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

DECISION OF THE TRIBUNAL ON PENALTY (WHIU)

14 Hakihea 2021

HEARING:	Substantive hearing held on 22-25 June 2021 in person; penalty hearing on papers
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") 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").[1]

2. In a substantive decision dated 8 October 2021, the Tribunal found that several of the particulars in the CAC's amended notice of charge had been established, namely:

   (a) Particulars 1(b)(i) and (ii): That the respondent, in or around 2015, dragged Child 2, and/or yelled at Child 2.

   (b) Particular 1(c)(ii): That the respondent, in or around 2015, left Child 3 unattended.

   (c) Particulars 1(e)(i), (ii) and (iii): That the respondent, in or around June 2017, 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.

   (d) Particular 1(f): That the respondent, in or around early 2018, on at least one occasion, 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.

   (e) Particulars 1(g)(i), (ii) and (iii): That the respondent, in or around 2018, 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.

   (f) Particular 1(h): That the respondent, in or around April 2018, dragged a crying child (Child 6) by the hand quickly, resulting in Child 6 not being able to walk properly.

   (g) Particular 1(i): That the respondent, in or around May 2018, 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.

[1] 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.

(h) Particulars 1(j)(i), (ii) and (iii): That the respondent, in or around early July 2018, 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.

(i) Particulars 1(l)(i)(in part): That the respondent between 5 March 2014 and September 2018, acted unprofessionally and/or inappropriately towards the children at the Centre on other occasions, including by shouting at children.

(j) Particulars 1(l)(ii), (iv), (v), (vi) and (vii): That the respondent between 5 March 2014 and September 2018, acted unprofessionally and/or inappropriately towards the children at the Centre on other occasions, including by 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.

(k) Particular 1(m): That the respondent 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.

Te Ture - The Law

3. Having determined that this case is one in which we consider exercising our powers, we must now turn to consider what is an appropriate penalty in the circumstances.

> ***404 Powers of Disciplinary Tribunal***
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> *(1) Following a hearing of a charge of serious misconduct, or a hearing into any matter referred to it by the Complaints Assessment Committee, the Disciplinary Tribunal may do 1 or more of the following:*
>
> *(a) any of the things that the Complaints Assessment Committee could have done under section 401(2):*
> *(b) censure the teacher:*

> *(c) impose conditions on the teacher's practising certificate or authority for a specified period:*
>
> *(d) suspend the teacher's practising certificate or authority for a specified period, or until specified conditions are met:*
>
> *(e) annotate the register or the list of authorised persons in a specified manner:*
>
> *(f) impose a fine on the teacher not exceeding $3,000:*
>
> *(g) order that the teacher's registration or authority or practising certificate be cancelled:*
>
> *(h) require any party to the hearing to pay costs to any other party:*
>
> *(i) require any party to pay a sum to the Teaching Council in respect of the costs of conducting the hearing:*
>
> *(j) direct the Teaching Council to impose conditions on any subsequent practising certificate issued to the teacher.*
>
> *(2) Despite subsection (1), following a hearing that arises out of a report under section 397 of the conviction of a teacher, the Disciplinary Tribunal may not do any of the things specified in subsection (1)(f), (h), or (i).*
>
> *(3) A fine imposed on a teacher under subsection (1)(f), and a sum ordered to be paid to the Teaching Council under subsection (1)(i), are recoverable as debts due to the Teaching Council.*

4. We note that, in determining penalty, the Tribunal must ensure that the three overlapping principles are met, that is, the protection of the public through the provision of a safe learning environment for students and the maintenance of both the professional standards and the public's confidence in the profession.[2] We refer to the decisions of the superior Courts which have emphasised the fact that the purpose of professional disciplinary proceedings for various occupations is actually not to punish the practitioner for misbehaviour, although it may have that effect.[3]

5. In *Mackay* we looked at the principles the Tribunal must turn its mind to when considering penalty following a finding entitling it to exercise its powers[4]:

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2 *CAC v McMillan*, NZTDT 2016/52.

3 *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [97]; *In re A Medical Practitioner* [1959] NZLR 784 at p 800 (CA).

4 Above n 16 at [40] – [62]

(a) Protecting the public;

(b) Setting the standards for the profession;

(c) Punishment;

(d) Rehabilitation;

(e) Consistency;

(f) The range of sentencing options;

(g) Least restrictive;

(h) Fair, reasonable and proportionate.

6. We do not intend to repeat what we said in that decision, other than to note that we have turned our mind to these principles in reaching our decision on penalty.

