an aggravating feature, but rather the absence of a mitigating one.

[47] While we acknowledge that the respondent was under personal stress at the time of this incident, as a professional in a role responsible for the care of small children it was important for her to manage that stress appropriately.

[48] It was submitted to us that Child A had a history of challenging behaviour, and his support staff member was not accompanying him that day due to covering work in another area of the Centre. This provides context, but in our view it does not mitigate the conduct of the respondent in a significant way. Children who are challenging are often more likely to be

vulnerable. Besides which, a child hitting another child with a plastic spade is the type of conduct one could expect to occur from time to time in an early childcare setting, although obviously not desirable. There was no imminent or serious danger. This is the type of conduct that a teacher in this context should be expected to deal with appropriately as a professional.

[49] The CAC also submitted as mitigating that Child A was not physically harmed by the respondent's conduct and suggested there has been no specific adverse effect on him. We consider the absence of physical harm relevant in assessing the seriousness of the conduct overall and take it into account, but note these aspects are more in the nature of a reduced or absent aggravating feature, rather than a mitigating feature. We also reiterate our concerns, outlined above that the use of corrective force is often going to have an adverse effect on a learner beyond the physical including the potential to harm the learner-teacher relationship.

Comparable Cases: Penalty

[50] In *CAC v Teacher C*, the Tribunal recognised that the C's conduct was "*at the lower end of the scale*" and acknowledged that the child's behaviour "*may have raised some issues of safety*."¹³ However, the Tribunal did not see sufficient evidence that the respondent had tried to distract or redirect that child, nor did she seek assistance. The Tribunal found the respondent had "*erred in several respects and we are very critical of her judgment as a teacher in early childhood education*."¹⁴ The Tribunal imposed a censure and conditions on the respondent's current and/or future practising certificate to require:

- (a) Completion of the Incredible Years Programme within 18 months of returning to teaching;
- (b) A copy of the Tribunal's decision be provided to any prospective, current or future employer in the education sector for a period of two years from the time she returns to teaching;
- (c) A mentor be approved by the Council for one year from the time she returned to teaching, the mentor to support her with behavioural management and provide quarterly reports to the Council on the respondent's engagement and progress; and
- (d) The register be annotated to reflect the conditions imposed.

[51] In *CAC v Chen*, the Tribunal's assessment of penalty included recognition of the fact that the respondent's new employer had supplied information to indicate she was doing well in a new

¹³ *CAC v Teacher C* NZTDT 2020/32 at [50].

¹⁴ *CAC v Teacher C* NZTDT 2020/32 at [54].

role. The Tribunal was “encouraged that the respondent is showing reflection and professionalism in her current role.”¹⁵ Noting the obligation to impose the least restrictive penalty in the circumstances, the Tribunal imposed:

- (a) censure;
- (b) conditions on the respondent’s practising certificate for two years from the date of the Tribunal’s decision:
 - i. the respondent was required to provide a copy of the Tribunal’s decision to her current employer and any prospective teaching employer;
 - ii. the respondent was required to practise under the guidance of a mentor approved by the Council which could stipulate the form of mentorship and the provision of mentorship reports and updates; and
- (c) annotation of the register for two years to reflect the conditions imposed.

[52] In *CAC v Mitchell*, the respondent’s participation in a performance management plan and mentoring was identified as a mitigating factor. It also led the Tribunal to accept that the imposition of professional development conditions might be unnecessary.¹⁶ The respondent had also accepted an eight-week action plan to address the incident that led to the laying of the charge.¹⁷

Submissions as to penalty outcome

[53] The CAC sought a penalty of censure and conditions on the respondent’s practising certificate to support, in a more formal arrangement, the performance management process she was previously engaged in with BestStart St Andrews.

[54] Consistent with the conditions ordered in *CAC v Teacher C* and *CAC v Chen*, the CAC sought:

- (a) The respondent is censured;
- (b) That the Teaching Council is ordered to impose on any future practicing certificate issued the following conditions;

¹⁵ *CAC v Teacher C* NZTDT 2020/32 at [56].

