

**BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL**

**NZTDT 2020/29**

**IN THE MATTER** of the Education Act 1989

**AND**

**IN THE MATTER** of a charge of serious misconduct referred by the  
Complaints Assessment Committee to the New  
Zealand Teachers Disciplinary Tribunal

**BETWEEN** **COMPLAINTS ASSESSMENT COMMITTEE**

Referrer

**AND**

**JULIA ROSE COSTELLO**

Respondent

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**DECISION OF THE TRIBUNAL ON CHARGES**

**8 October 2021**

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**HEARING:** Held on 22-25 June 2021 in person

**TRIBUNAL:** Rachael Schmidt-McCleave (Deputy Chair)  
Nikki Parsons & David Spraggs (members)

**REPRESENTATION:** C Paterson, Meredith Connell for the Complaints Assessment  
Committee  
The respondent, self-represented

## Hei timatanga kōrero – Introduction

1. The Complaints Assessment Committee ("CAC") has charged the respondent with serious misconduct and/or conduct otherwise entitling the Disciplinary Tribunal to exercise its disciplinary powers under section 404 of the Education Act 1989 (the "Act").<sup>1</sup>
2. The charges allege that the respondent engaged in various actions of ill-treatment and rough handling of babies and young children in her care, as well as allegations relating to racist comments and other unprofessional and abusive comments to children and colleagues, while she was employed as a teacher at the [REDACTED] (the "Centre") in Whangarei between March 2014 and September 2018. The first notice of charge is dated 9 July 2020 and leave was subsequently sought to amend it (addressed below).
3. The matter was heard in person in Whangarei on 22-25 June 2021. The respondent defended the charge, although did not file any statements of evidence prior to the hearing and gave limited evidence and submissions at the hearing. The respondent did question CAC witnesses and participated fully in the hearing in all other respects.

## Ko te hātepe ture o tonono nei – Procedural History and Preliminary Matters

4. It is fair to say these proceedings had a rather tortured procedural history before finally advancing to a hearing. It is not necessary to traverse them all here, but this Tribunal held a number of teleconferences with the parties, and issued a total of six procedural Minutes, the majority directed at the respondent filing briefs of evidence in advance (which did not happen).
5. The Tribunal does note, however, that initially the respondent was represented but that representative declined to attend further pre-hearing conferences after the first one which took place on 8 September 2020, and then declined to act further for the respondent (without giving adequate reason). Had the representative concerned been a registered lawyer, the Tribunal would have taken further steps in relation to his actions. He was not a registered lawyer, however, so with reluctance the Tribunal had to accept his withdrawal as the respondent's advocate. The respondent was unable to secure further

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<sup>1</sup> Note that the 1989 Act has since been replaced by the Education and Training Act 2020. The 1989 Act applies to this case, however, as the respondent was charged prior to the 2020 Act coming into force.

representation, which was unfortunate but, nonetheless represented herself well at the hearing.

### **Amended notice of charge**

6. In opening submissions at the hearing, the CAC sought leave to amend the notice of charge, submitting there was no prejudice to the respondent.<sup>2</sup> The respondent indicated she did not oppose the amendments sought and leave to amend was therefore granted.
7. The amended notice of charge charges that the respondent, a registered teacher of Whangarei, on various dates while working at the Centre between 5 March 2014 and September 2018, engaged in any or all of the following conduct:
  - (a) Between May 2014 and June 2015, Ms Costello swore and/or made inappropriate comments towards a child aged approximately [REDACTED] (**Child 1**) at the Centre by telling her to:
    - (i) “fuck off”; and or
    - (ii) “shut up and sit down” and/or “get over it”;
  - (b) In or around 2015, Ms Costello:
    - (i) dragged a child aged approximately [REDACTED] (**Child 2**); and/or
    - (ii) yelled at Child 2.
  - (c) In or around 2015, Ms Costello would regularly:
    - (i) call a child aged approximately [REDACTED] who had a medical condition (**Child 3**) a “retard”; and/or
    - (ii) leave Child 3 unattended; and/or
    - (iii) leave Child 3 in a dirty nappy; and/or

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<sup>2</sup> For the first amendment, because the Rules sought to be referred to were identical in wording to the Rules in the original notice of charge, and the second amendment because the respondent had been aware since December 2020 of the evidence of the relevant witness ([REDACTED]) which led to the proposed amendment.

- (iv) falsify Child 3's nappy records to record that her nappy had been changed;
- (d) In or around 2015, Ms Costello would regularly:
- (i) leave a baby aged between [REDACTED] (**Child 4**) in her cot and only change her nappy when she saw Child 4's grandparents arrived to pick her up; and/or
  - (ii) inform Child 4's grandparents that Child 4 had eaten, when she had not eaten;
- (e) In or around June 2017, Ms Costello:
- (i) shook a crying child aged approximately [REDACTED] (**Child 5**) hard while holding him; and/or
  - (ii) shouted close to Child 5's face; and/or
  - (iii) left Child 5 unattended while he was upset;
- (f) In or around early 2018, on at least one occasion, Ms Costello grabbed Child 5, then aged around [REDACTED], by the upper arms and yanked him out of his chair, causing him to hit his upper thighs on the underside of the kai table;
- (g) In or around 2018, Ms Costello:
- (i) yelled at Child 5, then aged around [REDACTED], who was stuck on his tummy under a picnic table, by shouting at him to crawl; and/or
  - (ii) told Child 5 "well you have to get yourself out"; and/or
  - (iii) walked away from Child 5 while he was still under the table;
- (h) In or around April 2018, Ms Costello dragged a crying child (**Child 6**) by the hand quickly, resulting in Child 6 not being able to walk properly;
- (i) In or around May 2018, Ms Costello patted a crying child (**Child 7**) hard on the bottom several times while she was holding Child 7 in her lap with his head facing the floor and his bottom facing the ceiling;

- (j) In or around early July 2018, Ms Costello:
  - (i) forcefully gripped a crying child aged approximately [REDACTED] (**Child 8**) by the upper arms while Child 8 was standing up; and/or
  - (ii) shook Child 8 while shouting at her; and/or
  - (iii) left Child 8 unattended while Child 8 was upset;
- (k) On or around 9 August 2018, Ms Costello made a racist comment by telling a child (**Child 9**), “you don’t need your shoes, you are just a little Māori girl”;
- (l) In addition to the specific incidents above at paragraphs (a) to (k), between 5 March 2014 and September 2018, Ms Costello acted unprofessionally and/or inappropriately towards the children at the Centre on other occasion(s), including by:
  - (i) Shouting and/or swearing at children; and/or
  - (ii) Leaving children unattended to cry; and/or
  - (iii) Leaving children with dirty nappies and/or falsifying the nappy registers; and/or
  - (iv) Restraining children by wrapping them too tightly in a blanket or sheet; and/or
  - (v) Grabbing children from behind and pulling them roughly from the kai table, causing them to hit their legs on the underside of the table; and/or
  - (vi) Shaking children roughly while holding them; and/or
  - (vii) Dragging children by the arm or hand;
- (m) Between 5 March 2014 and September 2018, on at least one occasion, Ms Costello was aggressive and/or hostile towards other staff at the Centre, including shouting at them, and/or verbally abusing them.

8. Particular 2 of the amended notice of charge states that:

The conduct alleged in paragraph 1 (and its subparagraphs), separately or cumulatively, amounts to serious misconduct pursuant to section 378 of the Education Act 1989 and any or all of rr 9(1)(a), (c), (f) and/or (o) of the Education Council Rules 2016 (as drafted prior to amendments on 18 May 2018) and/or rr 9(1)(a), (b), (c) and/or (k) of the Teaching Council Rules 2016 (as drafted following the amendments on 18 May 2018), and/or any or all of rr 9(1)(a), (c), (f) and (o) of the New Zealand Teachers Council (Making Reports and Complaints) Rules 2004, or alternatively amounts to conduct which otherwise entitles the Disciplinary Tribunal to exercise its powers pursuant to section 404 of the Education Act 1989.

#### **Application to proceed by formal proof**

9. In its written opening submissions filed on 28 May 2021, the CAC sought a direction that the hearing proceed as a formal proof hearing, on the basis of the written evidence filed by the CAC, and that the witnesses for whom the CAC had filed written briefs of evidence not be required to attend the scheduled hearing to give oral evidence and be cross-examined. This was on the basis that, despite initially engaging in the proceedings and indicating that she wished to defend the charge, the respondent had subsequently failed to take any substantive steps in the proceeding and had not, prior to the hearing, engaged with the process and seemed to be intending not to participate.
10. Formal proof hearings are provided for in the Rules of Court for various jurisdictions,<sup>3</sup> and enable courts to proceed to determine a matter based solely on affidavit evidence filed in advance of the hearing. In a formal proof hearing, defendants might be permitted some limited right to participate in some circumstances, but formal proof hearings often proceed without a defendant present. In other words, the statements of evidence filed in advance are taken as read.
11. The direction the CAC was seeking was proposed to be based on written statements of evidence filed in advance, and not given under oath (as an affidavit is). The evidence would then not be subjected to any testing, either by cross-examination or by questioning from the Tribunal.

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<sup>3</sup> For example, rule 15.9 of the High Court Rules (and its District Court equivalent).

12. Given the seriousness of the charges the respondent was facing, and the potential impact on her career and livelihood should the charges be established, the Tribunal was loath to proceed in this manner unless it was sure the respondent did not intend to participate (especially given the problems she had had with securing representation). The Tribunal therefore issued a Minute, dated 9 June 2021, advising the CAC of its reluctance to take unsworn and untested evidence as read. The Tribunal directed the respondent to advise the Council, within two days of the Minute, whether she intended to participate and appear in the hearing. The Tribunal advised the parties that, once it had received that indication and any intention by the respondent *not* to appear, the Tribunal would discuss the evidence and decide whether it required any witnesses to appear to be questioned by the Tribunal. The Tribunal also advised that, if a decision was made not requiring a witness to appear, sworn affidavits for those witnesses would need to be filed prior to the hearing.
13. The respondent subsequently advised the Council that she would be attending the hearing commencing 22 June 2021, and would be defending the charges. The Tribunal therefore issued a further Minute, dated 15 June 2021, directing that all witnesses appear in person at the hearing. The Minute also directed the respondent to file any statements of evidence she intended to rely on, as well as her response to the particulars of the charge. Subsequently, on 21 June and therefore immediately prior to the hearing, the respondent provided a written statement setting out her response to the charge. That statement will be referred to in evidence as appropriate later in this decision.

