

BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

NZTDT 2024-25

RARO TE MANA O TE
UNDER THE

Education Act 1989 (**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

DESMOND MEI MCCAULEY
(Registration No. 327955)

Kaiurupare / Respondent

Nohoanga | Hearing
Hei Māngai | Appearance

28 November 2024, AVL (Teams).
RW Belcher/OJ Cann, Luke Cunningham Clere for
the CAC
D Martin, NZEI for the Respondent

Tribunal

C Garvey (Deputy Chair), L Arndt, S Williams

DECISION ON LIABILITY, PENALTY and COSTS

16 DECEMBER 2024

Introduction

- [1] The Complaints Assessment Committee (CAC) charged Mr Desmond McCauley with serious misconduct or conduct otherwise entitling the Tribunal to exercise its powers in relation to three incidents involving the use of force and/or restraint on three learners in 2019. At the relevant time Mr McCauley was employed at Newton Central School, a primary school in Auckland (“the school”). Mr McCauley has not held a current practising certificate since March 2020.

- [2] The matter proceeded by way of a hearing on the papers on 28 November 2024. The Tribunal received an agreed summary of facts and submissions from both parties. The Tribunal found the charge proved, and determined to impose censure and to cancel Mr McCauley's registration.

The Disciplinary Charge

- [3] The CAC laid a notice of charge on 21 May 2024, seeking leave to amend this to refer to the Education Act 1989¹. Leave was granted and the matter proceeded on the basis of the amended charge dated 2 July 2024, the particulars of which read as follows:

Particulars of the Charge

- 1 The CAC charges that Desmond Mei McCauley, registered teacher, of Auckland:
 - a. On 15 March 2019 used force on a learner by roughly handling learner A by hitting him on the head.
 - b. On 15 March 2019 used force on a learner by roughly handling learner B by holding him by the ears and turning his head.
 - c. On 13 February 2019 used force on a learner by roughly handling learner C by restraining a learner in a hug-like hold.
 - d. On 28 June 2019 used force on a learner by roughly handling learner C by grabbing them by the arm and dragging them.
- 2 The conduct alleged in paragraph 1(a) to (d), separately or cumulatively, amounts to serious misconduct pursuant to section 378 of the Education Act 1989 and rules 9(1)(a) and 9(1)(k) of the Teaching Council Rules 2016.
- 3 In the alternative, the conduct outlined in paragraphs 1(a) to (d), separately or cumulatively, amounts to misconduct otherwise entitling the Disciplinary Tribunal to exercise its powers pursuant to section 500 of the Education and Training Act 2020.

¹ Leave to amend a charge may be granted pursuant to Rule 25A of the Teaching Council Rules 2016.

The Agreed Summary of Facts

- [4] Mr McCauley taught at the school from 2018 to 2019. The summary of facts does not outline his earlier teaching experience. According to the public register Mr McCauley held full registration, and his practising certificate expired on 27 April 2020. The charge involves three separate incidents over a five-month period involving three learners. The age of the learners is not stated. The summary of facts also does not explain the nature of the mandatory report (that is, resignation, dismissal or notice of possible serious misconduct).
- [5] In relation to particular 1(c) involving Learner C on 13 February 2019, Mr McCauley saw Learner C and his mother outside of the classroom before school and went to the door to “check in” with them. They were waiting to see another teacher, who Mr McCauley advised was not present. He asked if he could take Learner C. The summary goes on:
8. Mr McCauley took Learner C’s arm. Learner C tried to hold onto his mother. Mr McCauley wrapped Learner C in a hug-like hold. He held Learner C back and told him he had to let his mother go to work. Mr McCauley told Learner C’s mother to close the door.
 9. Mr McCauley moved back and repeated for Learner C’s mother to close the door. Learner C was visibly upset and violently struggling to get free.
 10. Mr McCauley brought Learner C into a karakia and held him by the hand to keep still.
 11. Mr McCauley did not inform the Principal or complete a Ministry of Education Incident of Physical Restraint form.
- [6] The second incident involves two different children when Mr McCauley was providing cover for another teacher on 15 March 2019. The context for the incidents is not outlined, but the summary of facts states that Mr McCauley:
- (a) slapped Learner A on the head on two occasions; and
 - (b) held Learner B’s ears and turned B’s head towards his face.
- [7] Neither of these incidents was reported to the Principal or to the Ministry of Education.

