

**BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL**

**NZTDT 2019-69**

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

**AND**

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

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

**AND** **CONNOR DOUGLAS DRIVER-BURGESS (AKA  
DOVAH)**

**Respondent**

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**TRIBUNAL DECISION**

**8 SEPTEMBER 2020**

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**HEARING:** Held at Wellington on 5 December 2019 (on the papers)

**TRIBUNAL:** Theo Baker (Chair)  
Sue Ngārimu and Neta Sadlier (members)

**REPRESENTATION:** Mr L Townshend for the CAC  
Ms J Andrews for the respondent

1. The Complaints Assessment Committee (CAC) has referred to the Tribunal a charge of serious misconduct and/or conduct otherwise entitling the Tribunal to exercise its powers. The charge is that on 28 August 2018, the respondent tickled two groups of students aged between seven and eleven. It is alleged that the conduct amounts to serious misconduct pursuant to s 378 of the Education Act 1989 (**the Act**) and rr 9(1)(a) and/or (b) and/or (e) and/or (k) of the Education Council Rules 2016 (**the Rules**)<sup>1</sup> or conduct otherwise entitling the Disciplinary Tribunal to exercise its powers under s 404 of the Act.
2. The parties conferred and agreed on the facts, that the conduct amounts to serious misconduct, and agreed on an appropriate penalty. We must still consider the evidence and satisfy ourselves of those matters

### **Evidence**

3. Before the hearing the parties conferred and filed an Agreed Statement of Facts (**ASF**). The facts are straightforward. On 28 August 2018 the respondent was relief teaching at [REDACTED] School. At some point in the morning, he tickled the backs, sides and shoulders of “approximately” four female students aged 10 to 11 years old.
4. At the beginning of the lunch break the respondent tickled another group of girls around the waist. These were aged about 7 to 8 years old. During the lunch break the first group of girls told the Team Leader what had happened and said that they didn't like it or think it was appropriate. The Team Leader spoke to the respondent about it. However after school, he received a complaint from one of the parents and so he reported it to the Principal.
5. The respondent accepted that the tickling had occurred. He explained that around that time, he viewed the tickling as a playful or informal interaction and that he had recently spent time with his young cousins. On reflection he now understands that this behaviour was a lapse of his professional judgement. He said:

*I apologise wholeheartedly for my lapse in professional judgement. It was not just wrong, it was stupid. I should never have tickled students or touched them in a way that implied a personal relationship. I will never do so again.*

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<sup>1</sup> Since 29 September 2019 these are now called the Teaching Council Rules as a result of s 12 of the Education (Teaching Council of Aotearoa New Zealand) Amendment Act 2018.

6. The factual allegation of the charge is therefore proved.

**Serious misconduct**

7. The respondent has conceded that the conduct amounts to serious misconduct. We must still be satisfied that it meets that test.

8. Section 378 of the Act provides:

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

(a) that—

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

(ii) reflects adversely on the teacher's fitness to be a teacher; or

(iii) may bring the teaching profession into disrepute; and

(b) that is of a character or severity that meets the Teaching Council's criteria for reporting serious misconduct.

9. The criteria for reporting serious misconduct are found in r 9 of the Rules). The CAC relies on rr (a), (b), (e) and (k):

***Criteria for reporting serious misconduct***

(1) *A teacher's employer must immediately report to the Teaching Council in accordance with section 394 of the Act if the employer has reason to believe that the teacher has committed a serious breach of the Code of Professional Responsibility, including (but not limited to) 1 or more of the following:*

(a) *using unjustified or unreasonable physical force on a child or young person or encouraging another person to do so:*

(b) *emotional abuse that causes harm or is likely to cause harm to a child or young person:*

...

(e) *breaching professional boundaries in respect of a child or young person with whom the teacher is or was in contact as a result of the teacher's position as a teacher; for example,—*

(i) *engaging in an inappropriate relationship with the child or young person:*

(ii) *engaging in, directing, or encouraging behaviour or communication of a sexual nature with, or towards, the child or young person:*

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

#### *CAC submissions*

10. The CAC advised that the New Zealand Police investigated the allegations and noted that the respondent's behaviour lacked criminal intent and that some of the statements were "severely tainted" by discussions that had taken place with friends and family before interviews.
11. The CAC accepted that there is no evidence that the respondent's conduct was sexually motivated, but he did touch groups of young students in a way that made them feel uncomfortable and demonstrates a lack of understanding of professional boundaries.
12. The CAC submitted that all three definitions of serious misconduct in section 378 were met. The respondent's conduct was likely to have adversely affected the wellbeing of children. The first group of students were upset enough by the respondent's behaviour that they approached a Team Leader at the school to make a complaint. In addition, several students have undergone evidential interviews by the New Zealand Police as part of their investigation.
13. Mr Townshend submitted that teachers are expected to demonstrate a high standard of professional behaviour. Teachers are responsible for learners in their care and are expected to protect them. His actions lacked professionalism and judgement, as he engaged in non-consensual and inappropriate touching of students which made them feel uncomfortable. This damages the trust and confidence that others have in him as a teacher, as demonstrated by his removal from the relief pool for the school and reflects adversely on his fitness to teach.
14. Finally, it was submitted that the conduct meets the test in *Collie v Nursing Council of New Zealand* [2001] NZAR 74,<sup>2</sup> and that reasonable members of the public, could reasonably conclude that the reputation and good standing of the teaching profession is lowered by the Respondent tickling these students.