### **Witness summons and admissibility applications**

#### *Witness summons*

14. On 16 June 2021, the CAC applied to the Tribunal to issue witness summonses requiring proposed CAC witnesses [REDACTED] and [REDACTED] to attend and give evidence at the hearing commencing 22 June. The application was made on the grounds that:
  - (a) The evidence of [REDACTED] and [REDACTED] is or may be material to the hearing of the matter before the Tribunal; and
  - (b) It is necessary in the interests of justice that summonses be issued to compel the attendance of [REDACTED] and [REDACTED] at the Tribunal hearing.

15. The application was made in reliance on section 406 of the Act, the brief of evidence of Kate Henderson dated 16 December 2020, and a memorandum filed in support of the application.
16. Section 406 of the Act<sup>4</sup> provides the Tribunal with the power to require a person to attend and give evidence at a hearing of the Tribunal, or produce any documents, records or other information in his or her custody or control that relate to the subject matter of the hearing (whether specified by the Tribunal or not). Under section 407 of the Act,<sup>5</sup> it is, *inter alia*, an offence not to comply with a section 406 order.
17. In support of its application, the CAC submitted that the evidence of ██████████ and ██████████ was likely to be highly relevant to the charge of serious misconduct against the respondent. Both women are registered teachers and worked at the Centre with the respondent during the period which is the subject of the charge. The CAC noted that ██████████ had previously provided a formal statement to the Police regarding conduct she witnessed while working at the Centre, and provided a detailed interview account to an investigator from the Teaching Council during the CAC investigation, and prior to the charge being laid. ██████████ had also provided a formal statement to the Police regarding conduct she witnessed while working at the Centre. Finally, the CAC noted the statement of evidence of the Teaching Council investigator, Ms Kate Henderson, in which she detailed her numerous attempts to contact both ██████████ and ██████████ by email and phone to no avail.<sup>6</sup> The CAC therefore submitted that it was necessary in the interests of justice to compel the attendance of both witnesses at the hearing.
18. On the grounds specified above, the Tribunal accordingly granted the witness summons sought.
19. On the morning the hearing commenced (22 July 2021), the Tribunal was provided with two medicals certificate from ██████████ (from her ██████████ and doctor respectively)<sup>7</sup>, setting out why she was deemed medically unable to attend the hearing. The Tribunal accepted that medical certificate and, as set out in further detail below in its discussion on

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<sup>4</sup> Section 502 in the 2020 Act.

<sup>5</sup> Section 503 in the 2020 Act.

<sup>6</sup> Brief of Evidence of Kate Henderson dated 16 December 2020 at paragraph [9.5]

<sup>7</sup> Dated 18 June 2021 and 23 June 2021.



the admissibility of certain evidence, admitted as hearsay evidence the previous statement and interview transcript of ██████████, to be afforded appropriate weight given its untested nature.

20. ██████████ failed to show up to the hearing and no contact was made by her to the Tribunal or to the CAC. The Tribunal considered compelling her attendance by the issue of a warrant but considered the issue could be dealt with as a matter of admissibility (as discussed below).

*Admissibility of evidence*

21. Related to the above, the CAC did not provide statements of evidence in advance of the hearing from ██████████, ██████████, and ██████████. The CAC, however, noted that each of these three had previously provided statements about their observations of the respondent's conduct as part of the CAC process or as part of the Police investigation. Specifically, the CAC pointed to the following:

- (a) ██████████ provided two incident reports to the Centre (both dated 23 August 2018), both confirmed as being "true and correct" and both signed by ██████████.<sup>8</sup> Additionally, the CAC said, ██████████ was spoken to on 3 December 2019 by an investigator during the course of the CAC's investigation. A file note of the conversation was recorded by the investigator and subsequently confirmed by email from ██████████ to be an accurate record of the conversation.<sup>9</sup>

The CAC submitted that numerous attempts to contact ██████████ were unsuccessful, that her previous statements are reliable, and that she is now in ██████████ and therefore unavailable as a witness. The CAC submitted that ██████████ statements should therefore be admitted as hearsay evidence under section 18 of the Evidence Act 2006.

- (b) ██████████ provided a formal statement to the Police on 13 March 2019, and was spoken to by CAC investigators in late 2019.<sup>10</sup> The CAC was unsuccessful in

<sup>8</sup> Attached to Brief of Evidence of Kate Henderson at KH1, BoD Vol 2 at 301.0107-0108.

<sup>9</sup> Attached to Brief of Evidence of Kate Henderson at KH10, BoD Vol 2 at 301.0267-0269.

<sup>10</sup> Attached to opening submissions at Tab 1. The CAC noted that copies of these documents have been disclosed to the respondent during the CAC investigation process.

obtaining a witness statement from ██████████ (leading to the issue of the witness summons already discussed).

(c) ██████████ provided a formal statement to the Police on 6 March 2019, and was spoken to by a CAC investigator on 2 December 2019. The CAC was unsuccessful in obtaining a witness statement from ██████████ (leading to the issue of the witness summons already discussed).

22. The CAC submitted that there is nothing to suggest that the previous statements provided by both ██████████ and ██████████ are unreliable and, because the respondent had filed no evidence contesting the allegations against her, the Tribunal should take those previous statements into account without requiring either witness to be called.

23. Finally, again immediately prior to the commencement of the hearing on 22 June, the CAC provided a sworn affidavit and medical certificate from ██████████,<sup>11</sup> seeking to have her police statement given on 18 March 2019 admitted as evidence without her having to attend the hearing (i.e. as hearsay evidence under section 18 of the Evidence Act.

24. The CAC submitted that the Tribunal should admit the evidence set out in paragraphs 21 - 23 above, and have regard to it when assessing whether the charges against the respondent have been made out.

25. Section 17 of the Evidence Act provides that hearsay evidence is not admissible except as provided in that, or another, subpart of the Evidence Act or by the provisions of any other Act. The CAC has also drawn the Tribunal's attention to rule 31 of the Teaching Council Rules 2016 which provides:

At a hearing, the Disciplinary Tribunal may receive as evidence any document, record, or other information that may in its opinion assist it to deal with the matter before or it, whether or not the document, record, or information would be admissible in a court of law.

26. Although, on its face, rule 31 above gives a broad discretion to the Tribunal, it is not an unfettered discretion and the courts have made findings in relation to very similar provisions in other disciplinary jurisdictions. The Court of Appeal in *A Professional Conduct Committee of the Nursing Council of NZ v Health Practitioners Disciplinary*

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<sup>11</sup> Née ██████████.

*Tribunal & W*<sup>12</sup>, considered the largely similar provision contained in the Health Practitioners Competence Assurance Act 2003.<sup>13</sup> The Court of Appeal upheld the decision of the High Court,<sup>14</sup> to the effect that the Tribunal, in assessing the admissibility of the proposed hearsay in terms of its discretion, must undertake a two-step process:<sup>15</sup>

- (a) First, the Tribunal should assess whether the evidence would be admissible under the Evidence Act.
  - (b) Second, the Tribunal may, nonetheless, in its discretion admit the evidence if that evidence may assist the Tribunal to deal effectively with the matters before it.
27. This Tribunal, accordingly, will follow that approach in relation to the CAC's application that the statements of ██████████, ██████████, ██████████, and ██████████ be admitted as hearsay evidence.
28. Section 18 of the Evidence Act enables a hearsay statement to be admissible in any proceeding if:
- (a) the circumstances relating to the hearsay statement provide reasonable assurance that the statement is reliable; and
  - (b) the maker of the statement is unavailable as a witness.
29. The term "unavailable as a witness" is defined in section 16 of the Evidence Act to apply if the person is dead, or is outside New Zealand and it is not reasonably practicable for him or her to be a witness, or the person is unfit to be a witness because of age or physical or mental condition, or the person cannot with reasonable diligence be identified or found, or the person is not compellable to give evidence.
30. Section 8 of the Evidence Act requires evidence to be excluded if its probative value is outweighed by the risk that the evidence will have an unfairly prejudicial effect on the

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<sup>12</sup> *A Professional Conduct Committee of the Nursing Council of NZ v Health Practitioners Disciplinary Tribunal & W* [2020] NZCA 435.

<sup>13</sup> Health Practitioners Competence Assurance Act 2003, sch 1, cl 6(1).

<sup>14</sup> *W v Health Practitioners Disciplinary Tribunal* [2019] NZHC 420, [2019] 3 NZLR 779. See also *Re Vatsyayann* HPDT 338/Med10/152P, 10 November 2010.

<sup>15</sup> *A Professional Conduct Committee of the Nursing Council of NZ v Health Practitioners Disciplinary Tribunal & W* [2020] NZCA 435 at [25].

proceeding, or needlessly prolong the proceeding. In determining this, the right of the defendant to offer an effective defence. The Court of Appeal in the *Nursing Council* decision confirmed that the first step for the Tribunal is consideration of the section 18 criteria, followed by a section 8 consideration.<sup>16</sup>

31. In terms of the first step, then:

- (a) The Tribunal accepts that the statements given to Police, and the CAC investigators, by ██████████, ██████████ and ██████████ provide reasonable assurance that they are reliable for the simple reason they were provided to police officers, and/or Council investigators, in the course of an investigation. In signing the police statements, the witnesses expressly confirm the knowledge that they make the statements knowing they could be used in court proceedings, and that it is an offence to make a statement that is known to be false or is intended to mislead. Further, ██████████ statement was confirmed on oath by the giving of her affidavit at the commencement of the hearing.

The Tribunal does not accept the same can be said, however, of the contemporaneous incident reports given by ██████████, ██████████ or ██████████. The Tribunal holds grave concerns about the process followed by the Centre to initially investigate concerns raised back in August 2018 as part of the Centre's "organisational review", most particularly that that investigation was carried out by Centre owner ██████████ some years after many of the incidents were alleged to have taken place, and was neither independent or conducted following good investigative process. Nor can the Tribunal attribute to the same reliability to a file note of a conversation ██████████ had with a CAC investigator which was not a formal interview.<sup>18</sup>

- (b) The Tribunal also accepts, as a result of the medical evidence filed with it by ██████████ ██████████ and ██████████, that they are unavailable as witnesses. The Tribunal does

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<sup>16</sup> *A Professional Conduct Committee of the Nursing Council of NZ v Health Practitioners Disciplinary Tribunal & W* [2020] NZCA 435 at [26].

