

BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

NZTDT 2024-37

RARO TE MANA O TE
UNDER THE

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

MŌ TE TAKE
IN THE MATTER OF

of a charge referred to the Tribunal

I WAENGA I A
BETWEEN

**COMPLAINTS ASSESSMENT
COMMITTEE (CAC)**

Kaiwhiu | Prosecutor

ME
AND

██
(Authorisation ██████████)

Kaiurupare / Respondent

Hearing on the papers:
Hei Māngai | Appearance

13 December 2024

J Ah Koy, Meredith Connell for the CAC.
A Kennerley for the respondent

DECISION ON LIABILITY PENALTY AND NON-PUBLICATION

22 January 2025

[1] ██████████ (the respondent) is an early childhood teacher employed at ██████████ ██████████ (the centre). The respondent is before the Tribunal for a single incident involving the use of force on a young learner at the centre on 27 April 2023.

[2] The incident was referred to the Teaching Council in a Mandatory Report dated 3 May 2023, sent by the centre's service provider. Following investigation by the Complaints Assessment Committee (CAC) a notice of charge was laid on 12 July 2024. The respondent accepted the charge, and by consent the matter proceeded as a hearing on the papers. The Tribunal received an agreed

Summary of Facts (the summary of facts)¹ and submissions on behalf of both parties. The respondent also filed an application for permanent non-publication orders with supporting affidavits from the respondent and the centre's service provider.

The Notice of Charge

[3] The respondent is charged with serious misconduct under s10 of the Education and Training Act 2020 (the Act) or conduct otherwise entitling the Tribunal to exercise its powers under s500 of the Act. The single particular of the charge reads that on 27 April 2023 the respondent:

(a) Pulled learner A by their upper arm, pulling and lifting them off the ground.

[4] The charge pleads a breach of rules 9(1)(a) and/or (k) of the Teaching Council Rules 2016 (the Rules).

The Facts

[5] The following outline is based on the summary of facts.

[6] The respondent first registered in 2017 and holds a current practising certificate. She remains an employee at the centre, having received a formal warning for the incident.

[7] In early 2023 the respondent was suffering significant back pain from an undiagnosed spinal injury, which impacted on her ability to use appropriate techniques when lifting children at the centre. Child A was 18 months old and had a habit of turning on the tap of a basin set at toddler height inside the centre. This had been occurring for several weeks before the incident and the respondent was frustrated by this behaviour. On 27 April 2023 at around lunchtime, Child A was observed by the respondent to turn on the tap and walk away, leaving the water running. Then²:

One of the other Kaiako, [REDACTED], was sitting on the floor working with other children. Ms [REDACTED] was about to stand up to turn the tap off when [the respondent] walked out of the sleep room, approached Child A and yelled at him for turning the tap on. Using one hand, [the respondent] then grabbed Child A on his upper right arm with a firm grip. She lifted him up off the ground approximately 350

¹ Summary of Facts signed by the respondent and counsel for the CAC on 14 November 2024.

² Above n1 at [6].

millimetres, moved him forward while he was off the ground and then placed him back on the ground.

- [8] Ms █████ (Kaiako A) intervened, telling the respondent to stop, and the respondent walked away. Kaiako A checked on Child A; the summary records that he was “*not visibly upset, but his arm was red where [the respondent] had grabbed it. The redness went away quickly and no marks were left behind.*”³ Kaiako A reported the incident to the Head Kaiako. Later that afternoon the respondent apologised for her actions to staff and to Child A.
- [9] A few days later the respondent met with senior staff to discuss the incident, and acknowledged she was frustrated and had “*reacted badly*” and “*knew her actions were wrong.*” She took leave to address her back pain. At a subsequent workplace meeting the respondent again expressed her remorse.
- [10] The respondent has undertaken treatment for her back injury and undertaken counselling and completed relevant professional development.