[8] The third incident occurred after school had finished but on school grounds on 28 June 2019, and again involved Learner C and his mother. Learner C's mother asked her son to join a karakia, a request which C ignored and resumed playing a game of handball. Then:

19. Mr McCauley yelled to Learner C "don't ever do that to your mother." He walked through the game and took Learner C roughly by the arm. He yelled at Learner C and pulled him by the arm back to the front area of the School.

20. Learner C was yelling and trying to get away from Mr McCauley. Learner C was visibly upset.

21. Learner C's mother carried Learner C to the book room. Learner C was furious and pushed on shelves and closed himself in. He was talked through calming activities before he was taken home.

[9] Mr McCauley did record this incident when directed to do so by the Principal.

Liability-Principles

[10] The CAC submits that Mr McCauley's actions separately or cumulatively amount to serious misconduct or alternatively, that the conduct is such that it entitles the Tribunal to exercise its powers under s404 of the Act. Counsel for Mr McCauley accepted the CAC's outline of liability principles and characterisation of the conduct as serious.

[11] To determine a charge of serious misconduct, the Tribunal is required to consider the conjunctive test set out under s378 of the Act. The first limb of the test is to establish whether the conducted alleged:

- (a) adversely affects, or is likely to adversely affect, the well-being or learning of 1 or more students; or
- (b) reflects adversely on the teacher's fitness to be a teacher; or
- (c) is an act or omission that may bring the teaching profession into disrepute.

[12] If one or more of these three limbs is engaged, then the Tribunal may make a finding of misconduct simpliciter. If the conduct is also considered to meet at least one of the criteria for reporting to the Teaching Council under rule 9 of the Teaching Council Rules 2016, then the test for serious misconduct is met. The amended notice of charge relies on:

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

[13] The Code of Professional Responsibility sets out the professional standards expected of teachers. As submitted on behalf of the CAC, “*learners, families and whānau and the wider community place a significant amount of trust in teachers to guide their children and young people on their learning journey and to keep them safe.*” Hence, the Code emphasises the importance of acting with integrity and professionalism, and in the best interests of learners.

[14] The CAC relies on clause 1.3 of the Code, which requires teachers to maintain public trust and confidence in the profession by demonstrating a high standard of professional behaviour and integrity. Clause 2.1 expects teachers to work in the best interests of learners by promoting the well-being of learners and protecting them from harm.

[15] The Examples in Practice published by the Council as a guide to the Code set out conduct which demonstrates, or does not demonstrate, the standards required of the teaching profession. As an example of the latter, specific reference in the commentary to clause 2.1 is made to:

Inappropriate handling such as physically grabbing, shoving or pushing or using physical force to manage a child’s behaviour.

[16] This reflects the prohibition on the use of corporal punishment in schools under s139A of the Act (replicated in s98 of the Education and Training Act 2020). The Act also prohibits the use of restraint in most circumstances. Section 139AC(1) outlines that a teacher or authorised staff member must not physically restrain a student unless-

- (a) The teacher or staff member reasonably believes that the safety of the student or of any other person is at serious and imminent risk; and
- (b) The physical restraint is reasonable and proportionate in the circumstances.

- [17] Restraint is defined in the same section to mean the use of physical force to “*prevent, restrict or subdue the movement of the student’s body or part of the student’s body.*” At the relevant time, the Education (Physical Restraint) Rules 2017 made it mandatory to report any incident of restraint in schools to the Ministry of Education and to the teacher’s employer.
- [18] For comparative purposes, counsel for the CAC referred the Tribunal to four cases involving the use of force by a teacher on young children for corrective purposes, which we have considered². While none of these are on all-fours with the present case, they confirm the seriousness with which the use of force for corrective purposes is likely to be viewed by the Tribunal, including in the absence of anger or any intention to cause harm.