<sup>17</sup> Brief of Evidence of ██████████ at paragraphs 4-5.

<sup>18</sup> Attached to Brief of Evidence of Kate Henderson at KH1, BoD vol 2 at 301.0267-0269.

not, however, accept that [REDACTED] and [REDACTED] are unavailable as witnesses, given that neither have engaged with the process.

32. In the *Nursing Council* case, the Court of Appeal confirmed that, after the assessment the Tribunal has undertaken in paragraph 31, the Tribunal could consider the exercise of its discretionary power to admit otherwise inadmissible evidence, noting that the Tribunal must exercise that discretion judicially, with reasons, and observing the principles of natural justice.<sup>19</sup>
33. In exercising its discretion, then, the Tribunal has carefully weighed the following factors:
- (a) The Tribunal does not wish to place the health of unwell witnesses at risk in circumstances where there is evidence given to Police and CAC investigators available.
  - (b) The Tribunal does not regard as credible previous statements or reports given by witnesses who have made no attempt to engage with the process or who have ignored Tribunal summonses.
  - (c) The charges the respondent faces are potentially serious.
  - (d) The respondent has a right to be able to question witnesses who seek to give evidence potentially prejudicial to her. That is her natural justice right. Equally, the Tribunal would benefit from being able to test such evidence further by being able to question the witnesses concerned.
34. In conducting this analysis, then, the Tribunal has determined that:
- (a) The prior statements and incident reports from [REDACTED] and [REDACTED] are inadmissible.
  - (b) The prior statements given to Police by [REDACTED] and [REDACTED] are admissible as hearsay evidence, but will be given due weight to reflect the fact the evidence those statements contain remains unsworn and untested.

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<sup>19</sup> *A Professional Conduct Committee of the Nursing Council of NZ v Health Practitioners Disciplinary Tribunal & W* [2020] NZCA 435 at [27] and [38].

35. The Tribunal does not consider section 130 of the Evidence Act is applicable here, because there would be a useful purpose to the witnesses appearing at the hearing to produce their prior statements, in that those statements could be tested and subjected to questioning from the Tribunal and the respondent if the witnesses were present.

### **Te Ture - The Law**

36. Section 378 of the Act defines serious misconduct:

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

- (a) that –
- (i) adversely affects, or is likely to adversely affect, the wellbeing 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.

37. The Tribunal agrees with the CAC's submission that the test under section 378 is conjunctive<sup>20</sup>, meaning that as well as meeting one or more of the three adverse consequences, a teacher's conduct must also be of a character or severity that meets the Teaching Council's criteria for reporting serious misconduct, pursuant to Rule 9 of the Teaching Council Rules 2016.
38. The Tribunal also accepts the CAC's submission that, if established, the respondent's conduct would fall within the following sub-rules of Rules 9(1):<sup>21</sup>
- (a) Rule 9(1)(a): using unjustified or unreasonable physical force on a child or young person:
  - (b) Rule 9(1)(b): emotional abuse that causes harm or is likely to cause harm to a child or young person.
  - (c) Rule 9(1)(c): neglecting a child or young person.

<sup>20</sup> *Teacher Y and Education Council of Aotearoa New Zealand*, [2018], NZTDT 3141, 27 February 2018 at [64].

<sup>21</sup> Whichever version of the Rules applied at the appropriate time.

- (d) Rule 9(1)(k): an act or omission that that brings, or is likely to bring, the teaching profession into disrepute.

### **Kōrero Taunaki – Analysis of Evidence**

39. Bearing in mind the above decisions on admissibility, this part of the Tribunal’s decision considers each particular and the evidence before the Tribunal. As noted by the CAC,<sup>22</sup> the standard of proof for establishing whether each particular is satisfied is the balance of probabilities. The Tribunal also notes that the respondent has denied each particular of the charge. The respondent said in her statement, confirmed at the hearing that:<sup>23</sup>

[I] do not particularly recall any of these alleged incidences [sic].

I do have strong concerns about the validity and truth to some if not all of these statements.

40. The Tribunal’s task, then, is to determine whether it is satisfied, on the balance of probabilities that each of the particulars has been established.

#### *Particulars 1(a)(i) and (ii)*

41. These particulars allege that, between May 2014 and June 2015, the respondent swore and/or made inappropriate comments towards Child 1 at the Centre by telling her to “fuck off”, and/or “shut up and sit down”, and/or “get over it”.
42. The evidence for this allegation is contained in the statement given to Police by ██████████ on 18 March 2019,<sup>24</sup> which the Tribunal has admitted as hearsay evidence. In that statement, ██████████ explained that her daughter, then aged █ had attended the Centre for about a year, starting when she was ██████████. ██████████ had taken her daughter out of the Centre when Head Teacher, ██████████, had departed the Centre.
43. Relevant to the particulars at issue, ██████████ explained that she had concerns with the respondent and articulated those to ██████████, the Centre Manager, when she removed her daughter. She described those concerns as follows:<sup>25</sup>

<sup>22</sup> CAC Opening Submissions, paragraph 5.4.

<sup>23</sup> Undated statement of Julia Costello filed 21 June 2021.

<sup>24</sup> BoD, vol 2 at 301.0122-0123.

<sup>25</sup> Paragraphs 12-14 of Police statement of 18 March 2019 in BoD vol 2 at 301.0123.

12. The concerns that I had included Julia swearing at the children. In particular I remember there was a Maori girl who was told to “fuck off” and to “shut up and sit down”, also to “get over it”. She would have been about [REDACTED].
  13. There were several times I remember hearing Julia swear at the children. It would be a raised voice.
  14. Julia also had her own blue tooth speaker and used to play songs that I did not think were suitable. This included rap songs where artists would swear and other tunes of music that she probably liked, rather than being child friendly tunes.
44. The Tribunal has given limited weight to [REDACTED] hearsay evidence. Nothing appears to have been raised by [REDACTED] at the time she observed the alleged behaviour giving rise to these particulars. Rather, she has told Police about what she observed some time later.
  45. Nor did [REDACTED] attend the hearing so that she could be questioned either by the respondent, or by the Tribunal.
  46. The CAC submitted that [REDACTED] hearsay evidence was broadly consistent with incidents that other witnesses described where Ms Costello spoke to children in an inappropriate or hostile way. However, the Tribunal notes that no other witnesses referred to the respondent swearing at children and, given the serious nature of the allegation, the Tribunal would have expected other witnesses to mention such incidents had they heard them.
  47. The Tribunal therefore declines to find particulars 1(a)(i), and (ii) to be established to the requisite standard.

*Particulars 1(b)(i) and (ii)*

48. As amended, these particulars allege that, in or around 2015, the respondent dragged Child 2, and/or yelled at Child 2.
49. The evidence for these particulars was given by [REDACTED]. [REDACTED] was employed at the Centre as Head Teacher for several years until [REDACTED]. Between June 2014 and June 2015, [REDACTED] was joint Centre manager with [REDACTED],



██████████.<sup>26</sup> ██████████ worked in the “Under 2” classroom with the respondent for approximately one year up until April 2015.<sup>27</sup>

50. Relevant to these particulars, ██████████ described the alleged incident as follows:<sup>28</sup>

I remember one particularly rough incident involving Julia and a child called [Child 2] at the Centre in around 2015. The incident was reported to me by two parents. I think one mother’s name was ██████████. The other parent was ██████████

Both parents withdrew their children from the Centre after they informed me that they had witnessed Julia drag a little girl through the playground and yell at her and roughly put her on an outside bench. They told me that [Child 2] had jumped in a blow-up whale pool that Julia was setting up, and that Julia had flipped [Child 2] out of the pool. I did not see the start of this incident, but I saw part of it from inside. In particular, I saw Julia dragging [Child 2] inside and yelling at her. I then had to comfort [Child 2] because she was upset and crying.

51. ██████████ stated that she also saw the respondent grabbing [Child 2] roughly on other occasions.
52. The Tribunal notes that ██████████ did not observe the entire incident as allegedly described to her by two parents, but does recall that part of the incident that gives rise to the alleged particulars in question in the amended charge (i.e. the dragging of Child 2 and the yelling at Child 2).
53. The CAC submits that ██████████’ evidence in relation to this incident is remarkably consistent with other evidence about dragging children and speaking to children in a rough voice and is consistent with the general theme of the respondent frequently losing her patience with young children and speaking to them in an inappropriate manner. She left the Centre in 2015 and not present at organisational review in 2018.
54. The Tribunal notes that ██████████ is giving this evidence some time after the alleged incident occurred, in part because ██████████ left the Centre in 2015 and was not present at the 2018 organisational review. When questioned both by the respondent and by the Tribunal as to why she did not raise the issue with the respondent at the time, ██████████ was adamant that she was unable to raise any issues with the respondent as she became defensive and did not take feedback well. The Tribunal does note in this regard that, when

<sup>26</sup> Brief of Evidence of ██████████ at paragraph 1.3.

<sup>27</sup> Brief of Evidence of ██████████ at paragraph 1.4.

<sup>28</sup> Brief of Evidence of ██████████ at paragraphs 5.1 and 5.2.

██████████ resigned from the Centre in ██████████ 2015, she sent a seven page letter about the respondent to ██████████. Part of that letter was contained in the CAC's Bundle of Documents, and it does refer to ██████████ being unable to raise issues with the respondent (for example, "*When I ask Julia to do something she will often just say 'no' and then walk away from me. I find this incredibly hard to work with as I find she is defiant to me all the time even in front of other staff*").<sup>29</sup>

55. Further, also in response to questioning at the hearing, ██████████ emphasised that once she left, she wished to put the experience behind her and did not intend to raise any further issues, until she was contacted first for the 2018 organisational review and subsequently for the CAC process. She admitted in response to questions from the Tribunal that she would respond differently now, and would take matters further, given the seriousness of the allegations.
56. ██████████' evidence at the hearing was also relatively balanced, as she acknowledged in response to questioning, that the respondent was not always forceful or rough with children, it would happen "*spasmodically*."
57. The Tribunal found ██████████ to be a fair and credible witness. Her evidence as to the alleged rough handling of Child 2 with respect to these particulars was consistent with other evidence given at the hearing of intermittent rough handling of children by the respondent.
58. The Tribunal therefore finds particulars 1(b)(i) and (ii) to be established on the balance of probabilities.