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<sup>22</sup> *Collie v Nursing Council of New Zealand* [2001] NZAR 74 at [28]

15. In relation to the second limb of the test for serious misconduct, Mr Townshend submitted that the conduct is of a character or severity that meets the Council's criteria for reporting serious misconduct (section 378(b)) in that the respondent used unjustified or unreasonable physical force on the two groups of students by tickling them around the waist, back and shoulders, in breach of rule 9(1)(a) of the Rules. She further submitted that this unjustified or unreasonable physical force has or is likely to have caused the students emotional harm as evidenced by the fact that they made the complaint to the School and engaged in a Police investigation, in breach of rule 9(1)(b) of the Rules.
16. The CAC submitted that the respondent breached the professional boundaries between teachers and students by touching these two groups of students in an inappropriate way, in breach of rule 9(1)(e) of the Rules, and finally that the conduct brings, or is likely to bring, the teaching profession into disrepute, in breach of rule 9(1)(k) of the Rules.
17. In addition, the CAC submitted that the conduct falls well short of the expectations of teachers, set out in the Code of Professional Responsibility. By tickling these two groups of students, the respondent failed to promote the wellbeing of learners and protect them from harm and failed to engage in ethical and professional relationships with learners that respect professional boundaries (2.1 and 2.2 of the Code of Professional Responsibility).

*Respondent submissions*

18. For the respondent, Ms Andrews accepted that the conduct meets all three definitions in section 378(a), and further the respondent:
- Used unjustified physical force on a student or young person because there is no justification for tickling the students;
  - Breached professional boundaries because he was treating the students in the playful and informal way that he was acceptable with his young cousins.
  - Brought the profession into disrepute, as reasonable members of the public would expect a teacher to understand that their relationship with students does not have the playful, informal characteristics of family relationships.
19. It was accepted that the students were upset by the respondents tickling, as would

be expected with an unjustified use of physical force, but “cautioned” the Tribunal against labelling behaviour that comes from a place of naivete and foolishness as abuse; inherent to emotional abuse is the design to humiliate, degrade, undermine and control, which is absent in this case.

### *Discussion*

20. We appreciate the point that Ms Andrews is making. Tickling children is not intrinsically an act of abuse. The reason it is not appropriate is that at best, it is an invasion of a child’s personal space without consent; at worst it is a sign of more sinister motives such as sexual grooming. In the present case, there is no evidence of the latter.
21. In *CAC v Teacher A NZTDT 2018-27*<sup>3</sup> we found, among other things, that a teacher had on one occasion picked a student up and threatened to throw her in the swimming pool and on another occasion had thrown her in. In considering whether the conduct amounted to serious misconduct, we said:
- Actual harm or adverse effect is not required. In fact, the first thing that strikes us about particular 1.a., (picking up and threatening to throw Student C in the pool) is simply how inappropriate such conduct was. It shows a lack of judgement and/or a lack of awareness of the respondent’s professional boundaries. Although there might have been a risk of physical harm, the way in which we find that the conduct was likely to harm Student C’s well-being was through a sense of embarrassment and disempowerment. The respondent might have thought that they were having fun. There should be no assumption that children enjoy being picked up by adults. Teachers are expected to respect the physical space of any student, and not to take advantage of their own physical size. We would have expected a male teacher to be more circumspect when deciding to physically handle an intermediate-aged girl.
22. Similar notions apply to the present situation. Adults should not assume that children like to be tickled. We assume that the respondent would not tickle an adult he had just met. Adults have power over children and can inadvertently exploit their superior strength and size. Teachers usually have further power because of their position of authority. As we said in *CAC v Buchan NZTDT 2017-23*, a child or student should be able to tell another person when their physical contact is unwanted or causes discomfort. This is very difficult when the other person is an adult and even harder

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<sup>3</sup> *CAC v Teacher A NZTDT 2018-27*, 28 March 2019

when it is a teacher.<sup>4</sup> In that case, a teacher had placed his hands on a student's waist while seated behind her at a cultural performance. He left his hands there and tapped her waist throughout the performance. At the end of the performance the student and her friend (another student) stood up to leave and he hugged them both. We noted that although there was no evidence of sexual advances, there are situations in which adults with sexual motives start with more subtle measures to test the waters.