¹⁶ *CAC v Mitchell* NZTDT 2020/25 at [34(g)] and [35].

¹⁷ *CAC v Mitchell* NZTDT 2020/25 at [40].

- (i) The Respondent engages a mentor who is provided with a copy of the Tribunal's decision and the mentor shall provide reports to the Teaching Council on the respondent's progress at quarterly intervals for a period of 12 months from the time she returns to teaching; and
- (ii) The respondent must provide a copy of the Tribunal's decision to any current or prospective employer in the education field for a period of 2 years from the time she returns to teaching; and
- (iii) The respondent must complete a programme approved by the Teaching Council that will assist with her management of challenging behaviour by young children in early childhood education within 18 months of returning to teaching.

[55] The respondent submitted that "the CAC's approach to penalty is accepted". Further, it was suggested that should Miss Lepper return to teaching, "a mentor that can assist her to manage the complex interplay between her personal wellbeing and her professional responsibilities could be constructive; and some professional development relating to dealing with challenging behaviours in pre-schoolers would be useful". It was submitted that this approach to penalty targets the underlying causes of the conduct.

Decision – Penalty | Whakataunga - Whiu

[56] We agree that the penalty proposed by the CAC, and accepted by the respondent is appropriate. We were assisted by the approach of the parties having considered the rehabilitative conditions that might be applied in this case. We set out our formal directions as to penalty below.

[57] We **order**:

- (a) The respondent is censured for her conduct;
- (b) The Teaching Council is to impose on any future practising certificate issued the following conditions;
 - (i) The Respondent engages a mentor who is provided with a copy of the Tribunal's decision and the mentor shall provide reports to the Teaching Council on the respondent's progress at quarterly intervals for a period of 12 months from the time she returns to teaching; and

- (ii) The respondent must provide a copy of the Tribunal's decision to any current or prospective employer in the education field for a period of 2 years from the time she returns to teaching; and
- (iii) The respondent must complete a programme approved by the Teaching Council that will assist with her management of challenging behaviour by young children in early childhood education within 18 months of returning to teaching.

Permanent Non-Publication Orders | Ngā Whakahau whakaputanga-kore pūmau

[58] The Tribunal's jurisdiction to make non-publication orders is contained in s 501(6) of the Act:

- (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 case, of the person charged or any other person.

[59] The Tribunal has observed that the “default position is the principle of open justice” and that “open justice is paramount to maintain public confidence in the teaching profession through the transparent administration of justice.”¹⁸

[60] Application of the principle of open justice to proceedings before the Tribunal is contained in s 501(3).¹⁹ The Tribunal applies a two-step approach to the determination of applications for non-publication orders.²⁰

- (a) First, whether it is proper to make a non-publication order having regard to the interests identified in the statutory provision.⁴⁰ Assessment of this step requires a deliberative judgment by the Tribunal as to whether it is satisfied that the consequences relied upon would be “*likely*” to follow if no order were made. The Tribunal has stated that “*this simply means that there must be an*

¹⁸ *CAC v Pilgrim* NZTDT 2021/35 (30 March 2022) at [88], [94] (citing *CAC v Teacher* NZTDT 2016/27 at [66]).

¹⁹ For example, *CAC v Teacher P* NZTDT 2021/20 (8 December 2021) at [43].

²⁰ *CAC v Teacher P* NZTDT 2021/20 (8 December 2021) at [45], *CAC v Jenkinson* NZTDT 2018/14 (17 September 2018) at [36].

'appreciable' or 'real' risk. ²¹ The Tribunal must reach a decision based on the evidence before it and no persuasive burden is imposed on the party seeking suppression.