Ngā Kōrero a te Kōmiti – CAC and Respondent Submissions

7. The CAC, in its submissions on penalty, submitted in summary that, having regard to the nature and gravity of the respondent's conduct, which involved the repeated and ongoing mistreatment of young children in the respondent's care on a number of occasions, the appropriate penalty should be censure and cancellation of the respondent's teaching registration under ss 404(1)(b) and (g) of the Act.

8. The respondent submits that this has been a long and tortuous process. She says an appropriate penalty is censure and conditions on her practising certificate to undertake the Incredible Years or similar programme, notification of the decision to future employers, and the undertaking of mentoring and supervision. The respondent submits that this is a fair and justified penalty as she voluntarily agreed not to teach for the past 3 years 1 month and she has suffered significant financial loss and hardship and health issues. She submits that up until these incidents she had not previously appeared before the Tribunal and had an unblemished record. She further submits that the working environment she was in was not a safe or constructive environment and was a significant factor in her ill mental health. Since leaving her teaching career the respondent says she has completed

a Diploma in child protection and is approaching the end of her first year in a Degree in Whanau Ora.

Kupu Whakatau – Decision

9. This Tribunal held, *in CAC v Fuli-Makaua*,[5] that cancellation of a teacher's registration will be appropriate in two overlapping circumstances:

   (a) Where the offending is sufficiently serious that no outcome short of deregistration sufficiently reflects the adverse effect on the teacher's fitness to teach, or its tendency to lower the reputation of the profession; and

   (b) The teacher has not taken adequate rehabilitative steps to address the causes of his or her conduct and has insufficient insight into his or her conduct. This may indicate a level of apparent ongoing risk that leaves no option but to deregister.

10. The Tribunal has, on many occasions, spoken of the serious manner in which it regards the unacceptable treatment of children.

11. In *CAC v Grace Trow,*[6] very similar allegations to those established here were found to be made out. The Tribunal was of the view that Ms Trow was wholly unsuited to early childhood education. A concerning feature of the case was the range of incidents and the number and that, while the teacher had accepted the facts, there was nothing in the material that demonstrated any remorse or insight into her behaviour. The teacher had not undertaken any remedial steps or expressed an interest in rehabilitation. The Tribunal ordered that the teacher be censured, and cancelled her registration.

12. Similarly, in the related decision in *CAC v Kelsie Trow*,[7] similar charges against Grace Trow's mother (the manager of the Centre in question) resulted in the Tribunal concluding that cancellation was the only outcome available to ensure the safety of children, given the teacher had not expressed any desire to continue teaching, let alone demonstrated any insight or rehabilitative steps.

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[5] *CAC v Fuli-Makaua* NZTDT 2017/40, 5 June 2018. See also *CAC v Ormsby* NZTDT 2017/33, 24 October 2018.
[6] *CAC v Grace Trow* NZTDT 2019-82, 28 July 2020
[7] *CAC v Kelsie Trow* NZTDT 2019-95, 28 July 2020

13. *CAC v Jamasbnejad*,[8] a case involving similar conduct as here, is an example of a case where the Tribunal did not order cancellation. This was because of the demonstrated improvements in the teacher's practice since the conduct occurred, which satisfied the Tribunal that she was unlikely to repeat the relevant behaviour in the future. The Tribunal considered that, as a result, cancellation was not warranted. The Tribunal censured the teacher, annotated the register, and imposed strict conditions on her practising certificate. The conditions imposed included a requirement to attend anger management, a requirement to not be employed in a position where she was directly responsible for the care of children for 18 months, and a requirement to be supervised for 18 months.

14. In *CAC v Tregurtha*,[9] the teacher regularly used force to prevent children from moving during nap time and mat time, forcefully held children in certain positions, and made a child sit at the kai table for prolonged periods. The Tribunal imposed a penalty of cancellation. The Tribunal considered that the teacher lacked insight into the seriousness of her conduct, and considered that her shortcomings as a teacher were so fundamental that cancellation was the only way to ensure the safety of children going forward.

15. As set out in the Tribunal's substantive decision, the conduct in the established particulars in this case was very serious, and involved a number of concerning rough handling and other incidents involving several children. Even without all the particulars of the amended charge proven, there was more than one incident established and over a period of several years. As the Tribunal discussed in its substantive decision, the conduct established was such as to potentially cause harm to the children involved.