*Particulars 1(c)(i), (ii), (iii), and (iv)*

59. These particulars allege that, in or around 2015, the respondent would regularly call a child aged approximately ██████████ who had a medical condition (Child 3) a "retard"; and/or leave Child 3 unattended; and/or leave Child 3 in a dirty nappy; and/or falsify Child 3's nappy records to record that her nappy had been changed.

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<sup>29</sup> BoD, vol 1 at 301.0190.

60. Several of the witnesses who gave evidence for the CAC spoke of the respondent allegedly engaging in such practises with respect to Child 3, a special needs child with a disability who attended the Centre. Specific evidence given was as follows:

(a) ██████ deposed that the respondent was Child 3's main caregiver.<sup>30</sup> ██████ stated that the respondent would call Child 3 a "retard", would not engage with her and would leave her unattended in part of the room for young babies, on a mat outside or on a beanbag "for hours".<sup>31</sup>

██████ also alleged that the respondent would not change Child 3's nappy until her father arrived to pick her up, and would falsify the nappy records to say her nappy had been changed earlier. ██████ claimed she knew this because when Child 3 was dropped off in the morning, ██████, would mark her nappy in pen to identify the nappy Child 3 had arrived in.<sup>32</sup>

██████ also stated that "we" contacted the Ministry of Education at one stage, with Child 3's parental permission, to obtain ideas of how to interact with Child 3. The Ministry provided guidelines which were never followed by the respondent.<sup>33</sup>

(b) ██████, when interviewed by the CAC investigator, referred to Child 3 being left by the respondent in her seat or chair "because it was easier."<sup>34</sup>

(c) ██████ deposed that Child 3 "would be left alone propped on the floor and left to her own devices."<sup>35</sup>

61. ██████ did not speak of hearing the respondent refer to Child 3 as a "retard." Nor did ██████ in her interview with the CAC investigator. The only evidence on this point comes in a somewhat throwaway comment in ██████' evidence.<sup>36</sup>

62. The issue of leaving children in dirty nappies, and the alteration of nappy records, was a vexed one through the hearing. The respondent categorically denied both aspects of this

<sup>30</sup> Brief of Evidence of ██████ at paragraph 3.1.

<sup>31</sup> Brief of Evidence of ██████ at paragraphs 3.2 and 3.3.

<sup>32</sup> Brief of Evidence of ██████ at paragraph 3.4

<sup>33</sup> Brief of Evidence of ██████ at paragraph 3.2.

<sup>34</sup> BoD vol 1 at 201.0079

<sup>35</sup> Brief of Evidence of ██████ at 4.9.

<sup>36</sup> Brief of Evidence of ██████ at paragraph 32.

allegation. The Tribunal has no doubts that [REDACTED], as she described, instigated a procedure to work out when children's nappies were being changed (her use of a pen to mark the nappy).<sup>37</sup> However, examples of the nappy charts for some weeks of the period in question were before the Tribunal in evidence,<sup>38</sup> and it is apparent from those examples that while some nappy entries were made (including by the respondent), on many occasions the charts were not completed at all. The Tribunal finds it impossible to ascertain from the evidence before it that the respondent was falsifying nappy charts.

63. With regards to leaving Child 3 unattended, the respondent's questioning of witnesses at the hearing suggested that she accepted this occurred at times but mitigated the alleged behaviour by pointing out that she was not far away but in another area of the wider [REDACTED] room at the Centre. The Tribunal does, therefore, accept that at times the respondent did not engage adequately with Child 3 and left her for long periods of time while in another part of the [REDACTED] room.
64. The Tribunal therefore finds that particular 1(c)(ii) has been established but that particulars 1(c)(i), (iii) and (iv) have not been established to the requisite standard.

*Particulars 1(d)(i) and (ii)*

65. These particulars allege that, in or around 2015, the respondent would regularly leave a baby aged between [REDACTED] (Child 4) in her cot and only change her nappy when she saw Child 4's grandparents arrive to pick her up; and/or inform Child 4's grandparents that Child 4 had eaten, when she had not eaten.
66. The evidence for these particulars was given by [REDACTED]. [REDACTED] gave general evidence about the respondent not changing children's nappies, and discrepancies on the nappy change sheets. She also claimed that the respondent "would often say to parents the children had been fed or changed when they hadn't been."<sup>39</sup> [REDACTED] then described the following:<sup>40</sup>

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<sup>37</sup> Brief of Evidence of [REDACTED] at paragraph 3.4.

<sup>38</sup> BoD vol 1 at 301.0198-301.0227

<sup>39</sup> Brief of Evidence of [REDACTED] at paragraphs 6.6-6.8.

<sup>40</sup> Brief of Evidence of [REDACTED] at paragraphs 6.9-6.10.

For example, one child, [Child 4], was about [REDACTED] old when she started at the Centre. [Child 4] was often picked up by her grandparents at around 12.30 pm, along with her older brother...who was also enrolled at the Centre.

When [Child 4] was about [REDACTED], I saw Julia notice when [Child 4's] grandparents were arriving and then take [Child 4] out of the cot. She would give her a quick nappy change and tell [Child 4's] grandmother that [Child 4] had just been fed. This was not true, as [Child 4] had been left in her cot and Julia had not attempted to feed her, based on what I had seen Julia doing on those occasions.

67. The problems with establishing allegations involving the changing of nappies by the respondent, and discrepancies in the nappy charts have already been traversed by the Tribunal above. For the same reasons, the Tribunal does not find particular 1(d)(i) to be established.
68. With respect to particular 1(d)(ii), the only evidence on this point came from [REDACTED], and some significant time after the event. The CAC submits that the specificity of this evidence lends it credibility, and that it is also consistent with other evidence before Tribunal that the respondent had favourite children and there was a difference in the way she treats them. However, the Tribunal considers an allegation that the respondent neglected to ensure a child had eaten, and then lied about it to the child's caregivers, to be a serious allegation. The Tribunal would also have expected to see evidence of complaints from the grandparents concerned that the child was hungry on pick-up, or similar such evidence. It is not, in the Tribunal's view, to treat a specific incident like this as analogous to general, vague allegations that the respondent may have treated children differently depending on her relationship with them.
69. The Tribunal therefore finds that particular 1(b)(ii) is not established to the requisite standard.

*Particulars 1(e)(i), (ii) and (iii)*

70. These particulars allege that, in or around June 2017, the respondent shook a crying child aged approximately [REDACTED] (Child 5) hard while holding him; and/or shouted close to Child 5's face; and/or left Child 5 unattended while he was upset.

71. Child 5's mother gave evidence at the hearing. She explained that Child 5 and his brother had attended the Centre from a very young age, starting in [REDACTED] when he was around [REDACTED] old. The respondent became Child 5's primary caregiver from that time.<sup>41</sup>
72. It appears she was not made aware of the alleged June 2017 incident at the time, but became aware in late 2018, after a meeting was held at the Centre with the Centre owners and a representative from the Ministry of Education to explain to parents that the respondent and [REDACTED] had left the Centre.<sup>42</sup> Child 5's mother was then told of the above incident, and Child 5's mother then reported her concerns to the Police, who ultimately decided not to bring any charges.<sup>43</sup>
73. Several of the CAC's witnesses gave evidence alleging that the respondent favoured other children at the Centre, and that Child 5 was not one of the respondent's favourite children.<sup>44</sup>
74. Specifically in relation to these particulars, the main evidence came from [REDACTED], a teacher still working at the Centre, who has worked there since May 2017 with the infants and toddlers aged up to three years old. [REDACTED] worked with the respondent until the respondent left.<sup>45</sup> [REDACTED] gave the following evidence about the "June 2017 incident":<sup>46</sup>

In June 2017, at around 12 pm one day, I was at the lunch table in the Centre feeding the children who were over two years old.

Julia was in the "Under 2" classroom. I noticed that she was cradling a baby, [Child 5], while walking over to the sleep room. [Child 5] was around [REDACTED] old at the time. He often screamed, and cried until he would pass out asleep, which happened a few times a day.

On this occasion, [Child 5's] head was resting in the crook of Julia's elbow. He had just been given a bottle of milk. He was screaming and crying. In response, Julia shook [Child 5] quite hard up and down as she held him in her left arm. Her arm was moving up and down to shake [Child 5]; it was harsh shaking, not just a gentle rocking. Julia then shouted close to [Child 5's] face (about 30 centimetres away) "why are you crying, you just had your bottle", or something similar. Julia spoke to [Child 5] in an aggressive, hostile tone, and she kept shouting at him as she walked over to the infant area. The sleep room is about five metres away from the "Under 2" classroom.

<sup>41</sup> Brief of Evidence of [Child 5's mother] at paragraphs 1.2-1.4.

<sup>42</sup> Brief of Evidence of [Child 5's mother] at paragraphs 2.1.

<sup>43</sup> Brief of Evidence of [Child 5's mother] at paragraphs 2.2 and 2.3.

<sup>44</sup> Brief of Evidence of [REDACTED] at paragraph 4.4; Brief of Evidence of [REDACTED] at paragraph 2.7; Brief of Evidence of [REDACTED] at paragraph 6.5.

<sup>45</sup> Brief of Evidence of [REDACTED] at paragraphs 1.2-1.3.

<sup>46</sup> Brief of Evidence of [REDACTED] at paragraphs 2.1-2.4.

Julia then put [Child 5], who was still upset, down in a beanbag in the infant area and left him there unattended. [Child 5] continued to scream for around 20 minutes until he fell asleep.

