

BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

NZTDT 2023-92

I TE TAKE O the Education and Training Act 2020
In the matter of

ME

And

I TE TAKE O a charge referred by the Complaints
In the matter of Assessment Committee to the New
Zealand Teachers Disciplinary
Tribunal

KO

Between

Complaints Assessment Committee

Kaiwhiu | Prosecutor

ME

And

Barbara Etzinger

Kaiurupare | Respondent

TRIBUNAL DECISION

8 January 2025

NOHOANGA:
Hearing

Held on 29 May 2024 on the papers via Teams

TE TARAIPUNARA:
The Tribunal

Ian Murray (Tiamana Tuarua)
Kiri Turketo raua ko Demian Shaver (Ngā mema o te
Taraipunara)

**NGĀ ROIA ME NGĀ
KAIAWHINA:**
Representation

Evan McCaughan for Complaints Assessment Committee
The Respondent is self represented

Hei timatanga kōrero – Introduction

1. The Complaints Assessment Committee (CAC) has referred a charge of serious misconduct and/or conduct otherwise entitling the Tribunal to exercise its powers. In a Notice of Charge dated 14 December 2023, the CAC alleged that the respondent:
 - (i) on or around 26 October 2022, slapped and/or flicked a student on the face.

2. The CAC contends that this conduct amounts to serious misconduct pursuant to section 10 of the Education and Training Act 2020 (the Act) and rules 9(1)(1)(a) and (k) of the Teaching Council Rules 2016 (the Rules); or conduct that otherwise entitles the Disciplinary Tribunal to exercise its powers under s 500 of the Act.

Whakarāpopoto o te whakataunga – Summary of decision

3. We concluded that the charge was established. We concluded that the conduct did not amount to serious misconduct but did amount to misconduct.

4. By way of penalty we made the following orders:
 - a. Annotation of the register for a period of 2 years.

 - b. That the following condition is imposed on any practising certificate issued to the respondent for a period of 1 year following the Tribunal's decision (s 404(1)(c));
 - i. To provide a copy of the Tribunal's decision to any teaching employer.

5. We ordered the respondent was to pay 40% of the CAC and Tribunal's costs and we also ordered non-publication of the student's name and the name of the respondent's current school.

Kōrero Taunaki – Evidence

6. Before the hearing the parties conferred and submitted an Agreed

Summary of Facts (ASF), signed by the respondent and counsel for the CAC. The ASF is set out in full:

Introduction

- 1 Ms Etzinger was first registered as a teacher on 11 July 2014. Her current practising certificate expires on 1 March 2025.
- 2 At the time of the incident that is the subject of the charge, Ms Etzinger was working at King's College, a private co-educational secondary school located in Otahuhu, Auckland. Ms Etzinger had been teaching at the school since 2018.

Incident: on or around 26 October 2022, Ms Etzinger slapped and/or flicked a student on the face.

- 3 On 26 October 2022, Ms Etzinger was walking past a Year 13 Business class. When Ms Etzinger passed by the classroom, a male Year 13 student (**Student A**) said: "Hi Barb". In response, Ms Etzinger lightly slapped Student A's face. The contact was loud enough to make a sound and left a small mark which quickly faded.
- 4 Student A was not upset by the incident at the time.
- 5 Later that afternoon Ms Etzinger sent Student A an email saying, "I just wanted to apologise for my instinctive reaction this afternoon". Student A subsequently replied, "No worries at all was all fun and games don't worry about it sorry for calling you by your first name".
- 6 Student A considered that, before this incident, he had a good relationship with Ms Etzinger. Student A did not initially complain about the incident but was prompted

to do so on 1 November 2022 after speaking with other teachers about it and realising it was "serious".

School investigation

- 7 On 7 November 2022 Ms Etzinger provided a statement about the incident:
- (a) She admitted that she had hit Student A's face when he had said something along the lines of "Hello Barbs".
 - (b) She was immediately shocked by her actions.
 - (c) She believed that "my mental health tank was completely depleted, which caused me to react to [Student A's] comment the way I did."
 - (d) She advised:
 - (i) Her parents (who lived in England) had both been very ill.
 - (ii) She had some financial concerns at the time.
 - (iii) She had several work-related stresses, including her extensive involvement in extra-curricular activities.
 - (iv) Student A was in her class the previous year and had called her by her first name several times. She had spoken to him multiple times about this not being appropriate.
 - (v) "Unfortunately I snapped when [Student A] not only called me by my name but a familiar nickname in front of his friends - possibly to get a laugh."

(vi) "I deeply regret what I did to [Student A] and wish that I could rewind the clock and undo it all. If appropriate, I would appreciate the opportunity to apologise personally to [Student A]."

