

**BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL**

**UNDER THE** Education Act 1989  
**IN THE MATTER** disciplinary proceedings pursuant to Part 32 of  
the Act  
**BETWEEN** **COMPLAINTS ASSESSMENT COMMITTEE**  
**AND** **MARK ALEXANDER BILLINGSLEY**  
registered teacher (Registration Number  
355104), of Mount Maunganui  
Respondent

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**DECISION OF THE TRIBUNAL**

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**Hearing:** 15 December 2021

**Tribunal:** Jo Hughson (Deputy Chairperson),  
Rose McInerney, Nichola Coe

**Counsel:** E J McCaughan for the Complaints Assessment  
Committee  
Mr Billingsley (self-represented)

**Decision:** 26 January 2022

## Summary

- [1] Mr Billingsley is a registered teacher<sup>1</sup>. His provisional practising certificate expires on 29 April 2023. At the time of the hearing Mr Billingsley had been teaching for approximately four years.
- [2] At the relevant times in July 2020 Mr Billingsley was a teacher at Above and Beyond Education Care Centre (the Centre) in Tauranga. He had begun working there on 6 July 2020. The Centre is a privately owned Early Childhood Education facility which is licensed for 50 children (including 15 children aged under two years old).<sup>2</sup>
- [3] The evidence received by the Tribunal was that Mr Billingsley is not currently working as a teacher.
- [4] The Complaints Assessment Committee (the CAC) charged that between 1 January and 24 July 2020 Mr Billingsley used unreasonable force and/or unjustified force on children at the Centre namely he:
- (a) picked Child A ( [REDACTED] ) up by placing his hands on the outside of Child A's upper arms.
  - (b) pulled on Child A's sweatshirt as Child A was running, causing Child A to fall over.
  - (c) Pushed Child B ( [REDACTED] ) off his lap, causing Child B to fall and hit her head.
  - (d) Pushed Child C ( [REDACTED] ) off a seat.
- [5] This conduct was alleged to amount to serious misconduct pursuant to section 378 of the Education Act 1989 (the Act), when the alleged acts are considered separately and cumulatively. Alternatively, it was alleged the conduct amounted to conduct which otherwise entitles the Tribunal to exercise its powers pursuant to section 202 of the Act.

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<sup>1</sup> Summary of Facts (ASF) at [1] signed by Counsel for the CAC on 29 October 2021. By email dated 28 October 2019 Mr Billingsley had confirmed the Summary of Facts as true and correct for the purpose of resolving matters [Hearing Bundle, page 14]. He also signed the final page of the document.

<sup>2</sup> Summary of Facts at [2].

- [6] The hearing proceeded on the papers based on a Summary of Facts which Mr Billingsley had confirmed was true and accurate and both he and Counsel for the CAC had signed the document.<sup>3</sup>
- [7] Written submissions were received from Counsel for the CAC, addressing the issues of liability, penalty, and non-publication orders. No written submissions were received from or for Mr Billingsley. Mr Billingsley's position on central matters was conveyed through Counsel for the CAC.
- [8] The Tribunal found the charge established as misconduct, rather than serious misconduct. The Tribunal made an order of censure and imposed conditions on Mr Billingsley's practising certificate requiring him to engage with a mentor approved by the Teaching Council for a period of one year from his return to work, and to provide a copy of this decision to any prospective and/or future employer in the teaching sector for a period of two years. Costs were also ordered.
- [9] Mr Billingsley did not seek permanent suppression of his name and identifying details.<sup>4</sup> The Tribunal was not satisfied that there were any grounds for such an order disclosed in the papers produced to it. It follows that Mr Billingsley's name may be published in connection with these proceedings.
- [10] The Tribunal made permanent orders under section 405(6)(c) of the Act prohibiting from publication the names and identifying details of Child A, Child B and Child C. The privacy interests of these children outweigh the public interest in them being identified. It followed that it was proper for there to be permanent orders.
- [11] The reasons for the Tribunal's decisions follow.

## **Facts**

- [12] The Tribunal made the following findings of fact<sup>5</sup>:

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<sup>3</sup> Above fn. 1.

<sup>4</sup> An interim order was in place until Monday, 18 October 2021 to enable Mr Billingsley time to make a formal application for orders. No application was received by that date and the interim order lapsed. No such application was received subsequently.

<sup>5</sup> ASF at [2]-[7].

*Picked Child A ( [REDACTED] ) up by placing his hands on the outside of Child A's upper arms*

[13] On or about 15 July 2020 another teacher at the Centre (Teacher A) observed Mr Billingsley interacting with a [REDACTED] (Child A) in the Centre's outdoor area. Teacher A was inside but could see through the glass doors.

[14] Teacher A thought that Child A was "bugging" Mr Billingsley. She saw Mr Billingsley pick up Child A using both hands, holding the outside of Child A's upper arms. Mr Billingsley then put Child A back down.

[15] Teacher A described Mr Billingsley's actions as "it was like how you would pick a child up when you were angry".

[16] Child A started crying. When Teacher A comforted Child A, she noted that Child A had a red mark on his right upper arm.

[17] Teacher A took Child A to the bathroom to show two other teachers Child A's arm.

