

BEFORE THE NEW ZEALAND TEACHERS' DISCIPLINARY TRIBUNAL

IN THE MATTER of the Education Act 1989

AND

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

BETWEEN **COMPLAINTS ASSESSMENT
COMMITTEE**

Referrer

AND **DAVID FORBES**

Respondent

DECISION OF TRIBUNAL

Dated 11 August 2022

Tribunal: Sam Wimsett
Nikki Parsons
David Spraggs

Hearing: 8 June 2022

Decision: 11 August 2022

Counsel: Harriet Farquhar for the Committee
Respondent: self-represented
Ben Nettleton for Evolve Education Group Limited

1. **INTRODUCTION AND SUMMARY OF DECISION**

- 1.1. In late 2017, David Forbes worked as an early childhood teacher at the Active Explorers Mayfair ECE Centre (“the Centre”) in Hastings. He worked in the Centre’s Big House.
- 1.2. Mr Forbes had been a teacher for approximately 12 years. He was described as passionate, creative, and someone who put in a lot of time and effort to the Centre and the children. Mr Forbes has now retired from teaching.
- 1.3. On an unspecified day in October or November 2017, there was an altercation between Mr Forbes and the complainant, [REDACTED]. As stated, Mr Forbes worked in the Big House. [REDACTED] worked in the house that cared for children who were slightly younger, which we refer to in this decision as the “B House”. The houses were in different parts of the Centre. [REDACTED] had offered to cover for another colleague, Ms P, in the Big House. It is alleged that Mr Forbes became aggressive towards [REDACTED] and raised his voice in anger inside the Big House. It is further alleged that Mr Forbes then pushed [REDACTED] with two hands on her upper back.
- 1.4. Mr Forbes denies the allegations. His position is that he put one hand on [REDACTED] shoulder in the context of stopping her from walking away so that he could continue a conversation with her. Mr Forbes does not accept that there was a push. He also denies getting angry and yelling at [REDACTED]. His position is that he got upset rather than angry and returned to his room in the Centre.
- 1.5. The Complaints Assessment Committee (“CAC”) charged Mr Forbes with serious misconduct or misconduct that otherwise entitles the Tribunal to exercise its disciplinary powers.
- 1.6. The issues for the Tribunal are first to determine if the particularised allegations have been proven. Then, if they have, it must determine whether the conduct amounts to serious misconduct or to conduct otherwise requiring a disciplinary response.
- 1.7. The Tribunal has made the following findings (the wording at (a) and (b) mirrors the wording of the charge):
- (a) It has not been proven that Mr Forbes acted in an aggressive manner towards [REDACTED] by raising his voice in anger at her.
 - (b) It has not been proven that Mr Forbes pushed [REDACTED] with two hands.
 - (c) It has been proven that Mr Forbes put a hand on [REDACTED] shoulder to stop her from moving away from him.

- 1.8. The conduct particularised in the charge has therefore not been proven to the required standard. Accordingly, the charge is dismissed.
- 1.9. Had the charge included a particular relating to Mr Forbes putting a hand on [REDACTED] shoulder, the Tribunal would have determined that it was conduct that warranted a disciplinary response.
- 1.10. Permanent suppression orders are made in relation to the names and identifying particulars of [REDACTED] and [REDACTED]. An interim suppression order is made in relation to the name of the Centre.
- 1.11. There is no order as to costs.

2. HEARING

- 2.1. The matter was heard at Hastings on 8 June 2022.
- 2.2. Prior to the hearing, the Tribunal received a bundle of documents containing written submissions, briefs of evidence and other evidential material. Submissions addressed both the charge and issues relating to the name suppression and costs. All material was considered by the Tribunal prior to the hearing and at the hearing itself.

3. EVIDENCE

- 3.1. The CAC called three witnesses. The first was [REDACTED]. She had prepared a brief of evidence which she read aloud. She was then asked supplementary questions by Counsel for the CAC and then cross examined by Mr Forbes. The relevant part of [REDACTED] statement states as follows:

In 2017, [REDACTED]. One day around October or November that year, I had an altercation with David Forbes, a colleague who taught in the Big House.

That day I was working in the B House when a colleague, Ms P, walked into the B House from the Big House, through a small gate that separates those two houses. Ms P was visibly upset and crying. I knew that Ms P worked as a teacher in the Big House, together with Mr Forbes. I approached her and offered to cover her in the Big House so that she could take a short break to settle herself and calm down. I did not ask her why she was upset and offered to take over for her in the Big House because I felt comfortable that the other staff in the B House could manage the class in my absence. Ms P agreed – and I left her and walked into the Big House to begin working there.

Upon arriving in the Big House, I saw that there were two teachers working there; Mr Forbes and [REDACTED]. The Big House was set up with a kitchen against the wall directly to the left of the doorway (as you walk into the room) and the play area towards the centre of the room. [REDACTED] was in the kitchen area. I told her I was there to help and asked her what I should do to cover for Ms P. Mr Forbes immediately asked what I was doing there and told me leave the Big House. I told him that I was substituting in for Ms P so that she could have a break for five minutes. He responded by yelling at me.