8 On 10 November 2022, the school's Principal, Ms Etzinger, and her representative met to consider the matter. The Principal subsequently advised Ms Etzinger by letter on 14 November 2022 that the school's preliminary view was that she should be summarily dismissed.

9 Ms Etzinger subsequently agreed with the school that she would go on medical leave for the remainder of the year and resign with effect from 31 January 2023.

Teaching Council/ CAC investigation

10 The school filed a mandatory report on or about 29 November 2022.

11 In response to the mandatory report Ms Etzinger advised on 13 December 2022 that:

(a) She admitted slapping Student A, and that she had "over stepped professional boundaries".

(b) The night before the incident she had a particularly poor night's sleep as she had spoken to her parents around 9pm and discovered that her mother had suffered a particularly bad fall and was in a lot of pain.

(c) In hindsight she should have taken a day's leave

but she decided to go to work as she only had 2 classes to teach that day and it was the last week of classes for the senior students.

- 12 On 6 May 2023, Ms Etzinger advised she had taken a number of steps which she considered would help her avoid physical and mental exhaustion in the future:
- (a) She was now working at a school where she was not involved in extra-curricular activities.
 - (b) Her current headmaster was very supportive of her.
 - (c) On 22 March 2023 she attended the "Building resilience and mental wellbeing for teachers and students" course at the Kohia Centre, Epsom Campus in Auckland.
 - (d) She had weekly meetings with another staff member "to keep tabs on my mental and emotional wellbeing."

7. We must be satisfied on the balance of probabilities that the CAC has proved the charge. In this case, the admissions in the summary of facts provide an adequate basis to establish the charge. Accordingly, we find that the charge is proved.

Hapa Taumaha - Serious Misconduct

8. It is for the Tribunal to be satisfied that the established conduct amounts to serious misconduct or conduct otherwise entitling the Tribunal to exercise its powers.
9. Serious misconduct is defined in section 10 of the Act as:

serious misconduct means conduct by a teacher—

a. that—

- (i) adversely affects, or is likely to adversely affect, the well-being or learning of 1 or more students; or

- (ii) reflects adversely on the teacher's fitness to be a teacher; or
 - (iii) may bring the teaching profession into disrepute; and
- b. that is of a character or severity that meets the Teaching Council's criteria for reporting serious misconduct.

10. In this case the relevant reporting rules alleged to be engaged are:

(a) using unjustified or unreasonable physical force on a child or young person:

(k) an act or omission that brings, or is likely to bring, the teaching profession into disrepute.

Ngā Kōrero a te Kōmiti - CAC submissions

11. The CAC set out the basis on which the alleged conduct met the threshold of serious misconduct. It argues that the three criteria in s 10(a) are met and that the two reporting rules are also established. The CAC argued "Whilst acknowledging that the level of force used was at the lower end of the spectrum, in terms of r 9(1)(a) Ms Etzinger's use of force was nevertheless both unjustified and unreasonable. To her credit, Ms Etzinger has not attempted to justify it.

12. The CAC provided a number of similar cases where serious misconduct was established by the use of physical force against a student. They argue that these support their submissions on serious misconduct.

Ngā Kōrero a te Kaiurupare - Respondent's submissions

13. The respondent did not explicitly address whether her conduct amounted to serious misconduct and rather she offered an explanation of her personal circumstances to provide context for her behaviour.

Kōrerorero – Discussion

14. Ultimately, we must be satisfied that the respondent's conduct meets at least one of the definitions of serious misconduct in section 10 of the Act, as well as being of a character or severity that meets the criteria for

reporting serious misconduct contained in rule 9.

15. The Tribunal has considered the use of force by teachers on a number of occasions. *CAC v Grace*¹ and *CAC v Taylor*² are representative of the orthodox position we have taken on physical force against children. This type of conduct will ordinarily be serious misconduct but, as with all cases, we are required to make a fact specific analysis of the amount of force used and the context in which it was used.³
16. The starting point is s 139A of the Act which has prohibited the use of force by teachers for the purposes of correction since July 1990.
17. Turning to the two-stage test in s 10 and rule 9.⁴ The first criteria is the effect of the behaviour on students. Ordinarily because the incident occurred in the school environment, involving a student under the respondent's authority, and involved physical contact with that student, we would usually conclude the respondent's conduct was likely to adversely affect the wellbeing or learning of the student involved and students witnessing the incident. However, this is not an ordinary case. Here the evidence suggests that the student was unaffected by the respondent's use of force and that only changed when a different teacher advised him what occurred was serious.
18. We are not willing to speculate that there was a risk that a different student with "a different temperament could easily have been adversely affected". It may be that a student with a different temperament may not have been inclined to speak to a teacher in the way the student in this case did.
19. While we do not wish to minimise the behaviour involved in this case or undermine the established body of decisions by this Tribunal where almost universally we have found an impact on students through the use of force by a teacher on a student, in the unusual circumstances of this case we ultimately found that there was insufficient evidence to establish this

¹ *CAC v Grace* (NZTDT 2017-6).