[18] One of those other teachers (Teacher B) went outside with Child A and asked Mr Billingsley what he had done. Mr Billingsley said he had not done anything.

[19] Teacher B took Child A to see the Centre Manager to show her his arm.

[20] The mark was not visible on his arm by the time the Centre Manager saw the child.

[21] The Centre Manager did not speak to Mr Billingsley at the time about the incident.

*Pulled Child A's sweatshirt as Child A was running, causing Child A to fall over*

[22] On an occasion between 6 and 24 July 2020, Teacher A observed Child A running across the room. Teacher A then saw Mr Billingsley pull the hood of Child A's hoodie from behind. Child A fell over.

[23] Teacher A was concerned that Mr Billingsley could have choked Child A.

[24] Child A started crying.

[25] Teacher A did not observe any injuries on Child A.

*Pushed Child B ( [REDACTED] ) off his lap, causing Child B to fall and hit her head*

[26] On an occasion between 6 and 24 July 2020, Teacher B was sitting around a table doing an activity with some children. Mr Billingsley was sitting on the mat behind her with a [REDACTED] (Child B), approximately 2 metres away.

[27] Teacher B could see Mr Billingsley in her peripheral vision.

[28] Teacher B heard Mr Billingsley say “get off my lap”, then he moved Child B off his lap and onto the floor beside him in a quick and abrupt way, resulting in Child B toppling onto her head. Child B said, “you hurt me”. Mr Billingsley replied, “You didn’t listen to me”.

[29] Child B was upset, rubbing the side of her head and holding her shoulder.

*Pushed Child C) [REDACTED] off a seat*

[30] On an occasion between 6 and 24 July 2020 Mr Billingsley was sitting on a seat at the Centre. Teacher A, who was cleaning up at the time, watched a [REDACTED] (Child C) try to climb up to sit on Mr Billingsley’s lap.

[31] Teacher A saw Mr Billingsley push Child C off his lap. Mr Billingsley used sufficient force so that “[Child C] went flying”, approximately one metre away from Mr Billingsley’s lap. Child C looked confused and shocked. Mr Billingsley said “[Child C], why did you jump off?”

[32] Teacher C informed the Centre Manager about the incident.

[33] All four incidents occurred over a period of approximately two-and-a-half weeks between 6 July and 24 July 2020 (Mr Billingsley having only commenced his employment at the Centre on 6 July 2020).

[34] Mr Billingsley was not spoken to in any details about any of the incidents until 24 July 2020 when the Centre Manager became aware of the allegations that he had been pushing children and grabbing their clothing from behind. Mr Billingsley told the Centre Manager at that time that he felt betrayed, and he questioned why no one had spoken to him directly about these issues previously.

*Mr Billingsley’s explanation for his conduct*

[35] It was an agreed fact that on 3 September 2020 Mr Billingsley provided the Teaching Council with a response to the Centre’s Mandatory Report about his alleged behaviour. He noted:

In response to the report where it states that I am using unnecessary force when handling the children. I pride myself on being a professional teacher in the work environment and I understand that I am required to be gentle with the children in my care. This report is based on others making assumptions from their observations. They did not feel the need to come to me and talk about what they had seen. It seems that my movement and interactions with the children has been

seen as too rough when in fact I am being gentle with the children I am accused of hurting.

In the case of [Child B], I was concerned about the fact that she was sitting on my lap as I cannot fold my legs so I did not want anyone getting the wrong idea about how/where she was sitting so I picked her up and tried to sit her beside me but instead in doing so she accidentally fell over. I know I should have apologised but at the time I was trying to be professional in the sense that I thought that moving her was right but I know it was an accident.

In the case of [Child A], I had asked him to put a jumper on as it was cold out and all the other kids had jumpers to go out, he refused. I got his jumper sat him down to put it on because it was very cold and he refused to go back inside. I then tried to get him back inside. I reached his hand to take him inside as he was not putting his jumper on then I was told there was a red mark where they said I had grabbed his arm but I had no recollection of grabbing his arm at all. I thought the red mark was from an incident I had not seen so I stated I don't know how he got it.

In the case of [Child C] I have noticed that this child is extremely unruly my attempts to try to help [Child C] understand how his actions are disrupting the interactions of the centre environment and as for the accusations of pushing [Child C] off the plank or anywhere I did not do that as he was playing and jumped. I did not push him and pretend he did it own his own.

### **Legal Principles - Liability**

[36] It was for the CAC to prove the charge, on the balance of probabilities.

[37] Included in the Summary of Facts was information about the approach of the Centre Manager when she became aware of allegations that Mr Billingsley had been pushing children and grabbing their clothing from behind, an "employment investigation", and the basis for the termination of Mr Billingsley's employment on 29 July 2020. The views reached by the Centre Manager about Mr Billingsley's conduct from an employment perspective, as recorded in the Summary of Facts, were not relevant and therefore were not taken into account by the Tribunal. It was for the Tribunal to make its own objective assessment of the conduct, without reference to any conclusions reached by the Centre or the Centre Manager.

[38] "Serious misconduct" is defined in section 378 of the Act as follows:

**Serious misconduct** means conduct by a teacher –

(a) That-

- (i) Adversely affects, or is likely to adversely affect, the wellbeing or learning of one 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.