23. In the present case, the parties agreed that all three definitions in the section 378 (a) were met. We agree, but we do not include any distress the students suffered as a result of Police interviews as part of any adverse effect on their well-being. We do accept that being tickled by a teacher is conduct that is likely to and did affect the students' wellbeing. We also accept that this significant lack of professional judgement reflects adversely on the respondent's fitness to be a teacher and may bring the profession into disrepute.
24. As for the second part of the definition serious misconduct, we do not agree that this conduct meets the criterion in rule 9(1)(b). The fact that students were upset by this physical act does not mean that the conduct amounts to emotional abuse. There is merit in Ms Andrews' submission that emotional abuse is designed to humiliate, degrade, undermine and control, which is absent in this case. In our view, the reason for the inclusion of rule (1)(b) is to cover situations that do not involve physical force. In many cases the conduct will be verbal, or it may involve a student being singled out in some way.
25. Although technically the act of tickling is the use of physical force for no reason and is therefore unjustified or unreasonable under rule 9(1)(a), we consider it fits more comfortably within rules 9(1)(e) and (k). We agree that the respondent breached professional boundaries by touching these students, and it is a serious breach of the Code of Professional Responsibility as submitted by the CAC. It is also likely to bring the teaching profession into disrepute under rule 9(1)(k). We agree that reasonable members of the public would consider the reputation of the profession is lowered by the respondent's conduct. Society does not expect girls to go to school to be tickled by a teacher.
26. The charge of serious misconduct is established.

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<sup>4</sup> *CAC v Buchan* NZTDT 2017-23, 8 February 2019 at [18]

## Penalty

27. Section 404 of the Act provides:

### **404 Powers of Disciplinary Tribunal**

- (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.*

### *CAC submissions*

28. The CAC has referred to three cases which have some similarity with the present case:

- *CAC v Elms* NZTDT 2015-35,<sup>5</sup> which included charges of tickling, tackling, hugging and inappropriately touching students.
- *CAC v Schofield-Matthews* NZTDT 2016-56,<sup>6</sup> where boundary breaches included sending a large volume of personal emails to a female student; and

<sup>5</sup> *CAC v Elms* NZTDT 2015-35, 7 July 2016

<sup>6</sup> *CAC v Schofield-Matthews* NZTDT 2016-56



- *CAC v Buchan NZTDT 2017-23*,<sup>7</sup> outlined above.
29. In the first of these, the teacher's registration was cancelled whereas in the other two, the penalty involved conditions. Mr Buchan's practising certificate was suspended until conditions were met.
30. The CAC submitted that in the present case the aggravating features were:
- (a) The respondent tickled two groups of students on two occasions, showing that his behaviour was more than a momentary lapse in judgement;
  - (b) One of the groups was aged 10 to 11 years, which is an age where students may feel more conscious of their bodies, and be more aware of what is appropriate and inappropriate touching than younger students;
  - (c) One group felt so uncomfortable that they approached a teacher;
  - (d) Several of the students have undergone Police evidential interviews as a result of the respondent's behaviour.
31. In mitigation, the respondent accepted that the respondent has accepted the allegations from the outset, has cooperated with the investigation and is remorseful.
32. The CAC submitted that the conduct was similar to that in *Buchan*<sup>8</sup> and *Schofield-Matthews*<sup>9</sup> and not as serious as *Elms*.<sup>10</sup> The CAC sought the following penalty:
- Censure;
  - Annotation for two years;
  - Conditions that the respondent complete professional development or learning on maintaining professional boundaries which has been approved by the Council and/or a period of mentoring with a Council-approved mentor; and disclosure of the Tribunal's decision to current and any potential employers.

#### *Respondent submissions*

33. For the respondent, Ms Andrews submitted that *Elms*<sup>11</sup> can be distinguished because there was a variety of breaches of professional boundaries, including having children sit on his lap, kissing student on the forehead, picking a student up, playing a game

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<sup>7</sup> *CAC v Buchan NZTDT 2017-23*

<sup>8</sup> Above, note 7

<sup>9</sup> Above, note 6

<sup>10</sup> Above, note 5

<sup>11</sup> Above, note 5

called “toilet”, hugging students and massaging the shoulders of a female colleague. This conduct occurred over a period of time, whereas the conduct in the present case is more confined.

34. Ms Andrews also argued that the teacher in *Schofield-Matthews*<sup>12</sup> formed an inappropriate relationship with a student by extensively emailing her. The emails had an emotional character and again, were sent over a period of time. The conduct was hidden from public view.
35. Finally, it was submitted that the conduct in *Buchan*<sup>13</sup> had a more intimate nature and was aggravated by the fact that the respondent had been a senior staff member, the conduct was prolonged and the student had been targeted.
36. It was accepted that the respondent’s conduct was profoundly wrong, but no student was targeted, and it occurred in public. The respondent quickly accepted responsibility for his actions. While his initial reaction had been that tickling was a playful interaction in response to spending time with young cousins, upon reflection he came to understand that by touching the students, people could infer there was a personal relationship, that his conduct was stupid, that it was a lapse in judgment.
37. The respondent agrees with the proposed penalty.