75. ██████ did eventually raise her concerns with the Centre owner, although she conceded she did not intervene at the time because she was supervising the children at the lunch table. She also said she did not report the incident “because I thought that I would be seen as an unreliable or difficult staff member, as I had only just started at the Centre and had already been off sick due to injury.”<sup>47</sup> ██████ eventually tried to raise her concerns directly with ██████,<sup>48</sup> and then eventually reported the incident to the Centre owner, ██████, as part of the organisational review of the Centre in August 2018.<sup>49</sup>
76. The CAC submit that ██████’ evidence is consistent with the general evidence that Child 5 was not one of the respondent’s favoured children and therefore was treated less favourably than her preferred children. It submits that the respondent disagreed with the food and sleep requirements conveyed to the Centre by Child 5’s parents, but did not take steps available to her to address this properly, namely by giving Child 5 extra expressed breast milk that had been provided to the Centre, or discussing the sleep situation with Child 5’s parents rather than leaving Child 5 for lengthy periods of time before he fell asleep.
77. The CAC submitted that ██████’ evidence was highly credible, and reliable. ██████ saw the incident clearly. This is a particularly serious example of Ms Costello becoming frustrated with a young child and taking out her frustration on the child; in this case by shaking and shouting at an unsettled, ██████ old baby. The CAC submitted that there can be no suggestion that this evidence was invented or exaggerated; ██████ clearly described what she saw, and on no analysis is the conduct likely to have been misinterpreted, particularly in light of the combination of shaking, shouting, and then leaving the child unattended to cry.

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<sup>47</sup> Brief of Evidence of ██████ at paragraph 2.5.

<sup>48</sup> Brief of Evidence of ██████ at part 5.

<sup>49</sup> Brief of Evidence of ██████ at paragraph 2.6.

78. Some time was spent in questioning by the Tribunal and the respondent of [REDACTED] at the hearing as to the nature of the respondent's interactions with Child 5 in relation to these alleged particulars. The Tribunal found [REDACTED] to be a credible witness, fair in her descriptions and consistent in her recollections. Her description of the way the respondent attempted to settle Child 5 was believable and the Tribunal accepts that there was some degree of rough handling in the respondent's attempted settling of Child 5. [REDACTED] was also adamant as to Child 5 being left unattended for some time while crying, expressing regret that, as a relatively inexperienced teacher herself at that time and not used to working with younger children, she had not intervened when Child 5 was left to cry.
79. The Tribunal is satisfied that particular 1(e)(i), (ii) and (iii) is established to the required standard, primarily because it accepts [REDACTED] evidence.

*Particular 1(f)*

80. Particular 1(f) alleges that, in or around early 2018, on at least one occasion, the respondent grabbed Child 5, then aged around [REDACTED], by the upper arms and yanked him out of his chair, causing him to hit his upper thighs on the underside of the kai table.
81. The main evidence in support of this particular was given by CAC witness, [REDACTED]. [REDACTED] is currently employed as a Student Teacher, working with children under three, at the Centre and is currently in her third year of teacher training. She has been employed by the Centre since [REDACTED], initially as a relieving teacher. She worked with the respondent at the Centre until the respondent left.<sup>50</sup>
82. [REDACTED] describes the alleged incident forming this particular as follows:<sup>51</sup>

Early in 2018, I observed an incident involving Julia while working at the Centre in the "Under 3s" classroom (one of the two classrooms for infants under three years old). Julia was with a group of infants under two years of age, and was feeding the infants. The incident happened at around 11 am. At the time, I was with my own group of toddlers in a different area to Julia (but in the same classroom), also feeding the infants.

[Child 5] was crying quite loudly while seated at the infant table area. [Child 5] was about [REDACTED] at the time. Julia told [Child 5], "stop crying or you can go to bed with no

<sup>50</sup> Brief of Evidence of [REDACTED] at paragraphs 1.1-1.3.

<sup>51</sup> Brief of Evidence of [REDACTED] at paragraphs 2.1 – 2.6.



lunch.” She said this in a gruff manner, and by this stage, [Child 5] was quite upset and still crying.

In my opinion, Julia was in a bad mood that day, and when the children were crying or grisly, Julia’s mood would get worse. Julia’s voice that day when she was speaking to kids was gruff and harsh, and she was storming around the classroom, stomping.

Julia then went and stood behind [Child 5], grabbed him from behind by his upper arms and yanked him out of the chair. As a result of this action, both of [Child 5’s] upper thighs hit the underside of the table. I heard a thud where his legs had hit the table.

After this happened, [Child 5] started screaming in a high pitched way, while still carrying on crying. It sounded like a “sore cry” (like he was hurt or in pain, not just a distressed cry). Julia then dumped [Child 5] on a mat on the floor about a metre away from the table and continued feeding the other infants.

saw this kind of thing happen multiple times.

83. ██████████ stated in her evidence that she did not say anything at the time because she “felt that [she] would have been bullied and forced out of the Centre.” She said she felt “too scared to speak out...because [she] felt that Julia would have been defensive and made [her] feel uncomfortable.” She also felt that she couldn’t raise issues with ██████████ ██████████ because she and the respondent would have made things difficult, as she had observed them do to other staff members in the past.<sup>52</sup>
84. ██████████ reported the alleged incident to ██████████ during the 2018 organisational review. She also submitted an incident report, provided a formal statement to the Police on or about 8 March 2019, and was interviewed by CAC investigators on 7 November 2019.<sup>53</sup>
85. The CAC submits that ██████████ evidence on this incident is broadly consistent with ██████████’ evidence discussed above in relation to Child 5’s temperament and the way the respondent would deal with his behaviour at times.
86. Again, some time was spent at the hearing by the Tribunal and the respondent in questioning ██████████ on this alleged incident. The Tribunal was also directed by the respondent to photographs of the kai table in question.<sup>54</sup> Again, ██████████ was fair in

<sup>52</sup> Brief of Evidence of ██████████ at paragraphs 5.1-5.2.

<sup>53</sup> Brief of Evidence of ██████████ at paragraphs 6.1, 6.3-6.4; Brief of Evidence of Kate Henderson at KH1 and KH4 – BoD Vol 2 at 301.0099 and 301.0119; and Brief of Evidence of Kate Henderson at KH12 – BoD vol 2 at 301.0322.

<sup>54</sup> Photos at BoD vol 2 at 301.0335 following.

her response to the questions put to her, and demonstrated physically the action of the respondent in lifting Child 5 out of his chair and away from the kai table.

87. The Tribunal is satisfied, primarily as a result of [REDACTED] evidence, that the alleged actions were done roughly, and with some degree of exasperation and force. The Tribunal therefore finds that particular 1(f) is established to the requisite standards

*Particulars 1(g)(i), (ii) and (iii)*

88. These particulars allege that, in or around 2018, the respondent yelled at Child 5, then aged around [REDACTED], who was stuck on his tummy under a picnic table, by shouting at him to crawl; and/or told Child 5 “well you have to get yourself out”; and/or walked away from Child 5 while he was still under the table.
89. The evidence for these particulars was given by [REDACTED]. [REDACTED] son attended the Centre from 2016 when he was about [REDACTED]. He was in the “Under 2’s” area when the respondent worked at the Centre.<sup>55</sup>
90. [REDACTED] described how, during 2018 when her younger child was around [REDACTED] [REDACTED], she would drop her son off at the Centre and sit in her car at the Centre carpark to breastfeed her younger child. In doing so, she witnessed a number of incidents in the outside play area involving the respondent and children at the Centre.<sup>56</sup> One of those incidents was that giving rise to these particulars, which [REDACTED] described in the following terms:<sup>57</sup>

On one occasion in 2018, I observed an incident involving a child, [Child 5], who was just over [REDACTED] at the time and not yet crawling (but at the age where most children are). [Child 5] was stuck on his tummy under a small child’s picnic table outside. He was very distressed and Julia was yelling at him to crawl. This went on for some time and then Julia said, “well you will have to get yourself out!” and walked off. [REDACTED], one of the other teachers, immediately came and picked [Child 5] up from underneath the table and comforted him.

<sup>55</sup> Brief of Evidence of [REDACTED] at paragraphs 1.2 and 1.3.

<sup>56</sup> Brief of Evidence of [REDACTED] at paragraph 2.1.

<sup>57</sup> Brief of Evidence of [REDACTED] at paragraph 2.1 (b).

91. The Tribunal has viewed the photographs of the Centre,<sup>58</sup> and has heard evidence from a number of witnesses, and is satisfied that ██████████ was in a position to observe the incident she described from her position in a car in the carpark outside the Centre.
92. The Tribunal is therefore satisfied that the incident occurred and that, indeed, the respondent accepts that it occurred in largely the manner described. This is because much of the respondent's questioning of witnesses in relation to this and other incidents relates to her use of the teaching methodology RIE, a teaching philosophy developed by Magda Gerber which, in essence, has as its philosophy respect for, and trust in, the baby to be an initiator, an explorer and a self learner. Gerber encouraged parents and caregivers to provide an environment for the child that is physically safe, cognitively challenging and emotionally nurturing, time for uninterrupted play, and freedom to explore and interact with other infants.<sup>59</sup>
93. Although the respondent can't recall this specific incident, she generally attributes her actions in leaving a child to fend for themselves in the way alleged by this particular to be an aspect of her following the RIE philosophy, a philosophy not necessarily followed or practised by the other teachers she worked. The CAC in response submitted that this does not excuse or justify the conduct described by ██████████. The child was distressed and crying, he was stuck, and was unable to get himself out from where he was. What ██████████ witnessed was not a teacher encouraging a nervous or reluctant child to do something independently; it was an uncaring interaction with a distressed child which ended with Ms Costello walking off and leaving him stuck.
94. The Tribunal accepts ██████████ evidence in relation to this particular, accepts the CAC's categorisation of it as set out above and therefore finds particulars 1(g)(i), (ii) and (iii) to be established to the requisite standard.

*Particular 1(h)*

95. This particular alleges that, in or around April 2018, the respondent dragged a crying child (Child 6) by the hand quickly, resulting in Child 6 not being able to walk properly.

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<sup>58</sup> Photos at BoD vol 2 at 301.0335 following.

<sup>59</sup> <https://www.magdagerber.org/blog/magda-gerbers-rie-philosophy-basic-principles>

96. The evidence for this was given by [REDACTED]. She stated:<sup>60</sup>

In or around April 2018, at about 3.30 pm one afternoon, I saw Julia outside the “Under 2s” room. Julia was supervising the children who were playing outside in the playground, including [Child 6], who would have been around [REDACTED] old at the time. [Child 6] had just had toilet training.

I saw Julia drag [Child 6] inside by the hand for about 30 seconds, for around ten metres. Julia dragged [Child 6] roughly while angrily telling [Child 6] to go to the toilet and not to pull her pants down. As Julia was dragging her, [Child 6] was trying to walk, but was not able to do so properly because of how Julia was pulling her along. [Child 6’s] feet were stumbling under her. [Child 6] was screaming and crying while this happened, and did not seem to want to come inside.