[39] This test for serious misconduct is conjunctive<sup>6</sup>. That is, as well as being behaviour by a teacher that has one or more of the adverse professional effects or consequences described in subsection (a)(i)-(iii) the conduct must also be of a character or severity that meets the Teaching Council's criteria for reporting serious misconduct. Those criteria are set out in Part 3, Rule 9 of the Teaching Council Rules 2016 (the Rules).

[40] Rule 9 states that a teacher's employer must immediately report to the Council in accordance with section 394 of the Act if the employer has reason to believe the teacher has committed a "serious breach of the Code of Professional Responsibility".

[41] The Code of Professional Responsibility (the Code) documents the minimum standards for ethical and professional behaviour that are expected of every registered teacher. As such the Code sets out the commitments that teachers make to the profession, learners, families and whānau, and to society.

[42] Rule 9(1)(a) through (k) is a non-exhaustive list of conduct which may constitute a serious breach of the Code and therefore, which must be reported by the teacher's employer.

[43] Whether or not there has been serious misconduct or misconduct simpliciter and the severity of any such misconduct is assessed by objective standards.

[44] The CAC submitted that the Respondent's conduct engaged all three limbs of part (a) of the definition. It was submitted further that the conduct engaged part (b) as it was a serious breach of the Code as demonstrated by the examples given in Rule 9 (1)(a), (d) and (k) of the Rules. As such, the CAC submitted that the test for serious misconduct was met.

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<sup>6</sup> *Teacher Y v Education Council of Aotearoa New Zealand* [2018] NZDC 3141, 27 February 2018, at [64].

- [45] When determining whether established conduct is “likely” to have had an adverse effect on a student for the purposes of the definition of serious misconduct in (a)(i), the Tribunal is not required to be satisfied that there has been an actual adverse impact on a student’s or students’ wellbeing or learning. While there may be no direct evidence of adverse consequences for a student, the Tribunal is entitled to proceed on the basis that such consequences are a logical outcome or likely occurred because of the teacher’s conduct.
- [46] In *CAC v Marsom*<sup>7</sup> in relation to (a)(i) of the definition, the Tribunal adopted the meaning of “likely” described by the Court of Appeal in *R v W*<sup>8</sup> in the context of name suppression. It said that “real”, “appreciable”, “substantial” and “serious” are qualifying adjectives for “likely” and bring out that the risk or possibility is one that must not be fanciful and cannot be discounted. The Tribunal as it was constituted in this case, had no reason to depart from that approach.
- [47] Previous Tribunal decisions demonstrate that the term “fitness to practise” in the definition of serious misconduct in section 378 (a)(ii) extends beyond competence issues and includes conduct that, when considered objectively, will have a negative impact on the trust and confidence which the public is entitled to have in the teacher and the teaching profession as a whole, including conduct which falls below the standards legitimately expected of a member of the profession, whether of a teaching character or not.<sup>9</sup>
- [48] When considering whether particular conduct may bring the teaching profession into disrepute (for the purposes of section 378 (a)(iii); and Rule 9(1)(k)) the question to be asked is whether reasonable members of the public, informed and with the knowledge of all the factual circumstances, could reasonably conclude that the reputation and good-standing of the teaching profession was lowered by the

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<sup>7</sup> NZTDT 2018/25

<sup>8</sup> [1998] 1 NZLR 35.

<sup>9</sup> This is the approach taken to “fitness to practise” for the purposes of the Health Practitioners Competence Assurance Act 2003, and the approach which has been taken by this Tribunal in previous decisions.



behaviour of the teacher concerned.<sup>10</sup> This objective test is applied regularly by the Tribunal<sup>11</sup>.

[49] As to the requirement that the conduct must also be of a character or severity that meets the Teaching Council's criteria for reporting serious misconduct, relevantly, Rule 9(1)(a) relates to using unjustified or unreasonable physical force on a child or young person or encouraging another person to do so. Rule 9(1)(d) relates to failing to protect a child or young person due to negligence or misconduct, not including accidental harm. It is Rule 9(k) that encompasses an act or omission that brings, or is likely to bring, the teaching profession into disrepute.

[50] Rule 9(2)(b) provides that serious misconduct described in any of paragraphs (a) to (e) and (k) may be a single act or a number of acts forming part of a pattern of behaviour, even if some of the acts when viewed in isolation are minor or trivial.

[51] The District Court on appeal, has ruled that if any one of the matters under limb (a) of the definition of serious misconduct in section 378 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.<sup>12</sup>

[52] Subjective matters personal to the respondent teacher are not to be considered in any significant way when objectively assessing whether there has been serious misconduct<sup>13</sup>. Personal factors may be given full consideration at the penalty stage if a charge is found to have been established. The Tribunal considered matters that Mr Billingsley raised by way of explanation for his conduct in that way.

### **Relevant standards**

[53] The Code makes it clear that teachers are expected to behave in ways that promote a culture of trust, respect, and confidence in them as a teacher and in the profession.

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<sup>10</sup> Being the standard stated by the High Court (Gendall J) in *Collie v Nursing Council of New Zealand* [2001] NZAR 74 at [28] in relation to the test of "likely to bring discredit to the [nursing] profession", adopted by the Tribunal in previous decisions including *CAC v Webster NZTDT 2016-57*, 6 April 2017 at [46] and *CAC v Harrington NZTDT 2016/63*, 6 April 2017 at [17].