Liability – Principles and Discussion

- [11] Section 10 of the Act sets out the test for serious misconduct as follows:
- (1) Serious misconduct means conduct by a teacher
 - (a) That-
 - (i) adversely affects, or is likely to adversely affect the well-being or learning of 1 or more students; or
 - (ii) reflects adversely on the teacher’s fitness to practise as 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.
- [12] The test is conjunctive, meaning both limbs must be met. If the second limb (a breach of r9 of the Rules) is not met, a finding of ‘bare’ misconduct may still be made.
- [13] Section 24 of the Act expressly prohibits the use of corporal punishment:

³ Above n1 at [8].

- (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; or
 - (b) seclude a child enrolled at or attending an early childhood service.

- [14] This prohibition on corporal punishment is reflected in the Education (Early Childhood Services) Regulations 2008. Regulation 56 is headed “Ill-treatment of children” and includes a requirement that a person employed or engaged in an early childhood service who on reasonable grounds is believed to have physically ill-treated or abused a child, be excluded from contact with children or from the service (pending resolution).
- [15] The Code of Professional Responsibility | *Ngā Tikanga Matatika* sets out high standards of ethical conduct expected of all teachers, regardless of role. Clause 1.3 expects that teachers will maintain public trust and confidence in the profession by demonstrating a high standard of professional behaviour and integrity. Clause 2 requires teachers to demonstrate a commitment to learners and work in their best interests, including by promoting the wellbeing of learners and protecting them from harm (cl 2.1).
- [16] The guidance document titled *Our Code: Examples in Practice*⁴ outlines examples of conduct that is considered to meet or to breach the Code. Reflecting the prohibition on the use of force in s24 of the Act, the commentary to cl 1.3 includes as conduct that will breach the Code:
- inappropriate handling such as physically grabbing, shoving or pushing, or using physical force to manage a learner’s behaviour.
- [17] The CAC submits that the respondent’s conduct is serious, engaging all three limbs of s10(1)(a) and r9(1)(a) of the Rules⁵. Rule 9(1)(refers to a teacher using unjustified or unreasonable physical force on a child or young person. The CAC submits that:
- (a) the conduct was likely to and did affect Child A (who was visibly upset), and there was a risk of injury. The respondent also yelled at the child with the potential to affect his emotional wellbeing, even if temporarily.
 - (b) the respondent showed a lack of patience and inability to regulate her emotions in the work setting, acting out of frustration and showing a lack

⁴ Our Code: Examples in Practice, published by the Education Council June 2017.

⁵ Committee submissions on liability, penalty and costs 15 November 2024.

of regard for Child A's wellbeing. There were other safe ways of managing the behaviour that did not involve the use of force or physical contact.

- (c) the conduct was likely to bring the reputation of the profession into disrepute, and the intervention of Kaiako A "*also speaks to the fact that [the respondent's] conduct was incompatible with the standards expected of teachers.*"
- (d) the conduct was in breach of clauses 1.3 and 2.1 of the Code and may bring the profession into disrepute.
- (e) the respondent lifted Child A off the ground by the arm in circumstances where this was neither reasonable nor justified. The respondent's back injury and impact on her lifting ability is not relevant (that is, because there was no need in the first instance to lift the child).
- (f) for the same reasons relied upon in relation to s10(1)(a)(iii) the conduct engages r9(1)(k), being conduct that brings or was likely to bring the profession into disrepute.

[18] On behalf of the respondent, it is submitted that several mitigating factors are relevant to the gravity of the conduct, namely⁶:

- (a) this was a brief and isolated incident.
- (b) Child A was not visibly upset, the observed red marks quickly went away, and the child still attends the centre.
- (c) the force used was at a low level with no intention to harm Child A.
- (d) the respondent's back injury impacted her manner of lifting the child.
- (e) the respondent acknowledged her conduct and expressed remorse.
- (f) there have been no further safety or disciplinary issues.

[19] Counsel for the respondent submits that the charge amounts to misconduct, but acknowledges that similar behaviour has been held by the Tribunal to amount to serious misconduct.

⁶ Submissions dated 29 November 2024.