After bringing [Child 6] inside, Julia told me that [Child 6] had pulled her pants down and was trying to go to the toilet in a puddle. This did not seem right to me because [Child 6] did not have any clothing pulled down, and I had never personally seen her try to go to the toilet outside before. Julia then walked back outside. I took [Child 6] to the toilet, and comforted her until she stopped crying. [Child 6] did not need to go to the toilet, and she then went off and played.

97. [REDACTED] explained that she did not report the incident at the time because the respondent had been hostile and angry towards children and other teachers in the months before the incident. She reported the incident to [REDACTED] as part of the Centre’s organisational review on 27 August 2018.<sup>61</sup> She also discussed it with CAC investigators at the end of 2019.<sup>62</sup>
98. The CAC submitted that [REDACTED]’ oral evidence about this incident was particularly compelling; she was especially concerned about this way of handling the children because of the potential for their shoulders to be injured. The CAC contends that this detail, coupled with the consistency between this type of handling of the children as between [REDACTED] and [REDACTED], lends it particular credibility.
99. The Tribunal has already spoken of [REDACTED]’ fairness and the balance in the way she gave her evidence and her resulting credibility as a witness. The Tribunal found the manner in which [REDACTED] described and demonstrated the action forming this particular to be convincing and is satisfied that, from time to time and including on this occasion, the

<sup>60</sup> Brief of Evidence of [REDACTED] at paragraphs 3.1 – 3.3.

<sup>61</sup> Brief of Evidence of [REDACTED] at paragraphs 3.4-3.5; Brief of Evidence of Kate Henderson at KH1 – BoD vol 2 at 301.0101

<sup>62</sup> Brief of Evidence of Kate Henderson at KH12 – BoD vol 2 at 301.0304-0305.

respondent could be forceful and somewhat rough in her handling of children. The Tribunal is therefore satisfied that particular 1(h) is established to the requisite standard.

*Particular 1(i)*

100. This particular alleges that, in or around May 2018, the respondent patted a crying child (Child 7) hard on the bottom several times while she was holding Child 7 in her lap with his head facing the floor and his bottom facing the ceiling.

101. The main evidence supporting this allegation came from ██████████. She stated:<sup>63</sup>

One day in or around May 2018, before lunchtime, I witnessed another incident involving Julia at the Centre. I was dealing with my own group of children at the time in the same classroom.

[Child 7] was ██████████ at the time. He was with Julia in the “Under 3s” classroom.

[Child 7] had been unsettled and was quite upset. Julia seemed like she was unable to settle him. She picked him up and sat on the couch, with [Child 7] facing towards her on her lap. Julia said something along the lines of, “why do you cry all the time”, to [Child 7] in a gruff, teeth-clenched manner, with a slightly raised voice.

[Child 7] continued to cry. Julia repositioned [Child 7] across her lap, with his head on one side and feet on the other side. [Child 7’s] head was facing the floor and he was face down, with his bottom facing the ceiling. Julia then patted his bottom quite hard a few times. It was probably about three to four times, and happened quite quickly. During this time, [Child 7] was inconsolable. The pat was neither “slight tapping” nor “extreme hitting”. However, it was too firm for [Child 7’s] age and size in my view. It is not acceptable to do that to any child. As a result of Julia’s actions, [Child 7] became more upset.

102. ██████████ explained that she didn’t know what to do at the time as it was “all a blur.”<sup>64</sup> She reported the incident to the Police in March 2019,<sup>65</sup> and also referred to it in an interview with CAC investigators towards the end of 2019, where she described the respondent’s actions as “forceful.”<sup>66</sup>

103. The Tribunal apprehends that the respondent’s questioning of ██████████ in relation to incident is to suggest that she was simply comforting Child 7, and that nothing about the way she handled Child 7 transgressed the boundaries of appropriate handling of a child.

<sup>63</sup> Brief of Evidence of ██████████ at paragraphs 3.1-3.4.

<sup>64</sup> Brief of Evidence of ██████████ at paragraph 3.5.

<sup>65</sup> Brief of Evidence of Kate Henderson at KH4 – BoD vol 2 at 301.0119-0120.

<sup>66</sup> Brief of Evidence of Kate Henderson at KH12 – BoD vol 2 at 301.0320-0321.

104. The CAC submitted that the conduct that [REDACTED] described was not consistent with appropriate settling of a distressed child. It demonstrated a lack of care, and frustration on the part of the respondent. While jiggling a child gently and holding them close might be a genuine attempt to soothe a child, and similarly patting a child's bottom to soothe them to sleep might be common settling techniques, it is clear that what [REDACTED] was describing was neither of those things. The way the respondent was described as speaking, in a gruff teeth-clenched manner, was not caring, and in the CAC's submission was not a genuine attempt at soothing Child 7.
105. Again, the Tribunal found [REDACTED] evidence on this incident to be fair and balanced, and a credible description and depiction of what she had observed. Again, the Tribunal views this alleged incident as an example of where, at times, the respondent could become frustrated with children and respond in a rougher than acceptable manner.
106. The Tribunal is therefore satisfied that particular 1(h) is established to the requisite standard.

*Particular 1(j)(i), (ii) and (iii)*

107. These particulars allege that, in or around early July 2018, the respondent forcefully gripped a crying child aged approximately [REDACTED] (Child 8) by the upper arms while Child 8 was standing up; and/or shook Child 8 while shouting at her; and/or left Child 8 unattended while Child 8 was upset.
108. The evidence in support of these particulars is solely that of [REDACTED] as provided to both the Police<sup>67</sup> and the CAC investigators.<sup>68</sup>
109. The CAC submitted that [REDACTED] evidence is consistent with the evidence of other witnesses about the way that the respondent would speak to children – coming up close to their faces, speaking to them in a harsh or threatening manner, and the grip that she described on Child 8's upper arms is similarly consistent with the way the respondent had been described as shaking Child 5 and handling Child 5's brother and other children. In that respect, and coupled with the fact that the evidence was given to police in a formal statement which was signed as true and correct, the CAC submitted that the Tribunal

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<sup>67</sup> BoD vol 1 at 201.0085-0086.

<sup>68</sup> BoD vol 1 at 201.0072-0074.

should be satisfied that it can find this particular of the charge proven on the balance of probabilities.

110. The Tribunal has indicated it is prepared to admit [REDACTED] hearsay evidence, with it to be afforded weight appropriate to it not being tested or sworn. With respect to these particulars, the Tribunal accepts that what is alleged by [REDACTED] here is consistent with the respondent's rough handling and shouting at children on occasion, and leaving them to cry unattended.
111. The Tribunal is therefore satisfied that particulars 1(j)(i), (ii) and (iii) are established to the requisite standard.

*Particular 1(k)*

112. This particular alleges that, on or around 9 August 2018, the respondent made a racist comment by telling a child (Child 9), "you don't need your shoes, you are just a little Māori girl".
113. The only evidence for this allegation comes from [REDACTED], whose evidence the Tribunal has declined to admit. The particular is therefore not considered further and is not established.

*Particulars 1(l)(i), (ii), (iii), (iv), (v), (vi), (vii)*

114. These particulars are framed generally to allege that, in addition to the specific alleged incidents already discussed, between 5 March 2014 and September 2018, the respondent acted unprofessionally and/or inappropriately towards the children at the Centre on other occasions, including by shouting and/or swearing at children, and/or leaving children unattended to cry, and/or leaving children with dirty nappies and/or falsifying the nappy register, and/or restraining children by wrapping them too tightly in a blanket or sheet, and/or grabbing children from behind and pulling them roughly from the kai table, causing them to hit their legs on the underside of the table, and/or shaking children roughly while holding them, and/or dragging children by the arm or hand.
115. The CAC submitted that the overall picture that was overwhelmingly painted by the evidence that the Tribunal heard is of a teacher who had a propensity to act in inappropriate ways that demonstrated frustration and intolerance of the young children in

her care. While this behaviour did not occur every day, or in respect of every child, the occasions of the type of conduct particularised at 1(l)(i) to (vii) occurred regularly. It was worse towards children who were not her favourites, and the occasions of the respondent having a bad day or being in a bad mood increased over time, to the point that they were very frequent by the start of 2018.

116. The main evidence for each of these non-specific allegations is as follows:

- (a) *Shouting and/or swearing at children:* ██████████ reported witnessing instances of the respondent yelling at children.<sup>69</sup> ██████████ remembered the respondent “shouting with a harsh tone of voice” to children, and telling them abruptly to go to sleep.<sup>70</sup> ██████████ talked about witnessing the respondent swearing at children with a raised voice on a number of occasions.<sup>71</sup> ██████████ also recalled the respondent screaming and shouting at children on a regular basis.<sup>72</sup>

For the reasons already discussed, the Tribunal is satisfied that the respondent did shout at children on occasion. However, the Tribunal is not satisfied that the evidence establishes that the respondent swore at children. Particular 1(l)(i) is therefore partly established.

- (b) *Leaving children unattended to cry:* ██████████, Office Manager and Administrator at the Centre from October 2017 until January 2020,<sup>73</sup> stated:<sup>74</sup>

Although I am not a trained teacher, some of Julia’s practices did not sit well with me personally. For example, the practice of leaving children to cry. If I asked if it was okay for a baby to be crying, I would be told “Yes, they’ll get over it”, and that it was part of the particular teaching philosophy (RIE). Julia would often leave [Child 5] to cry in his cot. She would tell him to “shut up” or similar, or say things like “no, I’m not picking you up, you can just sit there are [sic] cry”.

██████████ also spoke of the respondent leaving babies in their bed or cot screaming “from 15 minutes to longer”.<sup>75</sup> ██████████ remembered visiting the

<sup>69</sup> Brief of Evidence of ██████████ at paragraph 2.1.

<sup>70</sup> Brief of Evidence of ██████████ at paragraph 2.2(a).

<sup>71</sup> Brief of Evidence of Kate Henderson at KH4 – BoD vol 2 at 301.0123.

<sup>72</sup> Brief of Evidence of ██████████ at paragraph 6.1.

<sup>73</sup> Brief of Evidence of ██████████ at paragraph 1.1.

<sup>74</sup> Brief of Evidence of ██████████ at paragraph 2.3.