<sup>11</sup> Above, fn. 8.

<sup>12</sup> *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].

<sup>13</sup> See *Martin v Director of Proceedings* [2010] NZAR 333 and *Cole v Professional Conduct Committee of the Nursing Council of New Zealand* [2017] NZHC 1178, at [126]-[130] applied in previous decisions of this Tribunal.

[54] Clause 1.3 addresses a teacher’s commitment to the teaching profession and relates to:

Maintain[ing] public trust and confidence in the teaching profession by demonstrating a high standard of professional behaviour and integrity.

[55] By acting with integrity and professionalism, teachers and the teaching profession maintain the trust and confidence that learners, families and whānau, and the wider community place in teachers to guide their children and young people on their learning journey and to keep them safe<sup>14</sup>.

[56] Conduct that damages this trust and confidence breaches the expectation set out in Clause 1.3.

[57] Clause 2.1 of the Code addresses a teacher’s commitment to learners and relates to:

Work[ing] in the best interests of learners by promoting the wellbeing of learners and protecting them from harm.

[58] The Code was issued with “Examples in Practice” which provide positive examples of what the principles look like in practice and include behaviours that are unacceptable and breach the Code.<sup>15</sup> In relation to clause 2.1, an example given of behaviour that does not promote learners’ wellbeing includes inappropriate handling such as physically grabbing, shoving, or pushing, or using physical force to manage a learner’s behaviour.

[59] It is noted that section 139A of the Act provides that no teacher “shall use force, by way of correction or punishment, towards any student or child enrolled at or attending the school, institution or service”. In relation to this provision the Tribunal adopted the dicta in *CAC v Teacher*<sup>16</sup> to the effect that the use of any force contrary to section 139A will not automatically constitute serious misconduct. For the behaviour to amount to serious misconduct it must satisfy the character and severity threshold established in the Rules. This assessment must be undertaken on a case-by-case

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<sup>14</sup> Clause 1.3 *Code of Professional Responsibility*.

<sup>15</sup> *Code of Professional Responsibility, Examples in Practice* (Education Council, Wellington, June 2017).

<sup>16</sup> NZTDT 2016/50 at [26]

basis to determine if the charge is proved. This assessment is not merely a question of dealing with gradations at the penalty stage.

[60] In *CAC v Teacher*<sup>17</sup> the Tribunal commented about the use of physical force to any degree in the school environment:

We repeat as we have said in a number of cases in the past that the use of physical force – even at a lower level such as evident in this case – is unacceptable in New Zealand schools, and that any teacher who uses physical force contrary to s139A puts his or her status as a teacher in peril.

#### *Previous cases*

[61] Counsel for the CAC correctly identified that there have been previous cases considered by the Tribunal involving a teacher's use of force on a child in a learning setting.

[62] The Tribunal noted the following:

- (a) Mr *Risuleo*<sup>18</sup> was teaching a composite class of Year 1 and 2 students. The students were doing a colouring-in exercise when a child (Child H, aged 5) and another child tipped a jar of pencils on the floor. On Mr *Risuleo*'s instruction the children picked up the pens. Child H then threw a felt pen to the ground. Mr *Risuleo* walked over to Child H and grabbed his arm and pulled the child towards him in the direction of where the felt pen had landed and instructed him to pick up the pen. He told Child H it was not okay to throw pens in the classroom.
- (b) Mr *Risuleo*'s actions caused Child H to fall to the floor and hit his head. Child H cried and was upset. Mr *Risuleo* acknowledged that Child H might have bumped his head but did not see it occur. Child H went home and told his mother about the incident and that "Mr *Risuleo* pushed me over and I bumped my head and it hurts". After school Mr *Risuleo* phoned the child's mother and apologised and explained what had happened. He acknowledged he acted impulsively and that there were better ways to respond, for example, re-issuing the instruction to pick up the pen. Mr

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<sup>17</sup> NZTDT 2014/49.

<sup>18</sup> *CAC v Risuleo* NZTDT 2018/8, 17 September 2018.

Risuleo accepted to the Teaching Council that he had made a serious error of judgement and had used physical contact where he should not have.

- (c) When satisfying itself that Mr Risuleo's conduct was serious misconduct (noting it was conduct that "falls into the lower end of the scale of seriousness"), the Tribunal considered whether Mr Risuleo's actions amounted to "physical abuse" which was the relevant term used in rule 9(1)(a) at the time. At [30] and [32] onwards the Tribunal stated:

[30] In some cases the degree of force used easily sits within a common understanding of physical abuse. Sometimes the effect of the use of force is humiliation and might therefore amount to psychological abuse. Underlying both of these is the unique position of power and trust that a teacher holds. As we said in *CAC v Tregurtha*:

*Section 139A makes it clear that a teacher has no unique right to use force. We assume most teachers would not hit another adult if unhappy with their behaviour. A teacher's position does not legitimise actions that amount to crimes if committed in the community. Therefore teachers must be careful not to abuse the position of authority that they have in a classroom.*

...