² *CAC v Taylor* (NZTDT 2017-41).

³ See for example *CAC v Teacher* NZTDT 2016-50.

⁴ *Teacher Y v Education Council of Aotearoa New Zealand* [2018] NZDC 3141 at [64].

- criteria.
20. While the case involved a momentary loss of control, nonetheless the respondent acted in a highly inappropriate way. It is the antithesis of how teachers are trained to manage students. In our view, this behaviour by a teacher clearly adversely reflects on her fitness to be a teacher.
 21. The test for deciding whether a teacher's actions are likely to bring the teaching profession into disrepute is informed by the conclusions of the Court in *Collie v Nursing Council of New Zealand*.⁵ It is an objective test and requires consideration of whether reasonable members of the public informed of the facts and circumstances, could reasonably conclude that the reputation and good standing of the profession is lowered by the respondent's actions.
 22. To decide whether the behaviour in question may bring the teaching profession into disrepute, we considered the respondent's conduct in its proper context. While the combination of her crushing workload and difficult personal circumstances did not excuse her behaviour, it did explain it. With that context in mind, we concluded that a reasonable member of the public informed of the facts and circumstances, would not reasonably conclude that the reputation and good standing of the profession was lowered by the respondent's actions.
 23. Turning to our analysis of Rule 9, usually the use of force by a teacher would be unjustified or unreasonable physical force, However, if the use of any degree of force triggered this rule, then there would be no need for the modifying words "unjustified or unreasonable". So we need to make a fact specific assessment in this case. We do not see s 139A as engaged because the force used was not for correction but was an ill-considered and instinctive response by a teacher whose emotional well had run dry. We found this a difficult decision but ultimately we concluded that the behaviour while unacceptable, was not "unjustified or unreasonable" because of the difficult personal circumstances and the unusual

⁵ *Collie v Nursing Council of New Zealand* [2001] NZAR 74.

circumstances of the incident.

24. The respondent says she was burnt out from a combination of the workload at school and the extra curricular activities she supervised. She was also dealing with illness of her elderly parents who lived abroad. She had had a poor sleep and acted out instinctively at a time when she was overwhelmed. She was immediately remorseful and the student (who was in his final year at High School) appeared unaffected by the incident. The incident was not intended at correction or intended to harm but was an unfortunate instinctive reaction by someone at a very low point in their life.
25. We want to make it clear that teachers should not misinterpret this as any form of justification for the use of physical force. Quite the opposite. We recognise that physical force will almost always be unjustified or unreasonable and it was only the unusual set of circumstances in this case that made it not so,
26. We have already found the conduct did not bring discredit to the teaching profession.
27. As a result, the criteria for reporting serious misconduct are not established. However, the criteria for misconduct may be established so we turn to consider that issue.

Hapa - Misconduct

28. Having concluded that the statutory criteria for serious misconduct were not established, we have to then consider whether this behaviour amounts to misconduct.
29. The test for misconduct is not defined by the statute. However, the Court of Appeal have outlined the approach for determining whether behaviour amounts to misconduct:⁶

...if one of the matters in limb (a) of the definition [of serious misconduct] is made out, the question whether limb (b) is met

⁶ *Evans v Complaints Assessment Committee of Aotearoa New Zealand* [2021] NZCA 66 at [6] citing *Teacher Y v Education Council of Aotearoa New Zealand* [2019] NZCA 637.

determines whether the conduct is “serious misconduct” or “misconduct simpliciter”.

30. So, in deciding whether this respondent’s conduct amounts to misconduct we need to look only at the criteria in section 10(a) of the Act
31. Having found one of the criteria in s 10(a) was established then this conduct could amount to misconduct, and ultimately, we concluded that it did amount to misconduct. Accordingly, the behaviour is such that it entitles the Tribunal to exercise its disciplinary powers.

Whiu - Penalty

32. In *CAC v McMillan*,⁷ we summarised the role of disciplinary proceedings against teachers as:

... to maintain standards so that the public is protected from poor practice and from people unfit to teach. This is done by holding teachers to account, imposing rehabilitative penalties where appropriate, and removing them from the teaching environment when required. This process informs the public and the profession of the standards which teachers are expected to meet, and the consequences of failure to do so when the departure from expected standards is such that a finding of misconduct or serious misconduct is made. Not only do the public and profession know what is expected of teachers, but the status of the profession is preserved.