Mr Forbes then pushed me back towards the door leading to the B House. He put both hands on my upper back and shoved me away from him. I would not describe the push as especially violent, but it was forceful enough that it caused me to stumble and step away in order to keep my footing. I was shocked. I immediately spun around to face him and said words to the effect of “don’t you ever put your hands on me.”

[REDACTED] told Mr Forbes that he needed to go back to his room and stay there.

Mr Forbes did not reply and instead left the room.

- 3.2. In answering questions by Counsel for the CAC, [REDACTED] was asked to clarify certain things. First, with reference to her evidence of “yelling” by Mr Forbes, she was slightly less definitive and stated that it was “definitely a raised voice.” She said that Mr Forbes had told her that she “shouldn’t be in here” and that when he was talking to her, he was not doing so in a calm manner.
- 3.3. In relation to the alleged push, [REDACTED] stated that it was not an aggressive push, nor was it forceful. It did involve, on her evidence, two hands on her upper shoulder and that she had been standing sideways towards Mr Forbes at the time.
- 3.4. Under cross examination, [REDACTED] was asked a number of preliminary questions about the atmosphere at the Centre and the members of staff who had an agenda against Mr Forbes. In his words, there were teachers conspiring against him and who wanted him to leave or be removed from the Centre. [REDACTED] did not accept that there was such a conspiracy. It was accepted that the atmosphere within the Centre was less than ideal.
- 3.5. Mr Forbes suggested to [REDACTED] that he had put one hand on her shoulder so that they could carry on the conversation. In essence, to prevent her from walking away from him. Under this line of questioning, [REDACTED] stated that the force used was strong enough for her to lose her footing. She maintained that she had been pushed.

- 3.6. Under questioning from the Tribunal, [REDACTED] stated that Mr Forbes was a teacher who was very passionate about children's learning and that his interactions with children were positive. She stated that a number of staff did not get along well with Mr Forbes.
- 3.7. The second witness for the CAC was [REDACTED].
- 3.8. [REDACTED] also read aloud her brief of evidence before being questioned by Counsel for the CAC, Mr Forbes, and the Tribunal. The relevant parts of her witness statement state as follows:

That day I was working in the Big House alongside Mr Forbes and [REDACTED]. At some point during the day, Mr Forbes and [REDACTED] started arguing about which house children should be put down to sleep in. [REDACTED] became upset and told me that she needed to take a break. I suggested that she go over the B House and ask a teacher from that room to work in the Big House to cover her while she took a break. I suggested this because I knew that the B House had spare teachers working that day. [REDACTED] agreed then left the Big House to find a replacement teacher for her.

Moments later, [REDACTED] walked into the Big House. I was standing in the kitchen next to the door when she walked through. She turned to me and asked where she should go to help out.

Mr Forbes then approached us from the other side of the room and asked [REDACTED] what she was doing in the Big House. [REDACTED] told him that she was there to cover for Ms P, and he loudly and repeatedly told [REDACTED] to go back to the B House. [REDACTED] refused to, saying that they had enough teachers in the B House without her. Mr Forbes then put both of his hands on [REDACTED] back and pushed her towards the door that she had walked through.

The push caused [REDACTED] to lose her footing – by which I mean she had to step towards the door to avoid falling over. [REDACTED] responded by saying something like “take your hands off me, you don't need to touch me!”

Mr Forbes then left the room without saying anything further.

- 3.9. In further questions from Counsel for the CAC, [REDACTED] stated that when Mr Forbes was speaking with [REDACTED], the tone of his voice was one of frustration and anger. His body language suggested to her that he was stressed. Regarding the volume of his voice, she stated that it was firm, but not loud. It was not a speaking voice, but not loud. In terms of the alleged push, she said that the two of them were standing next to each other and that the level of force was enough for [REDACTED] to lose her footing.

- 3.10. In cross examination, Mr Forbes again suggested that there was a conspiracy against him at the Centre and that he was bullied by some of the teachers there. [REDACTED] did not accept this. Mr Forbes put to [REDACTED] that it was a single hand on the shoulder rather than a two-handed push, but this was not accepted by [REDACTED].
- 3.11. In answering questions from the Tribunal, [REDACTED] described a two-handed push as though a person was trying to move someone towards something.
- 3.12. [REDACTED] confirmed that there were children inside the Big House at the time, but that she did not recall whether any of them were upset by the events described.
- 3.13. [REDACTED] described Mr Forbes as a passionate, creative, and involved teacher who gave the job a lot of his time and energy. She believed that he was somewhat stressed and overwhelmed at that time. [REDACTED]
[REDACTED]
- 3.14. The final witness for the CAC was investigator [REDACTED] although her evidence was simply to produce documents and written statements made by Mr Forbes.
- 3.15. Mr Forbes' evidence in chief consisted of him reading out a handwritten document that he had prepared at the time of the CAC investigation. That investigation related to allegations wider than those contained in the charge. Mr Forbes' document therefore included material relating to matters that the Tribunal knew nothing about. We have put that evidence to one side, and it has certainly not prejudiced Mr Forbes in any way.
- 3.16. The most relevant part of Mr Forbes' documents is titled "Pushed A Teacher." Underneath that, he wrote "I put my hand on her shoulder." He then detailed the background to the altercation. As well as that, we had [REDACTED] notes from telephone conversations with Mr Forbes.
- 3.17. Mr Forbes was cross examined by Counsel for the CAC and questioned by the Tribunal.
- 3.18. Mr Forbes, under questioning, said that the head teacher of the Big House, [REDACTED] was away on the day of the altercation. There had been a disagreement about the placement of beds, and he felt that [REDACTED] was not properly following directions. There was a dispute about this, and [REDACTED] had a break. Mr Forbes accepted that he was not at all happy about [REDACTED] taking a break. When asked if he was "pretty annoyed", he said that that was a "fair call." Mr Forbes said that [REDACTED] had taken a couple of steps into the Big House when he said, "what are you doing here?" [REDACTED] then went straight passed him to [REDACTED]. She asked [REDACTED] what she should do. Mr Forbes accepted that he was annoyed about this – essentially being passed over in favour of [REDACTED]. When asked if he was angry, he said he was not sure. When asked