[32] We do not find the conduct in the present case as serious as *CAC v Karklins* which involved inadvertent physical harm as a result of using force. A teacher lost his temper with a misbehaving student. He picked up the primary school student and forcibly removed him from the classroom, depositing him on the floor of the cloak room. The boy was thrashing about and banged his head on the wall. The Tribunal found serious misconduct, not as physical abuse (r 9(1)(a)) but as conduct likely to bring discredit to the teaching profession (r 9(1)(o)). We found that the harm was an "unfortunate but foreseeable consequence" of his actions.

For similar reasons to *Karklins* we are not satisfied that the present case falls into the category of physical abuse. There are circumstances in which it is reasonable to guide a young student's hand to a directed task. It is evident that the respondent used more force than was required, and may have been motivated by some frustration, but we find this behaviour is conduct likely to bring discredit to the teaching profession, rather than physical abuse....

- (d) Ms *Chen*<sup>19</sup> was employed in an ECE in Hamilton at the relevant time on 10 July 2019. On that date, the grandmother of Student A (a boy aged approximately [REDACTED]) went to collect her grandson from the ECE at pick-up time. When she arrived, she stood at the door and witnessed an incident between Student A and Ms Chen.
- (e) In that regard, Student A was standing at a set of drawers. As he opened the drawer and reached inside, Ms Chen approached Student A. She pulled his arm out of the drawer in a rough manner and then slammed the drawer shut. Student A screamed and started to cry very loudly. With her hand around Student A's arm, Ms Chen pulled away from the drawer and started to walk very quickly with Student A in tow. Student A's grandmother thought that Ms Chen looked angry with Student A. As Ms Chen was walking quickly, Student A was stumbling behind her and being dragged. The grandmother saw that Ms Chen had a grip on Student A's arm holding his arm in the air as she was leaning forward pulling him along. Student A was crying and he looked frightened and shocked. His grandmother rushed towards him, bent down and picked him up. Student A was still crying and telling his grandmother about his arm, saying "hurt, nanny, hurt". He cried for the duration of the car trip home which was approximately 20 minutes. Student A's grandmother complained to the Centre that day and Ms Chen apologised to Student A's mother for being too firm with Student A.
- (f) Another incident occurred on 20 August 2019 between Ms Chen and Student C, a boy aged approximately 20 months. One teacher observed Ms Chen telling children to go inside the Centre. Student C did not want to go inside. Without saying anything to the other teachers who were present or to Student C, Ms Chen grabbed Student C's hand forcefully and pulled the boy inside. Student A started crying loudly. Another teacher saw Student C sitting by the open door. She described Ms Chen pulling on the child's arm and trying to drag him inside the room. The Centre Manager was informed.
- (g) The Tribunal was satisfied Ms Chen's conduct (when the two incidents were considered together) was serious misconduct. The Tribunal stated "[a]lthough her conduct was not intentional, and came from a place of

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<sup>19</sup> *CAC v Chen* NZTDT 2020/54.

frustration, it was nonetheless forceful conduct that cannot be tolerated towards children of such vulnerable age”.

[63] The Tribunal assessed the conduct against those standards and having regard to the previous cases where a teacher has used force on a child.

### **Findings on the Charge**

[64] The Tribunal considered carefully the established facts and the submissions that were made for the CAC.

[65] The Tribunal was satisfied the evidence established the matters that were alleged in the particulars of the charge occurred in respect of three children on four separate occasions over an approximate period of two-and-a-half weeks in July 2020. However, the Tribunal did not reach the point of being reasonably satisfied on the evidence that Mr Billingsley’s conduct could fairly or accurately be described as the unreasonable or unjustified use of force. In that regard, Tribunal members were not satisfied there was sufficient evidence to enable it to make the required context-specific assessment of whether the force used by Mr Billingsley on each of the three children was justified or reasonable and having regard to Mr Billingsley’s explanations to the Teaching Council.

[66] However, it is clear that some force was used on each occasion and the Tribunal was satisfied there were other more appropriate ways in which Mr Billingsley could have achieved the outcomes, he wished in respect of each of the children involved, short of physically handling them or pulling one child’s sweatshirt.

[67] In the end, for the reasons given below, the Tribunal was not satisfied that Mr Billingsley’s conduct on each of the four occasions, considered separately or cumulatively, was serious misconduct. As discussed below, the Tribunal concluded that each of the four incidents considered together, involved misconduct. For that reason, the Tribunal was entitled to exercise its powers pursuant to section 404 of the Act.

#### *Serious misconduct - Limb (a)*

[68] It was submitted for the CAC that Mr Billingsley’s conduct was likely to adversely affect the learning of all three children involved. The Tribunal agreed that a likely outcome of his actions was at least a degree of adverse impact on the wellbeing of the children, but not necessarily the learning of the children. Each of the children were at a vulnerable age and demonstrated distress at the time of the incidents,

which indicated to the Tribunal that Mr Billingsley's actions towards them had at least some impact on their immediate wellbeing. Limb (a)(i) of the definition of serious misconduct was met to that extent, in the Tribunal's opinion.