- [20] The parties referred the Tribunal to several cases for comparative purposes. Each case involving the use of force against a young learner must be assessed on its facts. In *CAC v Teacher Z*⁷ the teacher yelled at a two-year-old child in response to seeing them kick another, younger child, and then made contact to force the child to the ground. The child was visibly upset. The Tribunal found that while the child suffered no actual injury and the force used was not great, given the child's age there was a risk of serious harm which meant that the conduct could not be viewed as less than serious.⁸
- [21] In *CAC v Carmen*⁹ the teacher loudly instructed a child to get up off a low bed, and when they did not do so, grabbed the back of the child's sweatshirt with one hand and moved them, releasing the child so they dropped to the floor. The teacher was stressed and frustrated and the Tribunal commented that the use of force even in the absence of anger or aggression amounts to 'physical abuse' (as was the phrase used in r9(1)(a) prior to its amendment from 19 May 2018).
- [22] The Tribunal also found serious misconduct in *CAC v May*¹⁰ in which the teacher walked over to a child whom she wanted to go inside the centre, and grabbed their lower arm, swinging them in the air, as a means of getting the child to comply with an instruction. The Tribunal had the benefit of CCTV footage of the incident which it found concerning, and was unimpressed with the teacher's varying explanations for her conduct and apparent lack of appreciation of its seriousness. The Tribunal found that there was an intentional application of force, the force was '*relatively substantial as evidenced by the fact that Child A was swung around*' and was concerned at the intuitive use of force when other reasonable options were available¹¹. No intention to cause harm or evidence of actual physical harm was required for this conduct to meet the 'serious misconduct' threshold.
- [23] The following are two examples in which the Tribunal has found 'bare' misconduct. In *CAC v Teacher S*¹² the teacher placed their hands on a child's shoulders and moved them to a table to work. The child was upset but it was not clear to the Tribunal whether that was due to the teacher's actions or the child's prior behaviour for which he was verbally reprimanded. The CAC argued the

⁷ *Complaints Assessment Committee v Teacher Z* NZTDT 2020/14, 15 September 2020.

⁸ Above n7 at [26].

⁹ *Complaints Assessment Committee v Carmen* NZTDT 2018/21, 5 February 2018.

¹⁰ *Complaints Assessment Committee v May* NZTDT 2019/86, 9 January 2020.

¹¹ Above n10 at [42].

¹² *Complaints Assessment Committee v Teacher* [2018] NZTDT 5, 21 August 2021.

charge at the level of misconduct and the Tribunal agreed. The use of force was short-lived, involved the application of only a little pressure and was an attempt to guide the student without any anger or intention to correct the student's behaviour.

- [24] In *CAC v Emile*¹³ the teacher reacted to one child pushing another by pushing the child with one hand, and the child fell over. The teacher said they did not remember the incident. The evidence was that the child was unharmed. The incident was observed by another teacher who described it as very brief, and who could not speak to the Ms Emile's motivation. The witness did not consider it necessary to check on the child, say anything to Ms Emile, or immediately report the incident. The Tribunal did not consider it met the threshold of 'physical abuse' under r9(1)(a) (as it then was).

Liability - Findings

- [25] The Tribunal found this case to be finely balanced with regard to the threshold for serious misconduct. We accept that the defendant was influenced in her reaction by an injury and the pain this was causing her. The evidence indicates an absence of injury or obvious distress to the child, and the respondent immediately acknowledged she acted inappropriately and has taken steps to address this. However, focussing on the conduct itself, the respondent acted out of frustration in response to conduct that was not posing any risk of harm to Child A or to others, and resorted unnecessarily to a physical and potentially harmful response. The child's young age (18 months) is relevant.
- [26] With regard to the test for serious misconduct, the conduct – as an isolated incident and not a general commentary on the respondent's fitness – does engage s10(1)(a)(ii). The respondent has acknowledged this in terms of undertaking appropriate professional development and other steps to avoid a similar reaction occurring. On balance, we also find that the conduct has the potential to bring the profession into disrepute, considering the matter from the perspective of an objective member of the public walking into the centre and observing the incident. We consider that it would likely be viewed as unprofessional, including with the knowledge that Child A's behaviour was

¹³ *Complaints Assessment Committee v Emile* [2016] NZTDT 51, 14 December 2016.

recurring.¹⁴ An appropriate response would be to redirect and to promote a change in behaviour in a positive way. The respondent's use of physical force was unnecessary in the circumstances outlined in the summary of facts, and more than trifling in that the child was picked up by the arm and moved. This being unjustified, r9(1)(a) is engaged.