16. In addition, the Tribunal is concerned that, to date, the respondent has not demonstrated any meaningful remorse or insight into her behaviour or taken any rehabilitative or remedial steps. The Tribunal has insufficient reason at present to be satisfied that children in the respondent's care will be safe moving forward.

17. The Tribunal is mindful that the respondent has no past disciplinary history, and that she has suffered from health issues in the time during and since the conduct established.

[8] *CAC v Jamasbnejad* NZTDT 2015-25, 22 February 2016
[9] *CAC v Tregurtha* NZTDT 2017/39, 21 June 2018

Nonetheless, the Tribunal has seen no evidence from the respondent that she taken meaningful steps to rectify, or reflect upon, her conduct.

18. Considering the above, as well as the obligation upon us to impose the least restrictive penalty in the circumstances, pursuant to section 404(1) of the Act, we therefore order as follows:

(a) A censure under section 404(1)(b) of the Act;

(b) Cancellation of the respondent's registration under section 404(1)(g) of the Act.

He Rāhui tuku panui – Non-publication

19. The respondent seeks permanent name suppression for herself on the basis, in summary, that that the proceedings have had a negative impact on her mental health, and that publication of her name would have a further detrimental impact on her mental health, because of Whangarei being a small town. By her own admission, the respondent states that this has been a very public process.

20. The CAC opposes name suppression. The CAC submits that there is insufficient evidence to justify an exception to the fundamental principle of open justice, and therefore it is not proper for the Tribunal to make the orders sought pursuant to s 405(6).

21. The CAC further submits that the fact that the respondent has been found guilty of serious misconduct also weighs strongly in favour of publication. There is a strong interest in open justice given the respondent was found to have engaged in prolonged and repeated rough handling of children. The information provided by the respondent is insufficient to displace the presumption of open justice.

22. The Tribunal accepts, and agrees with the CAC's submissions on name suppression. The application of the principle of open justice to proceedings before the Tribunal is contained in section 405(3) of the Act. The primary purpose behind open justice in a disciplinary context is the maintenance of public confidence in the profession concerned through the transparent administration of the law.[10]

[10] *CAC v Teacher* NZTDT 2016/27 at [66[citing *X v Standards Committee (No 1) of the New Zealand Law Society* [2011] NZCA 676 at [18].

23. The Tribunal's powers to prohibit publication is found in section 405(6) of the Act. It can only make one of the non-publication orders in (a) to (c) of section 405(6) if it is of the opinion that it is "proper" to do so having regard to the interests of any person, including but not limited to, the privacy of the complainant and to the public interest.

24. The Tribunal has adopted a two-step approach to applications for non-publication orders. First, it considers whether it is proper to make a non-publication order having regard to the various interests identified in section 405(6); and, secondly, it decides whether to exercise its discretion to make the orders sought.[11] Bare assertions will not suffice for displacing the principle of open justice and nor will the "ordinary" hardships or expected consequences of a proceeding involving allegations of serious professional misconduct.[12]

25. The Tribunal does not consider there to be a basis to displace the presumption of open justice by suppressing the respondent's identity. There is no evidence before the Tribunal of negative impact on the respondent, or people connected to her, beyond that which ordinarily exists in proceedings of this kind.

26. The Tribunal therefore declines the respondent's application for permanent name suppression.

27. The Tribunal has made interim orders suppressing the names and identifying details of 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. Those orders are now made permanent. There is no public interest in any of those details being available.

Utu Whakaea – Costs

28. The CAC submits that a 50% contribution to the CAC's overall costs is appropriate. This reflects the fact that a substantial number of the particulars were made out, and the prolonged nature of the procedural steps eventually leading to the hearing (with the respondent still failing to bring evidence, beyond her own written statement, to defend the charge).

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[11] Ibid at [61].

[12] *Y v Attorney-General* [2016] NZCA 474 citing *Hart v Standards Committee (No 1) of the New Zealand Law Society* [2011] NZCA 676 approved by the Supreme Court declining leave to appeal in *Hart v Standards Committee (No 1) of the New Zealand Law Society* [2012] NZSC 4.

29. The Tribunal accepts the CAC's submissions on costs and therefore orders 50% costs in favour of the CAC as per the costs schedule submitted by the CAC.

30. Under section 404(1)(h) the respondent is ordered to pay 50% of the costs shown in the CAC schedule.

31. The respondent is also ordered to pay 50% of the Tribunal's costs. Any objection should be filed within 10 days of receipt of the decision and referred to the Deputy Chair.

Rachael Schmidt-McCleave
Deputy Chair

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

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).