<sup>75</sup> Brief of Evidence of ██████████ at paragraph 4.2.



sleep room at the Centre and seeing babies left to cry.<sup>76</sup> ██████ remember Child 5 left to cry until he passed out asleep,<sup>77</sup> and Child 8 left to scream and shout, as was the respondent's practice.<sup>78</sup> ██████ remembered the respondent following the same practices on a number of occasions.<sup>79</sup>

For the reasons already discussed, the Tribunal is satisfied that the respondent left children unattended to cry on occasion. Particular 1(l)iii) is therefore established.

(c) *Leaving children with dirty nappies and/or falsifying the nappy registers:*

As already discussed above, because the Tribunal has excluded the hearsay evidence of ██████, the primary evidence for this allegation comes from ██████ who stated:<sup>80</sup>

I was on the floor every day in my role as Head Teachers. I didn't have my own group of children so I would cover the other teachers' breaks as well. If Julia was about to go to lunch, I would check with her regarding which babies in her group had had a nappy change. Children's nappies were meant to be changed every two hours, regardless of whether or not the nappies were wet or soiled. There were always discrepancies between what Julia said and what was recorded on the nappy change sheets. It was obvious to me that she wasn't changing the nappies when she said she was, and compared to what she was noting down. This was because there were many incidents of nappies leaking or being too full because they hadn't been changed all day, and kids with bottom rashes from being left in soiled nappies.

There were kids who used different nappies at home to the nappies that were used at the Centre. Most parents would buy cheaper brands for the kids to use at the Centre because we were changing them every two hours. They would use a brand like Huggies at home. As mentioned above, at one point I started putting marks on nappies on the children as they came into the room in the morning with a pen so I knew that was the original nappy they had come to the Centre with. This was so I could raise with Julia that she had not changed nappies when she said she had. When I challenged Julia on this, saying that the nappy was the one the child had come to the Centre in and that they hadn't been changed for several hours, Julia would make excuses and say things along the lines of, "I checked them, they were dry", or "they must have done a wee after I checked them." There were also times that the kids in Julia's group weren't even recorded on the nappy list and yet they had been at the Centre all day. Teachers were responsible for writing the names of children down on the nappy change sheet if they were in the teacher's group.

<sup>76</sup> Brief of Evidence of ██████ at paragraph 2.3.

<sup>77</sup> Brief of Evidence of ██████ at paragraph 2.2.

<sup>78</sup> Brief of Evidence of ██████ at paragraph 4.7 and 4.5.

<sup>79</sup> Brief of Evidence of ██████ at paragraphs 2.1-2.3.

<sup>80</sup> Brief of Evidence of ██████ at paragraphs 6.6-6.7.

For the reasons already discussed, the Tribunal does not accept that the evidence clearly shows that the respondent left children with dirty nappies or falsified the nappy registers. Particular 1(I)(iii) is therefore not established.

(d) *Restraining children by wrapping them too tightly in a blanket or sheet:*

The evidence for this allegation came from a number of CAC witnesses. ■■■ spoke of the respondent swaddling children roughly in a sheet so the child could not move when being fed.<sup>81</sup> ■■■, who was employed as a teacher at the Centre from February 2015 until approximately September 2016, the last six months of which were in the Under 2's room with the respondent,<sup>82</sup> stated.<sup>83</sup>

I observed Julia restraining the babies at the Centre regularly. When she put the babies to sleep, she would wrap them really tightly so they could not move. She would physically wrap them in a sheet or blanket, wrapping their arms, body and legs, so only their head would be sticking out.

Julia would then hold the baby in a cradle position, also tightly, for anywhere between five and 30 minutes, until the baby eventually fell asleep. You could see the baby fighting to get out and sometimes the baby would be crying.

I had my own group of babies I would put to bed. I would put them in their cot and pat them to sleep, rubbing their back or rub [sic] their eyes, settling them by soothing. When I put babies to sleep they would have wrapping, but I would wrap them so that they were able to move and wriggle but feel secure. Babies need to be comfortable to sleep. Julia would wrap them so tightly they couldn't move. The wrap was around the baby (not tied to the cot or bed). Julia's reasoning when I asked what she was doing was that the babies needed to learn to sleep.

Julia would wrap babies like this when they were aged six months and older. We didn't have many babies at the Centre who were younger than six months old. It didn't seem to me that Julia would wrap babies in this way for any reason other than that she had decided they needed to sleep. This was because the babies Julia was wrapping tightly did not seem grumpy or overtired or anything like that. Julia would do this daily to get babies to sleep.

The babies didn't react well to being wrapped like this, and it would take half an hour to 45 minutes to settle them. Usually if it got to the 20-minute mark and they hadn't settled, I would get them up as it indicated they were not tired. Then usually in an hour or so they would be really tired and they would settle easily.

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<sup>81</sup> Brief of Evidence of ■■■ at paragraph 4.3.

<sup>82</sup> Brief of Evidence of ■■■ at paragraphs 1.2 – 1.3.

<sup>83</sup> Brief of Evidence of ■■■ at paragraphs 21.-2.5.

Finally, ██████████ also referred to this practice, stating that the respondent wrapped babies tightly in a sheet or blanket to the point where they were unable to move.<sup>84</sup>

Based on her questioning of witnesses at the hearing, the Tribunal does not understand the respondent to be denying she restrained children in the manner indicated by this particular (referred to by the respondent as swaddling).

The Tribunal also accepts that swaddling of very young children is an accepted practice amongst some parents. The Tribunal is, however, concerned that children may have been swaddled and then left to cry for long periods of time, and also that older infants (over the age of six months) may have been swaddled, a practice which the Tribunal does not accept is appropriate, given a child of that age's ability to move and want to break free from restraint. The Tribunal considers that it is standard for those who swaddle to stop doing so once babies start to roll over (typically between the age of two and four months), because of the raised risk of Sudden Infant Death Syndrome (SIDS).

The Tribunal therefore finds particular 1(l)(iv) to be established.

(e) *Pulling children roughly from the kai table*

██████████, who gave evidence on the specific allegation similar to this general one, spoke of this being a "common occurrence", "at least once per fortnight, sometimes more frequently", claiming that the respondent did not seem to "notice or care if the child hit the underside of the table. ██████████ stated that this happened several times with Child 5.<sup>85</sup> ██████████, in her interview with the CAC investigators, referred to this happening as being "very abrupt, grab them, hit their legs on the table, not caring, and then just go and put them on the ground and ignore them and go back to the others".<sup>86</sup>

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<sup>84</sup> Brief of Evidence of ██████████ at paragraphs 4.1-4.5.

<sup>85</sup> Brief of Evidence of ██████████ at paragraphs 4.1-4.5

<sup>86</sup> BoD vol 1 at 201.0074-0075.

For the reasons already discussed above, the Tribunal is satisfied that this particular 1(l)(v) is established.

(f) *Shaking children while holding them:*

██████████, again in her interview with CAC investigators, described the respondent shaking Child 5 “quite hard” when he was trying to sleep and she was holding him.<sup>87</sup> ██████████ described the following incident involving Child 5’s brother:<sup>88</sup>

On one occasion when [Child 5’s brother] had been crying and had wriggled free of his blankets, I witnessed Julia yell at [Child 5’s brother] to “shut up” and pick him under his arms. She used one hand to reposition the bedding and roughly handled [Child 5’s brother] for a couple of seconds while she was yelling at him. Specifically, Julia roughly jerked [Child 5’s brother] forwards and backwards. It was not prolonged. She then forcibly put him back in the cot and rewrapped him in the bedding.

For the reasons already discussed above, the Tribunal is satisfied that this particular 1(l)(vi) is established.

(g) *Dragging children by arms or hands:*

██████████ described the respondent grabbing a child’s arm and walking too quickly so the child was unable to walk properly.<sup>89</sup> ██████████ described as a “common practice” that the respondent would drag kids by the arm or hand when they were trying to pull away.<sup>90</sup>

For the reasons already discussed above, the Tribunal is satisfied that this particular 1(l)(vii) is established

*Particular 1(m)*

117. This particular alleges that, between 5 March 2014 and September 2018, on at least one occasion, the respondent was aggressive and/or hostile towards other staff at the Centre, including shouting at them, and/or verbally abusing them.

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<sup>87</sup> BoD vol 1 at 201.0076.

<sup>88</sup> Brief of Evidence of ██████████ at paragraph 4.4.

<sup>89</sup> Brief of Evidence of ██████████ at paragraph 4.6.

<sup>90</sup> Brief of Evidence of ██████████ at paragraph 4.8.

118. Many of the CAC's witnesses spoke about the respondent's alleged poor behaviour towards themselves and other staff members. Specifically:

(a) ██████ stated:<sup>91</sup>

[I] felt too scared to speak out about the incidents because I felt that Julia would have been defensive and made me feel uncomfortable. She had treated staff this way in the past when they had spoken out. For example, ██████ another staff member, got snapped at quite a lot.

....

You couldn't raise issues with Julia in a constructive way. She wasn't open to talking about professional issues in the classroom, or open to trying new things with children that might have diverse needs. Instead, it seemed like Julia saw herself as being on a pedestal. It was like she could do no wrong and you had to do things her way. If things didn't go Julia's way, ██████ might come in and talk about the issue in a meeting. ██████ wouldn't talk about it directly to the person, but it would come up in a meeting.

Julia would snap at teachers if she was in a mood. For instance, if a child was crying in the sleeping room and we brought them out to the floor, she would snap and say that we should have left the child in there longer. Usually after Julia snapped at one of us, we would just talk about it with another staff member and then get on with our day – we didn't feel like we could take it any further.

█████ stated relevantly:<sup>92</sup>

Sometimes Julia would come inside while teaching the outside area just to tell us that something ██████ (other teachers at the Centre) had done was stupid. On one occasion, I remember Julia complaining about ██████ craft project with the children. The children weren't engaging with the craft activity so ██████ was doing it by herself. Julia said something about how she wasn't getting paid to sit there "on her arse" and play by herself. Her tone was quite condescending and very judgmental. Julia didn't like ██████ and would tell me about how she would pick on ██████ She would make snide jokes to ██████ face.

Both Julia and ██████ could be aggressive and hostile towards other teachers, for example shouting at them or belittling them. No one wanted to challenge them due to the possible repercussions. On occasions where Julia would think you were doing something wrong, she would go straight to ██████ and report it, even if what you were doing was right. It was not uncommon for them to tell you off in front of other staff members. ██████ often got told off on front other [sic] staff members and in front of children. At times, Julia and ██████ would also shout at each other in front of children about non-work related issues.