- (b) Second, whether to exercise its discretion to make the orders sought. At this stage of the assessment, the Tribunal is required to consider “*the more general need to strike a balance between open justice considerations and the interests of the party who seeks suppression.*”

[61] The respondent does not seek suppression or advance any evidence to support an order. No order is therefore made in respect of the respondent.

[62] BestStart St Andrew's has **not** applied for non-publication of information identifying it including the names of management staff working at or associated with that centre. The CAC abides the Tribunal's decision but has submitted that publication of this information could conceivably lead to a risk that Child A is identified by families and whānau of children who attend BestStart St Andrew's. We are not aware of any independent grounds upon which non-publication orders are called for in respect of the school and its staff, but the concern that the child may be identified through identifying the school is one that we must consider. We have no information from the school or from the family of the child on this issue. We note that the conduct took place in 2021, at which time the child was three years old, so would now be between 5 and 6 years of age, and likely now at a primary school rather than at the same Centre. On the basis of the current material, we do not consider there is a likelihood that the child would be identified if the school or its staff are identified. However, given the finality of a non-publication decision, we grant leave for the school to file material addressing this point as set out in our directions below.

[63] Finally, the CAC seeks prohibition of the names of the student involved in the incident, in accordance with the protections afforded to young persons under Rule 34 of the Teaching Council Rules 2016. There is no opposition to that by the respondent. The order is appropriate, there is no public interest in the identity of the child and the child by virtue of their young age is vulnerable.

[64] We **order**, permanently, non-publication of the identity of Child A referred to in the notice of charge.

CAC v Jenkinson NZTDT 2018/14 (17 September 2018) at [36]; *CAC v Pilgrim* NZTDT 2021/35 (30 March 2022) at [88].

[65] We **order**, on an interim basis, non-publication of the school and the names of management staff employed by the school at the relevant time. This order **will lapse on 29 February 2024**, unless another order is made by the Tribunal.

[66] We grant the CAC and the school leave to file material **by 28 February 2024** if they consider there is a real risk that publication of the school and staff identities would lead to identification of the child referred to in the notice of charge. If no material is filed, the interim orders will lapse. If such material is filed, it will be referred to the panel to consider and issue a decision on the papers.

Costs | Utu

[67] The CAC acknowledged reduced costs from the usual starting point of 50 percent is appropriate as the respondent accepted liability and agreed to proceed with a hearing on the papers and an agreed summary of facts. The respondent accepts this approach but sought leave to address costs once quantum was known.

[68] On the basis of the material before it the Tribunal is minded to order costs at a level of 40 percent for the CAC costs. Their total costs provided were \$8,228.50 which is a reasonable level and would result in an order for costs (at 40 percent) of \$3,291.40. Having regard to the regrettable delay in the delivery of our decision we make no order for Tribunal costs.

[69] We order the respondent pay the CAC costs of **\$3,291.40**, with the order effective from 29 February 2024, **unless further orders are made by the Tribunal** in the interim.

[70] We **grant the respondent leave** to make submissions on costs, with any memorandum to be filed **within 10 working days of the issue of this decision** unless an extension is sought and granted. The Chair may issue directions on the papers on this aspect. If no other directions are made by the Tribunal on costs in the interim, then our costs order above at [69] **takes effect on 29 February 2024**.



J M O'Sullivan

Chair of the New Zealand Teacher's Disciplinary
Tribunal

NOTICE

1 A teacher who is the subject of a decision by the Disciplinary Tribunal made under section 500 of the Education and Training Act 2020 may appeal against that decision to the District Court (section 504(1)).

2 The CAC may, with the leave of the Teaching Council, appeal to the District Court against a decision of the Disciplinary Tribunal made under section 500 (section 504(2)).

3 An appeal must be made within 28 days of receipt of written notice of the decision, or any longer period that the District Court allows. 4 Clause 5(2) to (6) of Schedule 3 to the Education and Training Act 2020 applies to every appeal under section 504 as if it were an appeal under clause 5(1) of Schedule 3