Liability - Findings

- [19] Mr McCauley was involved in four separate incidents involving three young learners over a period of months. We agree with the CAC that his conduct amounts to serious misconduct, engaging each of the three limbs under s378(1) and rules 9(1)(a) and (k). While the evidence in the summary of facts in relation to Learners A and B is scant, the incidents involving Learner C were more than fleeting and involved a resort to force as a means of managing the behaviour of a young student.
- [20] The summary of facts indicates that Learner C was adversely affected by Mr McCauley’s interference on both occasions. While there is no evidence of the response of Learners A and B to being slapped and handled by Mr McCauley, we find that it is likely that they were affected, even if for a short period. The summary indicates that the conduct occurred in the classroom and was therefore likely to have been observed by other students, potentially causing embarrassment to the students and impacting the way that students related to Mr McCauley.
- [21] With regard to Mr McCauley’s fitness as a teacher, the events cumulatively indicate an inability to self-regulate and to consistently use positive behaviour management strategies. The evidence supporting particulars 1(c) and (d) does not suggest that Mr McCauley sought the view of Learner C’s mother before intervening in her presence, to establish her level of comfort with his physical contact with her child, or

² CAC v de Jong [2017] NZTDT 11, CAC v Disciple [2023] NZTDT 23, CAC v Teacher NZDT 2023/24 and CAC v Dinsdale NZTDT 2019/42.

what other response might be appropriate.

[22] In each of the incidents in the charge, Mr McCauley's actions were likely observed by other students. The circumstances described support a finding that the use of force was unnecessary and unreasonable. It was, in the circumstances described in the summary of facts, a clear departure from expected standards under the Code and contrary to s139A of the Act. The Tribunal did not receive any explanation from Mr McCauley as to why an Incident of Physical Restraint form was not completed, such as whether he was unaware of the requirements for reporting, or whether he deliberately avoided doing so. However, we accept that the inclusion of this point in the summary of facts acknowledges that it was wrong not to make a report. Non-compliance with any form of mandatory reporting is a matter that prima facie goes to fitness. For all these reasons, s 378(1)(a)(ii) is therefore engaged.

[23] Further, applying the objective test of a reasonable member of the public informed of the relevant facts, the conduct was likely to lower the standing or reputation of the profession (per s378(1)(a)(iii)), for the reasons already outlined. As the CAC submits, teaching involves facing challenging behaviours and responding to this appropriately:

Their position requires that [teachers] are capable of maintaining composure, employing appropriate strategies, and acting professionally. Members of the public must be taken to think less of a profession that tolerates a teacher's resort to the use of force, or the use of inappropriate tone, as a way of moderating the behaviour of a child.

[24] For the same reasons, addressing a breach of the Rules, the Tribunal finds that the use of force by Mr McCauley was unjustified and/or unreasonable. With regard to Learner C, on the first occasion Mr McCauley held him while the child was violently struggling as well as further restraining him by the hand. On the second occasion, he used sufficient force to compel Learner C across the school grounds whilst he was resisting and upset. Slapping children is clearly inappropriate, particularly so about the head as occurred with Learner A. The conduct towards Learner B also reads as the use of physical contact to a child's face in order to direct or correct the student's behaviour. We agree with previous statements of the Tribunal that pulling a student on the ear, even in the absence of evidence of physical harm, is a

“demeaning way of treating a student...[and] has no place in the education of children and young people.”³ We are satisfied that this conduct engages rule 9(1)(a).

- [25] We also consider that the resort to force for purely corrective purposes, and with three children over a period of several months, is likely to bring the profession into disrepute, meeting rule 9(1)(k).