[69] It was submitted for the CAC, including with reference to section 139A of the Act, that the combined conduct reflected adversely on Mr Billingsley's fitness to be a teacher. It was submitted that teachers who are fit to teach are capable of exercising a level of self-control which "avoids reactive use of force in this way, and members of the public would expect that to be the case". The Tribunal was of the view, that the established conduct viewed objectively does raise questions relevant to Mr Billingsley's fitness to be a teacher, in the sense that it accepted that teachers who are fit to teach can reasonably be expected to exercise good judgement and self-control in their interactions with all learners. That includes minimising physical contact with learners in situations where correction is required. The Tribunal was concerned that Mr Billingsley had resorted to the use of a degree of force to achieve the outcomes he desired when there were less-physical ways in which he could have reacted. For example, in relation to the child who was running across the room, Mr Billingsley could have dealt with that by drawing the child aside and speaking to him, rather than pulling on his sweatshirt. Limb (a)(ii) is met, in the Tribunal's view.

[70] It was submitted for the CAC that "using force against very young children in the way that Mr Billingsley has done, causing various children to become upset", satisfies limb (a)(iii) of the definition of serious misconduct in that, at the very least, it "may" bring the teaching profession into disrepute. The Tribunal did not consider that reasonable members of the public, informed of the proven facts and circumstances, could reasonably conclude that the reputation and standing of the profession was lowered by Mr Billingsley's behaviour. The Tribunal considered that reasonable members of the public could conclude that the conduct, although potentially unwise, was not unreasonable in the circumstances particularly those described by Mr Billingsley. Limb (a)(iii) is not met, in the Tribunal's opinion.

*Serious misconduct - Limb (b)*

[71] The Tribunal did not accept the submission that was made for the CAC that all four incidents were of a character or severity that met the Teaching Council's criteria for reporting serious misconduct under Rule 9 of the Teaching Council Rules.

[72] As above, the Tribunal did not reach the point of being satisfied, on the established facts, that Mr Billingsley used unjustified or unreasonable physical force on a child

or young person. Nor was the Tribunal able to conclude on the evidence before it, that Mr Billingsley, by his conduct on each of the four occasions, failed to protect a child or young person due to negligence or misconduct, not including accidental harm. The Tribunal has already explained why it was not satisfied that the conduct, when viewed objectively, involved acts that brought or was likely to bring the teaching profession into disrepute.

[73] With reference to the previous cases which have involved the use of physical force on children, the Tribunal did not consider Mr Billingsley's conduct was directly comparable because it could not be satisfied on the evidence that the physical contact that he had with the children was unreasonable or unjustified. Certainly, the cases are comparable to the extent that the Tribunal accepted that Mr Billingsley had no intention of hurting any of the children, which was the case in *Risuleo*.

### **Finding – misconduct**

[74] Two elements of limb (a) of the test for serious misconduct are met, but limb (b) of the test is not met, in the Tribunal's view.

[75] For those reasons the Tribunal was not satisfied the established conduct met the test for serious misconduct. Rather, the conduct, when the four actions are considered together, was misconduct.

[76] The Tribunal objectively assessed the severity of the conduct as being at the very low end of the scale of seriousness.

### **Penalty**

[77] Having made an adverse finding of misconduct, the Tribunal was entitled to exercise its powers under section 404 of the Act. The Tribunal could do one or more of the things set out in section 404(1). That included any of the things that the CAC could have done under section 401(2) where there has been a finding of misconduct (including censure the teacher, impose conditions on the teacher's practising certificate or authority, such as (without limitation) requiring the teacher to undergo supervision or professional development., suspend the teacher's practising certificate or authority for a specified period, or until specified conditions are met, and annotate the register in a specified manner).<sup>20</sup>

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<sup>20</sup> Section 404(1)(a).



- [78] It is well established that the primary purposes of the imposition of disciplinary penalties under the Act are to maintain professional standards (through general and/or specific deterrence), to maintain the public's confidence in the teaching profession, and to protect the public through the provision of a safe learning environment for students<sup>21</sup>.
- [79] Rehabilitation of the teacher is often an important purpose.<sup>22</sup>
- [80] In previous decisions the Tribunal has accepted as the appropriate sentencing principles those identified by Collins J in *Roberts v Professional Conduct Committee of the Nursing Council*<sup>23</sup>. His Honour identified eight factors as relevant whenever an appropriate penalty is being determined in professional disciplinary proceedings. In short, the Tribunal must arrive at an outcome that is fair, reasonable, and proportionate in the circumstances. It must identify the least restrictive penalty that can reasonably be imposed which meets the seriousness of the case and discharges the Tribunal's obligations to the public and the teaching profession.

### **Facts relevant to penalty**

#### *Personal circumstances of Mr Billingsley*

- [81] Mr Billingsley's response to the Mandatory Report the Centre Manager made about his conduct is cited above.
- [82] The CAC accepted that Mr Billingsley was not spoken to in any detail about the incidents until 24 July 2020. Further, that the Centre elected to dismiss Mr Billingsley, rather than attempt to work with him to improve his performance or adjust his behaviour.
- [83] The CAC also acknowledged that Mr Billingsley was a relatively inexperienced teacher at the time, having been teaching for approximately four years. Further, that he had no previously disciplinary findings against him.
- [84] In terms of other personal mitigating factors, the CAC acknowledged that Mr Billingsley had accepted the charge, reached agreement on the Summary of Facts,

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<sup>21</sup> As discussed in *CAC v McMillan* NZTDT 2016/52 at [23].