Penalty

[27] Having found the charge provide, the Tribunal is required to consider the exercise of its powers under s500 of the Act. The principles of penalty in disciplinary proceedings are well-established, being to protect the public, and to maintain professional standards and public trust and confidence in the teaching profession. There are a range of penalties available to the Tribunal. We are required to impose a penalty that is fair, reasonable and proportionate, and is the least restrictive penalty that is appropriate in the circumstances. The Tribunal should also aim for consistency with similar cases.

[28] In reliance on similar cases including those referred to above, the CAC submitted that an appropriate penalty is:

- (a) censure.
- (b) annotation of the register for a period of 12 months.
- (c) the imposition of conditions on the respondent's practising certificate for a period of 12 months:
 - (i) that the respondent notifies her employer or any prospective employer in the teaching profession of the Tribunal's decision;
 - (ii) that the respondent undertakes further professional development relating to managing child behaviours.

[29] The respondent's submissions outline the penalty principles, as described, and note the guidance in *Roberts v Professional Conduct Committee of the Nursing Council*¹⁵ which the Tribunal is familiar with and has applied. The respondent accepts the CAC's position but submits that the Tribunal may consider that the

¹⁴ We have applied the test in *Collie v Nursing Council* [2001] NZAR 74 at [28] to the effect that reasonable members of the public informed of the facts and circumstances could reasonably conclude that the reputation and standing of the profession is lowered by the respondent's conduct.

¹⁵ [2012] NZHC 3354 at [44]-[51].

respondent has undertaken sufficient professional development such that it is not necessary to impose a condition in this regard.

[30] It is usual to take into account aggravating and mitigating factors when determining an appropriate penalty. The main aggravating factors in this case are the child's young age and absence of any justification for yelling or physically moving the child.

[31] The mitigating factors that are relevant to penalty are:

- (a) the absence of prior disciplinary history, cooperation with the CAC and the disciplinary proceedings.
- (b) the respondent's acknowledgement that the conduct was inappropriate.
- (c) the support of the respondent's employer, and continued relationship with Child A.
- (d) that the respondent has obtained treatment for her back injury.
- (e) that the respondent has engaged in counselling, completed the Incredible Years course, and attended courses for mindfulness techniques and meditation for dealing with frustration and anger.

[32] In *CACv Teacher Z*¹⁶ the Tribunal imposed censure, conditions including undertaking the Incredible Years course or similar, a requirement to disclose the condition to any new employer and annotation of the register for two years. In *CAC v Carmen*¹⁷ the Tribunal was satisfied the incident was isolated and the respondent had been impacted by ill-health, and imposed censure, annotation and conditions for a 12-month period involving a disclosure requirement and engagement with a mentor. In *CAC v Emile*¹⁸, the Tribunal imposed censure, annotation of the register and conditions for a 12-month period requiring disclosure of the decision and that the teacher undertake an approved course in behaviour management. Reflecting the more serious nature of the incident and absence of apparent insight of the teacher, the Tribunal imposed cancellation and censure in *CAC v May*¹⁹.

¹⁶ Above n7.

¹⁷ Above n9.

¹⁸ Above n13.

¹⁹ Above n10.

[33] On the basis of the steps already taken by the respondent, her acknowledgment of her conduct and the one-off nature of the incident that falls at the lower end of seriousness, we consider that censure and annotation are appropriate, together with a condition requiring the respondent to disclose the Tribunal's decision to her current or prospective employer for a period of 12 months. We do not consider it is appropriate in the circumstances to require the respondent to undertake further professional development as part of this penalty.

Costs

[34] Pursuant to s500(1)(h) of the Act the Tribunal may order costs in favour of a party following the hearing of a disciplinary charge. Costs are guided by the Tribunal's Practice Note on Costs. Helpful guidance on the principles of costs in disciplinary proceedings is also set out at length in *A Professional Conduct Committee v Brown*²⁰.