Penalty

- [26] Having found the charge proved, the Tribunal may impose a penalty under section 404 of the Act. The principles of penalty in disciplinary proceedings are well established, being to provide for the protection of the public, and the maintenance of professional standards and public confidence in the teaching profession. The penalty imposed should be fair, reasonable and proportionate, and comparable to those imposed in similar cases. The Tribunal should impose the least restrictive penalty that is appropriate in the circumstances. As Mr McCauley does not hold a current practising certificate, this limits the available penalties by removing the option of suspension, or the ability to impose conditions with immediate effect.

- [27] Cancellation of registration is reserved for cases in which:

- (a) the offending is sufficiently serious that no outcome short of deregistration sufficiently reflects the adverse effect on the teacher’s fitness to teach, or its tendency to lower the reputation of the profession; and
- (b) the teacher has not taken adequate rehabilitative steps to address their conduct relevant to the offending, indicating an ongoing risk.⁴

- [28] The CAC submit that the appropriate penalty is censure and cancellation. On behalf of Mr McCauley, Mr Martin simply submits that it is open to the Tribunal to oppose an “*appropriate penalty*” and does not raise any objection to the CAC seeking cancellation. In correspondence from Mr McCauley’s original counsel at the pre-hearing stage, it was explained to the Tribunal that Mr McCauley has no intention to return to teaching.

³ See *Complaints Assessment Committee v Maeva* [2016] NZTDT 37.

⁴ In reliance on *Complaints Assessment Committee v Fuli-Makaua* 2017/40, 5 June 2018.

- [29] It is not for the Tribunal to simply cancel a teacher's registration where that is requested or not opposed. Voluntary deregistration is open under clause 7 of Schedule 3 of the Education and Training Act 2020⁵. It is important that the Tribunal considers and imposes a penalty that meets the circumstances of the case.
- [30] Where a case is of sufficient gravity that cancellation must be given serious consideration, the Tribunal will almost invariably require clear evidence of insight and rehabilitative steps taken and/or willingly contemplated by the teacher to ensure that the protective purposes of discipline can be adequately met. Such evidence has not been provided in this case. Mr McCauley has not provided a Reflective Statement (as is relatively common practice for a hearing on the papers), or any evidence of insight into his conduct.
- [31] Accordingly, we find that cancellation is the only appropriate response to the circumstances presented. Had relevant evidence been provided and Mr McCauley demonstrated engagement in professional development and support to avoid similar conduct, then a penalty short of cancellation could have been contemplated.
- [32] In the circumstances, we also consider it appropriate to impose a censure.

Costs

- [33] Having successfully prosecuted the charge the CAC seeks costs amounting to a 40% contribution, in reliance on the Tribunal's Practice Note on Costs. A schedule of costs was filed outlining a total of \$11,195.40, including the costs incurred by the CAC at the investigation stage.
- [34] Mr McCauley seeks a reduction of the contribution ordered to 20%. This submission is made on the basis that Mr McCauley has not defended the matter at any point nor raised matters in his defence, to presumably reduce the need for attendances and allow a straightforward resolution.
- [35] A helpful discussion of the approach to costs in professional disciplinary proceedings is set out in *Professional Conduct Committee v Brown*⁶ including:

⁵ The Council must voluntarily deregister a teacher on request if it is satisfied that the person is not under investigation under subpart 4 of part 5.

⁶ *Professional Conduct Committee appointed by the Medical Council of New Zealand v Brown* [2024] NZHC 990 (1 May 2024) from [86].

- (a) costs are ultimately discretionary, to meet the interests of justice in a particular case.
- (b) the power to impose costs is given no statutory guidance and a wide range of factors may be taken into account.
- (c) costs are not part of the penalty, which is important when assessing the appropriate reduction from a 50% starting point as provided for in the Practice Note. Mitigating factors that may have been relevant to a reduction in penalty are not relevant to costs.
- (d) if a teacher admits a charge and fully cooperates to bring the matter to an end in an expedient way, a reduction 'in the region of' 10% will be appropriate. This is an incentive to cooperate but reflects the principle that the profession should not be left to bear the full costs of proceedings.
- (e) the wide discretion that the Tribunal has in relation to costs does not invite a "*granular comparison*" between cases.