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<sup>91</sup> Brief of Evidence of ██████ at paragraphs 5.1, 5.3-5.4.

<sup>92</sup> Brief of Evidence of ██████ at paragraphs 5.2, 5.3, 5.6-5.7

The staff never had reflective discussions on practice with each other. I would often try to explain what I was doing with the children (for example, certain methods I was trying) and reflect on that to other teachers. I would try and ask other teachers what they thought and ask for their perspective to help them understand that there were other ways of doing things. I felt that I couldn't have these conversations with Julia. For instance, if I tried to intervene with the babies when they were pushing and fighting with each other, she would tell me to just leave them and that they could sort it out themselves. If I tried to talk to her about different techniques with some of the children, she would disagree and say that I wasn't right or she would just leave and talk to [REDACTED].

At one stage, I did have a meeting with [REDACTED] about some concerns I had about Julia's behaviour. This was in 2018. [REDACTED] dealt with it by saying that Julia needed a holiday because she was tired and stressed out. A short time after that conversation Julia took leave. When Julia came back, everything was still the same. Julia started working outside with me and [REDACTED]. Julia said this was because she didn't want to work with the teachers inside because they were lazy. She was later transferred to the kitchen.

[REDACTED] recalled an incident where she was verbally abused by the respondent in the sleep room, shortly before she decided to leave the Centre, and was told by the respondent and [REDACTED] that they "knew enough people in Whangārei to make sure [she] never worked in early childhood education again."<sup>93</sup> [REDACTED] reported a negative conduct at the Centre when anyone tried to raise any issues and stated that the respondent had been defensive towards feedback in the past.<sup>94</sup>

[REDACTED] gave evidence about trying to help the respondent, and the respondent's angry and sarcastic behaviour in response:<sup>95</sup>

A short time before Julia left the Centre, she went on leave due to stress. This was also around the time that concerns started coming up about Julia's teaching practices. It was agreed that, after her leave ended, Julia would come back to work in the kitchen for a while rather than being on the floor working with kids. I know about this because Julia asked me to be her support person at the meeting where this was discussed.

Although Julia agreed to working in the kitchen when it was suggested, when she came back from leave, she seemed quite angry and started talking about how she was being treated like a criminal. She made sarcastic remarks about being a risk to children. I did not think that was professional. I expressed my concerns about how Julia was acting when she came back after being on leave to [REDACTED], the director of the Centre.

In my view, there was an unhealthy staff dynamic at the Centre due to the fact that [REDACTED]. I think that [REDACTED] allowed Julia to do and say things and behave in certain ways that [REDACTED] would not have permitted if Julia had been another staff member.

<sup>93</sup> Brief of Evidence of [REDACTED] at paragraph 7.2.

<sup>94</sup> Brief of Evidence of [REDACTED] at paragraphs 3.1-3.3.

<sup>95</sup> Brief of Evidence of [REDACTED] at paragraphs 3.1-3.3.

119. The CAC submitted that the above evidence in relation to particular 1(m) establishes that the respondent contributed to a culture of intimidation and fear at the Centre, which meant that staff were reluctant to report issues to Centre Management.
120. The Tribunal accepts that it was a common theme among the witnesses who appeared before it that a culture existed within the Centre where staff members were reluctant to raise issues, primarily because of the relationship [REDACTED] that existed. The Tribunal also accepts that, by the time of the organisational review in 2018 and by the time the respondent left the Centre, she was in a distressed state and was not happy in her employment. The respondent accepts as much, stating in her closing submissions that the process made her feels punished for her mental health struggles. [REDACTED] also spoke at the hearing, in response to questioning from the respondent, of the respondent's struggles with depression and anxiety towards the end of her time at the Centre at the least.
121. The Tribunal therefore accepts that what the respondent was going through in her personal life, as well as the underlying culture at the Centre generally, the lack of day-to-day involvement of the Centre owners, and the fact that [REDACTED] ran the Centre, may well have resulted in some poor behaviour on occasion from the respondent towards other staff and, that she may have been aggressive and hostile towards other staff from time to time. The Tribunal has insufficient evidence before it, however, to conclude that the respondent shouted at staff or was verbally abusive towards them. Rather, the majority of the allegations in this regard appear to have been directed more towards behaviour by [REDACTED]. The Tribunal therefore finds particular 1(m) to be partly established only (namely that on at least one occasion, the respondent was aggressive and/or hostile towards other staff at the Centre).

### *Particular 2*

122. Particular 2 charges that the conduct alleged in paragraph 1 (and its subparagraphs), separately or cumulatively, amounts to serious misconduct pursuant to section 378 of the Education Act 1989 and any or all of rr 9(1)(a), (c), (f) and/or (o) of the Education Council Rules 2016 (as drafted prior to amendments on 18 May 2018) and/or rr 9(1)(a), (b), (c) and/or (k) of the Teaching Council Rules 2016 (as drafted following the amendments on

18 May 2018), and/or any or all of rr 9(1)(a), (c), (f) and (o) of the New Zealand Teachers Council (Making Reports and Complaints) Rules 2004, or alternatively amounts to conduct which otherwise entitles the Disciplinary Tribunal to exercise its powers pursuant to section 404 of the Education Act 1989.

### **Kupu Whakatau – Decision**

123. The Tribunal therefore finds, in summary, that particulars 1(b)(i) and (ii), 1(c)(ii), 1(e)(i), (ii) and (iii), 1(f), 1(g)(i), (ii) and (iii), 1(h), 1(i), 1(j)(i), (ii) and (iii), 1(l)(i)(in part), (ii), (iv), (v), (vi) and (vii), and particular 1(m) to be established on the balance of probabilities.
124. Those particulars in the amended notice of charge not listed above have not been established.
125. The Tribunal considers that, cumulatively and for the reasons discussed below with respect to the legal position, the established particulars amount to serious misconduct pursuant to section 378 of the Act, and rules 9(1)(a), (c), (f) and (o) of the Education Council Rules 2016 and rules 9(1)(a)(c), (f) and (o) of the New Zealand Teachers Council (Making Reports and Complaints) Rules 2004. Those particulars relating to rough handling of children would also individually constitute serious misconduct in the Tribunal's view.
126. The Tribunal accepts that the respondent's behaviour in shouting or speaking harshly at children was conduct that as, at a minimum, likely to adversely affect those children's emotional and/or psychological wellbeing (s 378(a)(i)). Similarly, the particulars relating to rough handling of children is all conduct that, by its nature, was likely to adversely affect those children's physical and emotional wellbeing, if not causing harm.<sup>96</sup>
127. Neglecting children by leaving them for lengthy periods to cry, or wrapping children firmly in swaddles when they are of an age where swaddling is inappropriate is, in the Tribunal's view, also conduct that risks adversely affecting children's emotional and psychological wellbeing.<sup>97</sup>

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<sup>96</sup> See the comments of the Tribunal in *Complaints Assessment Committee v Finau* NZTDT 2017/25, January 2018.

<sup>97</sup> Refer *Complaints Assessment Committee v Trow* NZTDT 2019-82, 28 July 2020; *Complaints Assessment Committee v Tregurtha* NZTDT 2017/39, 21 June 2018; *Complaints Assessment Committee v Ngapo & Ngapo* NZTDT 2014/46 & 47, 3 September 2014.



128. The Tribunal is also satisfied that, given the likely adverse impact of such conduct as found established on the wellbeing of the children involved, the conduct established not only reflects adversely on the respondent's fitness to practise (s 378(a)(ii)), but is also conduct that may bring the teaching profession into disrepute (s 378(a)(iii)). Members of the public are entitled to expect that early childhood teachers, responsible as they are for the care and wellbeing of dependent and vulnerable babies and young children, will not engage in conduct which would risk causing any harm (physical, emotional or psychological) to those in their care. By engaging in the conduct established, the Tribunal is satisfied that the respondent departed from the professional standards expected of early childhood teachers.
129. These standards are only reinforced in early childhood education by the Education (Early Childhood Services) Regulations 2008, which prescribe the minimum standards with which licensed early childhood centres must comply, and the Teachers' Code of Professional Responsibility. In particular, clause 2.1 of that Code requires teachers to work in the best interests of learners by promoting their wellbeing and protecting them from harm. The guidance to the Code refers to inappropriate handling (such as grabbing, shoving and pushing) as an example of behaviour which will not promote learners' wellbeing and may cause harm.<sup>98</sup>
130. Similarly, clause 1.2 of the Code expects that teachers will maintain "public trust and confidence in the teaching profession by...engaging in professional, respectful, and collaborative relationships with colleagues", while clause 1.5 requires teachers to contribute to a professional culture that supports and upholds the Code. By engaging in hostile behaviour towards other staff at times, the Tribunal considers that the respondent contributed to a negative culture at the Centre, and departed from the expected standard of behaviour towards colleagues on occasion.

### **Whiu - Penalty**

131. The Tribunal therefore invites the parties to make submissions on the appropriate penalties to be opposed under section 404 of the Act:

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<sup>98</sup> Teaching Council *Code of Professional Responsibility – Examples in Practice* (June 2017) at page 11.

- (a) The respondent to provide written submissions on the penalty to be imposed, and issues of cost, within 14 days of receipt of this decision.
- (b) The CAC to provide written submissions on the penalty to be imposed, and issues of cost, within 7 days of receipt of the respondent's submission on penalty, or within 21 days of receipt of this decision, whichever date is the earliest.

### **He Rāhui tuku panui – Non-publication**

132. The Tribunal's interim orders suppressing the names and identifying details of the respondent, the children named in the charge, and the parents of the children named in the charge, and staff members in the Centre who gave evidence remains in place until the Tribunal's issues its decision in relation to penalty. The Tribunal can indicate now that suppression of the names and identifying details of the children named in the charge, and the parents of children named in the charge, is likely to be made permanent.
133. If, however, any final orders for suppression are sought by the respondent, she is directed to file an application and evidence addressing the reasons why she considers the Tribunal should make a permanent order under section 405 of the Act at the same time she files her submissions on penalty. The CAC is likewise directed to address any issues of non-publication in its submissions on penalty.



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Rachael Schmidt-McCleave  
Deputy Chair

1. This decision may be appealed by the 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. Section 356(3) to (6) applies to every appeal under this section as if it were an appeal under section 356(1).