[35] The CAC seeks a contribution of 40% of the costs incurred in the prosecution of the proceedings. This is consistent with the Tribunal's practice of ordering costs at this level where a party has cooperated to resolve a matter expediently. The CAC's costs schedule outlines total costs in the sum of \$11,316.00, 40% of which is \$4,526.40.

[36] The essential principle of costs in disciplinary proceedings is that the profession as a whole should not bear the full costs of the matter. For the same reason the Act allows the Tribunal to make an order in favour of the Teaching Council, under s500(1)(i). The practice is for the Council to charge a fee for hearings on the papers, which is currently \$1455.00. This does not reflect the actual costs incurred. A contribution of 40% is \$582.00.

[37] The respondent seeks an order for a reduced contribution towards costs, in reliance (essentially) on the timing of the referral by the CAC to the Tribunal. The mandatory report was made on 27 April 2023. The CAC determined to refer the matter on 26 July 2023, at which time the CAC was required to refer any matter to the Tribunal that it considered may possibly constitute serious misconduct. On 29 July 2023 an amendment to the Act came into force which requires the CAC to refer matters where suspension or deregistration are considered to be likely

²⁰ [2024] NZHC 990.

consequences, but enables the CAC to resolve other matters by agreement, including those it considers may amount to serious misconduct. Accordingly, counsel for the respondent submitted that this matter would not have come before the Tribunal had another few days elapsed before the drafting of the charge. Counsel advised that they invited the CAC to withdraw the charge on the basis of an agreed penalty.

- [38] The CAC submits, and we agree, that the respondent's position overlooks the fact that the CAC may "*at any time, refer a matter to the Disciplinary Tribunal for a hearing*" under s497(4) of the Act, and was entitled to do so before and after the July 2023 amendment. The CAC was not obliged to withdraw the charge and, having laid the charge, the Committee was 'functus officio' and had no power to impose a penalty, even by consent.
- [39] For the Tribunal to depart from an order in the vicinity of a 40% contribution in a case such as this requires either a finding that the costs sought are unreasonable (we do not consider the circumstances described establish this); or evidence of the respondent's financial position showing an inability to meet an award or that this will cause significant hardship. No evidence has been filed to provide evidence on either basis. Accordingly we will make an order for costs as sought.

Non-publication orders

- [40] Section 501 of the Act provides that hearings of the Tribunal should be in public, as is consistent with the principles of open justice. The Tribunal may order non-publication of names, evidence, or the whole or part of any documents produced in the proceedings: s501(6). Such order may be made if in the Tribunal's opinion it is "proper" to do so, taking into account the interests of any person and the public interest. The Tribunal will have regard to the evidence before it, and whether any adverse risk asserted to follow from publication is likely to occur, such that it may consider it proper to make an order.
- [41] The Tribunal is also required pursuant to r34 of the Rules to protect the interests of children and other vulnerable people when considering non-publication orders. In this case, interim orders were made by consent prior to the hearing suppressing the name of Child A out an abundance of caution, as the child is not named in the charge. It is appropriate that this order is made permanent as there is clearly no public interest in the child's identity being known. An interim order was also made by consent in favour of the respondent and the centre, without

prejudice to the CAC's position on any permanent application.

[42] Applications for permanent non-publication orders were made by the respondent, with the support of the centre. Subsequent to the hearing a separate application was received on behalf of the centre.²¹

[43] The respondent filed a supporting affidavit together with a letter from her general practitioner. The grounds on which the respondent seeks an order are summarised as follows:

- (a) acknowledgement that her handling of Child A was an "*unsafe practice*" and that she is "*very remorseful*."
- (b) the back injury impacted her lifting technique, and she has since sought medical treatment.
- (c) rehabilitative steps have been taken namely the respondent has completed the Incredible Years programme, attended a course "Taming an Angry Mind", and undertaken counselling and meditation aimed at self-regulating her response to challenging behaviour.
- (d) there have been no further issues in relation to her conduct at the centre.
- (e) as a consequence of these proceedings the respondent has suffered from anxiety, low mood, lack of sleep, and at one time during the disciplinary process, suicidal thoughts, and has consulted her general practitioner.