[36] The Tribunal does not have any evidence of Mr McCauley's ability to meet an order for costs. In principle we see no basis to further reduce the contribution ordered below 40%. It is arguable whether some further contribution by or on behalf of Mr McCauley to the summary of facts, or provision of a reflective statement (for example) would have significantly increased the costs incurred by the CAC in the circumstances.

[37] The Tribunal may also make an order for a contribution to the costs incurred by the Tribunal in conducting the proceedings, payable to the Teaching Council, and we do so in this case calculated as 40% of the current standard fee for a hearing on the papers (this fee is \$1455 of which 40% is \$582).

Non-Publication

[38] The Tribunal may make orders for non-publication, if it is of the opinion that it is proper to do so. Mr McCauley did not make an application. The school made an application by letter dated 26 November 2024. The grounds for this application (which included the mistaken belief that Mr McCauley also had sought suppression and would be identified if the school was named) are that:

- (a) the impact on the school and the environment that it promotes to its whānau, kaimahi and tamariki would likely be detrimentally impacted by publication of its name.
- (b) that the school cannot disclose to the school community what employment-related action was taken in response to the allegations and “*therefore will be disadvantaged in assuring whanau that it has taken the appropriate steps and that such conduct will not occur in the future.*”
- (c) publication of the school’s name might inadvertently lead to a disclosure of the complainant’s identities, or at least create some suspicion as to their identity. (It is not stated whether any of the learners remain at the school).
- (d) the school was not complicit in the offending and took appropriate steps.

[39] The CAC took a neutral position in relation to the school’s application and sought non-publication orders on behalf of the three learners referred to in the charge and summary of facts. This application is made out of an abundance of caution as none of the evidence before the Tribunal identifies those learners by name or age.

[40] We agree that it is proper to order suppression of the names of the learners. Regarding the school however, the Tribunal is not satisfied that there is a likely risk the learners will be identified if the name of the school is published. The Tribunal has frequently noted the likelihood of some potential fallout for schools when a charge of serious misconduct is proved against a current or former teacher.⁷ This in itself will rarely be sufficient to displace the principle of open justice and the expectation of transparency in disciplinary proceedings. Similarly, it is not uncommon for a school to rely on an argument that it acted responsibly in relation to the misconduct and should therefore not suffer the risk of adverse publicity. The Tribunal has also found that this too is insufficient to displace the presumption of open justice.⁸

[41] Here, the charge relates to events that occurred over four years ago, and the ages of the children are not identified in the summary of facts. While we appreciate the articulate submission on behalf of the school and acknowledge the concerns identified, we are not satisfied that an adverse impact is likely to follow from

⁷ See eg *Complaints Assessment Committee v Teacher* 2016/27.

⁸ *Complaints Assessment Committee v Taurapa* [2022] NZTDT 27 at [148].

publication. The school is free to provide reassurance to its community (as it does in the submission) that appropriate actions were taken in response to Mr McCauley. The school is not constrained from providing contemporaneous evidence if needed to provide reassurance that these events from 2019 do not reflect its values and the current “*environment that it promotes to its whanau, kaimahi and tamariki.*”

Orders

[42] Accordingly, the Tribunal orders:

- (a) Censure.
- (b) Cancellation of Mr McCauley’s registration.
- (c) Costs in favour of the Complaints Assessment Committee in the sum of \$4,478.00.
- (d) Costs in relation to the Tribunal’s proceedings payable by Mr McCauley to the Teaching Council in the sum of \$582.00.

[43] The Tribunal makes the following orders for permanent non-publication:

- (a) The names and identifying particulars of the children referred to as Learner A, Learner B and Learner C in the notice of charge and agreed summary of facts.



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