#### *Discussion*

38. We accept that the CAC’s submission that the respondent’s conduct was more than a momentary lapse of judgement. He tickled two groups of students on two occasions because he did not think there was anything wrong with his behaviour. His judgement was that his conduct was reasonable, and therefore, did not lapse.
39. We acknowledge that the older girls might feel more conscious of their bodies, but we do not find that is an aggravating feature. Their awareness of the inappropriateness of the respondent’s conduct does not make it more serious.
40. We accept that the police evidential interviews would have been stressful for the students, but we are not convinced it is an aggravating feature of his conduct. We trust it will serve as a salient lesson for the respondent. Tickling students leads to an inference of sinister motives, that may be investigated by the police; and that includes

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<sup>12</sup> Above, note 6

<sup>13</sup> Above, note 7

putting students through interviews.

41. For the reasons outlined by Ms Andrews, we agree that *Elms*<sup>14</sup> and *Schofield-Matthews*<sup>15</sup> are in a different category from the present case. The similarities with *Buchan*<sup>16</sup> include that the conduct occurred in public. In that case the student in that experienced the teacher's hands on her waist during a performance. The ASF in the present case does not disclose how long the tickling occurred in the present case, but we assume that each student was tickled for a matter of seconds. We agree that any discomfort experience by the student in *Buchan* was for a longer period. The use of the word "targeted" to describe the conduct in *Buchan* may overstate the position, but we accept that as the only subject of this conduct, that student was singled out. We also accept that the respondent in the present case had a misplaced sense of fun, whereas there seemed no reason at all for Mr Buchan's behaviour.
42. Overall, we accept Ms Andrews' submission that this conduct was not prolonged, was not in private, and was very foolish. Although at first glance, the notion of a man tickling girls that he has just met may cause disquiet, we accept that there is no evidence of an improper motive.
43. We have considered the cases referred to, as well as *CAC v Teacher A*.<sup>17</sup>
44. We agree that a censure, conditions on practice and annotation is appropriate. Although we have previously directed conditions that teachers attend professional development on professional boundaries, it may be that no such formal programmes exist. We therefore modify the proposed penalty and impose the following:
- a. The respondent is censured under section 404(1)(b);
  - b. Under sections 404(1)(c) and (j), we impose the following conditions on his practising certificate:
    - i. The respondent is to locate information on professional boundaries for teachers in New Zealand and within 3 months of the date of this decision, provide a reflection of his understanding of why his behaviour was wrong, and how he will be respecting personal space;
    - ii. Within 2 months of the date of this decision, the respondent is to advise

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<sup>14</sup> Above, note 5

<sup>15</sup> Above, note 6

<sup>16</sup> Above, note 7

<sup>17</sup> Above, note 3

- the Council of the name of a mentor that is approved by the Council;
- iii. For a period of one year from the date of this decision, the respondent will work with his mentor and will meet not less than once a quarter;
  - iv. At the end of 6 months and 12 months, the mentor will provide a brief report to the Council, confirming their contact and advising if there are any concerns about the respondent.
  - v. For a period of two years, the respondent must notify any employer (being a school or institute of learning) of this finding and provide a copy of this decision.
- c. The register will be annotated accordingly for a period of two years

### **Costs**

45. The CAC did not seek costs.
46. Ordinarily we would direct a contribution to the Tribunal's costs, we have decided that because of the delay in issuing this decision, costs will be waived.

### **Non-publication**

47. The CAC sought permanent name suppression of the students who were tickled by the respondent.
48. The respondent has interim name suppression and did not apply for permanent name suppression, but Ms Andrews submitted that identification of the respondent would lead to identification of the students. She advised that further evidence from the school can be provided.
49. The names of the students were not mentioned in any of the material before the Tribunal. The charge is simply that the respondent tickled two groups of students aged between seven and eleven. We can make orders for non-publication of the names of the students out of an abundance of caution, but as it stands, we have found simply that the respondent tickled two groups of students.
50. We invite further submissions on the question of orders for non-publication for the students, respondent and school, and in particular how identification of the respondent would lead to identification of the students:
  - The CAC is to file any further submissions and evidence, including from the school, as to how naming the respondent would lead to identification of the students, by **30 September 2020**.

- The respondent may reply by **14 October 2020**.
- The CAC has a further right of reply by **21 October 2020**.

51. In the meantime, there are interim orders for non-publication of the names of the respondent, students and school.



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Theo Baker  
Chair

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

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