33. Our powers on finding serious misconduct are contained in section 500 of the Act:
- a. any of the things that the Complaints Assessment Committee could have done under section 497(2):
 - b. censure the teacher:
 - c. impose conditions on the teacher’s practising certificate or authority for a specified period:
 - d. suspend the teacher’s practising certificate or authority for a specified period, or until specified conditions are met:
 - e. annotate the register or the list of authorised persons in a specified manner:
 - f. impose a fine on the teacher not exceeding \$3,000:
 - g. order that the teacher’s registration or authority or practising

⁷ NZTDT 2016/52, 23 January 2017, paragraph 23.

- certificate be cancelled:
- h. require any party to the hearing to pay costs to any other party:
 - i. require any party to pay a sum to the Teaching Council in respect of the costs of conducting the hearing:
 - j. direct the Teaching Council to impose conditions on any subsequent practising certificate issued to the teacher.

Ngā Kōrero a te Kōmiti – CAC Submissions

34. The CAC proposed the following penalty:

- (i) Censure;
- (ii) Annotation of the Register (for 12 months);
- (iii) Conditions (to apply for 12 months from the date of the Tribunal's decision to any current or future practising certificate):
 - (A) To provide a copy of the Tribunal's decision to her employer.
 - (B) To practice under the guidance of a mentor approved by the Teaching Council (with the mentor to provide quarterly reports to the Teaching Council in a form acceptable to the Council).
 - (C) To attend any further education courses that the Teaching Council requires.

Ngā kōrero a te Kaiurupare – Respondent's submissions.

35. The respondent did not explicitly address penalty.

Kōrerorero - Discussion

36. We were impressed with the respondent's reflective statement and the insight she showed. We were also impressed with the reference from her current school. She clearly has the support of this school and the principal and we were impressed with the support she was being provided. We are confident that a repeat of this behaviour is highly unlikely. We also recognise that there was context to the misconduct. While this does not excuse the behaviour, it does explain it. We also accept that the behaviour is very unlikely to be repeated.

37. We want to impose a penalty that acknowledges the relative seriousness of what occurred but one that will also assist the respondent to continue to rehabilitate and improve her teach practice. We do not consider censure is appropriate where we found only misconduct. While we see force in the conditions suggested by the CAC, we consider that the way the school is managing the situation renders some of these proposed conditions unnecessary.

38. As a result we make the following orders:

- a. Annotation of the register for a period of 2 years.
- b. That the following conditions are imposed on any practising certificate subsequently issued to the respondent for a period of 1 year following the Tribunal's decision (s 404(1)(c));
 - ii. To provide a copy of the Tribunal's decision to any teaching employer.

Utu Whakaea - Costs

39. The CAC sought a contribution of 40% of its costs under s 404(1)(h). The respondent has not specifically addressed the issue of costs

40. The Tribunal has previously indicated that costs of 40% will ordinarily be appropriate in cases determined on the papers and we see no reason to depart from that approach even though we ultimately found misconduct rather than serious misconduct.
41. Therefore, the Tribunal orders the respondent to pay 40% of the CAC's actual and reasonable costs under s 404(1)(h) and the Tribunal's costs under s 404(1)(i).
42. The Tribunal delegates to the Deputy Chair authority to determine the quantum of those costs and issues the following directions:
- a) Within 10 working days of the date of this decision the CAC is to file and serve on the respondent a schedule of its costs; and
 - b) Within a further 10 working days the respondent is to file with the Tribunal and serve on the CAC any submissions he wishes to make in relation to the costs of the Tribunal or CAC.
43. The Deputy Chair will then determine the total costs to be paid

He Rāhui tuku panui – non-publication

44. We make an order prohibiting publication of the name of student involved in the incident, student A, in accordance with the protections afforded to young persons under Rule 34 of the Teaching Council Rules 2016. We also suppress the name of the respondent's current school who supported her through the provision of references. There is no public interest in naming the school. We make no other suppression orders.



Ian Murray

Te Upoko Tuarua o Te Rōpū Whakaraupapa o Aotearoa –

Deputy Chairperson of the New Zealand Disciplinary Tribunal

NOTICE - Right of Appeal under Section 409 of the Education Act 1989

1. This decision may be appealed by teacher who is the subject of a decision by the Disciplinary Tribunal or by the Complaints Assessment Committee.
2. An appeal must be made within 28 days after receipt of written notice of the decision, or any longer period that the court allows.
3. Sections 356(3) to (6) apply to every appeal under these sections as if it were an appeal under section 356(1).