<sup>22</sup> *CAC v Teacher* NZTDT 2016/55 at [30].

<sup>23</sup> [2012] NZHC 3354 at [44]-[51].

and that he had cooperated with the CAC investigation (thereby indicating he has a degree of insight into his conduct).

[85] It was submitted for the CAC that depending on what, if any further information Mr Billingsley provided, the Tribunal may consider this to be a matter that could be dealt with by an order of censure, and conditions requiring Mr Billingsley to provide a copy of the Tribunal's decision to any prospective teaching employer and to practise under the guidance of a mentor approved by the Teaching Council, which may stipulate the form of mentorship and the provision of mentorship reports or updates. Such an approach would be consistent with the orders made in *Risuleo* and *Chen*, it was submitted.

[86] Counsel for the CAC advised by Memorandum dated 29 November 2021<sup>24</sup> that Mr Billingsley had indicated he is not currently working as a teacher and is on a Jobseeker benefit, while he is seeking work. Further, that he is hoping to get back into teaching in the future, is willing to do more training to prove that his teaching practice is at the highest level, and that he really enjoyed teaching and felt a sense of honour and privilege to help guide the next generation.

#### *Findings on Penalty*

[87] The Tribunal considered the relevant penalty principles including the previous cases, as well as the submissions that were made for the CAC.

[88] The Tribunal was satisfied that it was appropriate and necessary to impose a formal penalty. For the reasons given below, the Tribunal considered that the least restrictive penalty which meets the seriousness of the case and discharges the Tribunal's obligation to the public and the teaching profession is a censure to express the Tribunal's disquiet about the conduct and the imposition of conditions on practice (section 404(1)(c)).

[89] The Tribunal took into account that:

- (a) Cancellation or suspension of registration or a practising certificate should not be ordered if an alternative penalty can achieve the objectives sought.
- (b) Rehabilitation of the teacher is a factor requiring careful consideration.

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<sup>24</sup> Hearing Bundle, pages 77-79.

- (c) Ultimately, the Tribunal must balance the nature and gravity of the offending and its bearing on the teacher's fitness to practise against the need for removal or suspension and its consequences to the individual teacher<sup>25</sup>.
- (d) Aggravating and mitigating features need to be taken into account.

[90] The Tribunal did not consider that Mr Billingsley's conduct was of sufficient gravity to warrant the imposition of the most severe penalty outcomes of cancellation or suspension and was of the view that such measures would be a disproportionate response to the established conduct.

[91] As indicated, the Tribunal assessed the severity of the conduct as being at the very low end of the scale of seriousness. It considered that it was conduct that would most likely be handled in-house in most learning institutions, including ECE settings.

[92] The Tribunal considered that Mr Billingsley would benefit from working for a period under the guidance and with the support of a mentor once he returns to work as a teacher. The Tribunal considered that mentoring focused on dealing with challenging situations involving children in ECE settings would do much to set Mr Billingsley up for future success in the profession, and particularly the ECE sector where there is a need to retain competent male teachers.

[93] Having weighed the relevant aggravating and mitigating features and considered the issue of rehabilitation, in the end, the Tribunal decided to make an order censuring Mr Billingsley as a mark of its disquiet about his conduct, and to uphold professional standards that are applicable in modern New Zealand teaching environments.

[94] In addition, the Tribunal decided to impose the following conditions on Mr Billingsley's practising certificate, for rehabilitative purposes and to protect the public (pursuant section 404(1)(c)):

- 94.a.1 Mr Billingsley is to work under the guidance and support of a mentor approved by the Teaching Council, for a period of 12 months from his return to work in the teaching sector. The focus of the mentoring is to be on dealing with challenging situations involving children in an ECE setting. It will be for the Teaching Council to put in place requirements for the provision of

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<sup>25</sup> *Dad v General Dental Council* [Privy Council] at [1543] referred to in *Patel v Dentists Disciplinary Tribunal* (High Court, Auckland, AP77/02, 8 October 2002, Randerson J) at [31].

mentoring reports or updates during that 12-month period. Taking into account that Mr Billingsley is not currently employed as a teacher, this condition will remain in effect for a period of two years.

Should Mr Billingsley's practising certificate expire without him having fulfilled this condition then the Tribunal anticipates that the Teaching Council would seek to impose a condition on any subsequent practising that may be issued to Mr Billingsley that he must practise under the guidance and with the support of a mentor for a period, upon his resumption of teaching.

- 94.a.2 Mr Billingsley must provide a copy of this decision to any, and all, prospective and/or future employers in the teaching sector. This condition is to remain in effect for two years from the date of this decision.