[44] The respondent's affidavit supports these submissions and indicates ongoing difficulties with her mental and physical health. The respondent's GP writes that the respondent was seen in July and October 2024 due to distress attributed to the disciplinary proceedings, with symptoms affecting her daily life, sleep and physical health.²² The letter does not directly comment on the matter of publication and the likely impact on the respondent however the respondent's affidavit expresses a concern that publication will further impact her health negatively and concludes:

²¹ The application filed by way of a memorandum on behalf of ██████████ ██████████ is dated 20 December 2024, by which time the Tribunal had conducted the hearing on the papers and determined to grant the respondent's application. Accordingly, the Tribunal did not reconvene or consider it necessary to seek further submissions from the parties as this further evidence did not make a material difference to the findings already made.

²² Letter from ██████████ dated 7 November 2024.

11. I feel that not allowing name suppression would set me back hugely emotionally and physically, and could have serious negative impacts on my mental health moving forward.

12. I am also worried that the publication of my name will detrimentally affect the good name of my preschool...

[45] The affidavit of ██████████ the centre's service provider dated 29 November 2024 describes the centre's location in a small community with only two early childcare services, and that it is the only centre-based provider in the area that caters to under-tuos. The affidavit refers to the centre's good reputation (annexing ERO reports in support) and absence of any previous need to file a mandatory report with the Teaching Council over nearly 30 years. Ms ██████████ deposes that identifying the respondent will identify the centre and potentially the child.

[46] The CAC opposes the application by the respondent. While indicating that the committee does not view the centre's grounds as particularly compelling, the CAC is neutral as to whether it may also be subject to an order²³. The CAC acknowledges that there may be a risk of identifying the Child A given the small roll and small community.

[47] In opposing the respondent's application, the CAC refers to the respondent's "*rough handling*" of Child A and submits that there is a "*strong public interest in publication in these cases.*" The CAC submits that the reputational harm asserted is no more than the ordinary consequence of publicity of an adverse disciplinary finding, as are anxiety and stress ordinary consequences of proceedings. The CAC submits that the evidence filed in support of the respondent's mental health difficulties is insufficiently detailed to render non-publication 'proper'.

[48] Non-publication orders are within the discretion of the Tribunal. In this case we accept that the respondent's interests outweigh the public interest in her name being published in relation to these proceedings. We are satisfied on the evidence that there is no ongoing risk of harm with regard to the respondent's practice, and that the respondent has acted professionally in her response to this incident, off-setting the otherwise strong public interest in publication. The

²³ Committee submissions in reply 5 December 2024.

respondent has satisfied the Tribunal that she has genuine concerns for her mental well-being in particular.

- [49] The small community and lack of choice for parents with children aged under two and the interests of Child A and his family are also matters we have taken into account. With regard to the centre, these factors are also important as is their ongoing relationship with the family, and the risk of suspicion falling on others if it is named and the respondent is not. For these reasons we consider it appropriate to suppress the name and location of the centre. We consider that the purposes of the Act can adequately be met with publication of a decision with these features redacted.

Orders

- [50] Accordingly, the Tribunal makes the following orders pursuant to s500 of the Act:
- (a) The respondent is censured: s500(1)(b).
 - (b) A condition to be imposed on the respondent's practising certificate pursuant to s500(1)(c):
 - (i) The respondent is to disclose a copy of the Tribunal's decision to a current or prospective employer for a period of 12 months.
 - (c) Annotation of the register for a period of 12 months, pursuant to s500(1)(d).
 - (d) The respondent to pay costs to the CAC pursuant to s500(1)(h) in the sum of \$4526.40.
 - (e) The respondent to pay costs to the Teaching Council pursuant to s500(1)(i) in the sum of \$582.00.
- [51] The Tribunal makes the following permanent orders for non-publication pursuant to s501(6):
- (a) The name and identifying particulars of the respondent, [REDACTED]

- (b) The name and location ([REDACTED] of [REDACTED] [REDACTED]
- (c) The name of the child referred to in the notice of charge as Child A.



Catherine Garvey
Deputy Chair of the New Zealand Teacher's
Disciplinary Tribunal