### *Costs*

- [95] It is usual for an award of costs to be made against a teacher once a charge is established. When considering the appropriate quantum of costs, the Tribunal must take account of the need for the teacher who has come before the Tribunal to make a proper contribution towards the costs that have been incurred. That is to ensure the teaching profession as a whole does not have to fund all the costs of these proceedings.
- [96] The CAC initially sought a contribution towards its costs of \$2,197.58, representing 40% of costs (excluding GST). Total CAC costs (Committee investigation costs and external legal costs) were indicated as being \$5,493.94. It was indicated that the CAC agreed that a 40% contribution was appropriate given the circumstances of Mr Billingsley having accepted responsibility for his misconduct and agreed to the matter being dealt with on the papers.<sup>26</sup> This has been the approach of the Tribunal in recent times.
- [97] In his Memorandum dated 29 November 2021, Counsel for the CAC advised the Tribunal that Mr Billingsley had advised that while on the Jobseeker benefit, after his

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<sup>26</sup> See *CAC v Adams* NZTDT 2018, 11, 13 September 2018.

bills and rent, he has \$20 left each week. No independent supporting evidence of this was provided, other than confirmation of payment of the benefit.

[98] Counsel for the CAC submitted that as Mr Billingsley is in receipt of a benefit, there may be some scope for reducing the level of the costs awarded against him.

[99] All circumstances considered, the Tribunal decided that a 30% contribution to the CAC's costs as claimed, would be reasonable and appropriate in this case.

[100] Accordingly, the Tribunal made an order pursuant to section 404(1)(h) that Mr Billingsley is to pay the sum of \$1,648.18 to the CAC. This reduced order takes account of Mr Billingsley's current financial circumstances.

[101] If Mr Billingsley wishes to enter a payment arrangement in respect of these costs, then he may take this up with the Teaching Council as costs ordered by the Tribunal under section 404(1)(i) are recoverable as a debt due to the Council.<sup>27</sup>

[102] As to the hearing costs the Tribunal made an order that Mr Billingsley make a 40% contribution towards those costs, being payment of the sum of \$458.00 to the Teaching Council. That order is in line with the Tribunal's Costs Practice Note and is made under section 404(1)(i).

### **Non-publication orders**

[103] The Tribunal's jurisdiction to make non-publication orders is found in section 405 of the Act. An order can only be made under section 405 (6) (a)-(c) if the Tribunal is of the opinion that it is proper to do so, having regard to the interests of any person (including, without limitation, the privacy of the complainant, if any) and the public interest.

#### *Mr Billingsley*

[104] An interim non-publication order was in effect until 18 October 2021 to preserve the position for Mr Billingsley should he have wished to make an application for an order suppressing his name and identifying details. As Mr Billingsley made no application the interim order lapsed.

[105] Mr Billingsley did not make an application subsequently.

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<sup>27</sup> Section 404(3) of the Education Act 1989.

[106] Now that he has been found guilty of misconduct there is a public interest in his name being published in connection with these proceedings. The principle of open justice is paramount to maintain public confidence in the teaching profession through the transparent administration of justice<sup>28</sup>. There are no private interests of Mr Billingsley that are apparent to the Tribunal which would override the public interest in open disciplinary proceedings and his name being published. Accordingly, it would not be proper to make a permanent order.

#### *Child A, B and C*

[107] The Tribunal considered that it is proper that the names of Child A, B and C be permanently suppressed from publication having regard to the children's privacy interests. Accordingly, there will be permanent non-publication orders under section 405(6)(c) in respect of the names of Child A, B and C.

[108] No application for non-publication orders was made by the Centre (and the Centre had no part in the proceedings). It follows that the Centre's name may be published in connection with these proceedings.

#### **Conclusion**

[109] The Charge was established. Mr Billingsley is guilty of misconduct.

[110] The Tribunal's formal orders under the Education Act 1989 are:

- (a) Mr Billingsley is censured for his misconduct pursuant to section 404(1)(b).
- (b) The following conditions are to be imposed on Mr Billingsley's practising certificate, pursuant to section 404(1)(c):

110.b.1 Mr Billingsley is to work with the guidance and support of a mentor approved by the Teaching Council, for a period of 12 months of his return to work as a teacher. The focus of the mentoring is to be on dealing with challenging situations involving children in an ECE setting. It will be for the Teaching Council to put in place requirements for the provision of mentoring reports or updates during that 12-month period. As Mr Billingsley is not

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<sup>28</sup> *CAC v Teacher* NZTDT 2016/27, at [66].

currently working as a teacher, this condition will remain in effect for two years from the date of this decision.

110.b.2 Mr Billingsley must provide a copy of this decision to any and all prospective and/or future employers in the teaching sector. This condition is to remain in effect for two years from the date of this decision.

- (c) Mr Billingsley is to pay \$1,648.18 to the CAC as a contribution to its costs pursuant to section 404(1)(h),
- (d) Mr Billingsley is to pay \$458.00 to Teaching Council in respect of the costs of conducting the hearing, under section 404(1)(i).
- (e) There are orders under section 405(6)(c) permanently suppressing from publication the name and identifying particulars of Child A, Child B and Child C.

Dated at Wellington this    day of 26th

January 2022



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**Jo** **Hughson**  
Deputy Chairperson

## **NOTICE**

- 1 A teacher who is the subject of a decision by the Disciplinary Tribunal made under section 404 of the Education Act 1989 may appeal against that decision to the District Court (section 409(1) of the Education Act 1989).
- 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 404 (section 409(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 Section 356(3) of the Education Act 1989 applies to every appeal under section 409 as if it were an appeal under section 356(1).