if he felt under pressure, he replied “absolutely.” Mr Forbes denied that he lost his temper or raised his voice. He did not accept that he had yelled nor that he had pushed [REDACTED]. He accepted that [REDACTED] had said to him words to the effect of “don’t ever put your hands on me.”

- 3.19. Under questioning from the Tribunal, Mr Forbes accepted that he could have handled the situation better.
- 3.20. The final witness for Mr Forbes was [REDACTED]. She was the team leader for the Big House and away sick on the day of the altercation (actually went home early). She was not able to comment therefore on the alleged incident itself.

4. **THE CHARGE**

- 4.1. The CAC charged that Mr Forbes engaged in serious misconduct or conduct otherwise entitling the Disciplinary Tribunal to exercise its powers.
- 4.2. The charge is particularised as follows:

The CAC charges that David William Forbes, registered teacher of Hastings, in or around 2017:

- (a) Acted in an aggressive manner towards a colleague in the Centre by raising his voice in anger at teacher C [REDACTED]; and/or
- (b) Pushed teacher C [REDACTED] with two hands.

The conduct alleged in paragraph 1(a) and 1(b) separately and/or cumulatively, amounts to serious misconduct pursuant to section 378 of the Education Act 1989 and rule 9(1)(o) of the Teaching Council Rules 2016 or alternatively amounts to conduct which otherwise entitles the Disciplinary Tribunal to exercise its powers pursuant to section 404 of the Education Act 1989.

- 4.3. The CAC must prove the charge on the balance of probabilities.

5. **HAS THE CHARGE BEEN PROVEN?**

- 5.1. The Tribunal is in the position of having heard evidence from three teachers in relation to an event five years previous. All three presented as dedicated teachers. All three presented as credible. To find the particulars proven, the Tribunal would have to set aside the evidence of Mr Forbes and prefer the evidence of the witnesses for the Committee.

- 5.2. In relation to the first allegation, the Tribunal has not found it proven that Mr Forbes acted in an aggressive manner by raising his voice in anger. We accept that Mr Forbes raised his voice beyond a normal conversational level, but we do not accept that he did so in anger. We also do not accept that he acted aggressively. Mr Forbes was not yelling, but he did wish to make a point and therefore raised his voice. ██████ oral evidence on this point was less definitive than her brief of evidence and we do not view ██████ oral evidence as supporting the allegation. Putting that alongside Mr Forbes' evidence, we have considerable doubt as to whether he raised his voice in anger. Similarly with the allegation he was aggressive. Our overall assessment of the evidence is that Mr Forbes was frustrated and stressed. As a result he raised his voice beyond the normal level. The charge requires proof of more.
- 5.3. Regarding the second allegation of pushing teacher C with two hands, the Tribunal has spent significant time and effort considering the contrasting evidence of Mr Forbes and the CAC witnesses. As stated above, all three presented as credible. All three have been consistent in their positions as to what happened on the morning in question. In essence we are asked by the CAC to set aside the evidence of Mr Forbes and prefer the evidence of ██████ and ██████. For the reasons set out below, we are not prepared to do that.
- (a) Mr Forbes was not aggressive or angry as alleged by the CAC. Given what we have decided on this point, we do not see it as implausible that Mr Forbes would put a hand on ██████ shoulder in order to continue the conversation.
 - (b) ██████ telling Mr Forbes not to put his hands on her could be consistent with either version of events.
 - (c) As stated above, Mr Forbes has been consistent in his denial of the allegation of a push.
 - (d) It was common ground that Mr Forbes was a dedicated teacher who cared about the children under his care. We have some doubt as to whether he would have pushed ██████ when the children were in the area.
 - (e) Overall, Mr Forbes presented as credible.
- 5.4. Accordingly, even having regard to the standard of proof that applies, we are left in some doubt as to whether there was a push and whether two hands were used. Mr Forbes gets the benefit of that doubt.
- 5.5. In making the decision that we have; we have not made a determination that ██████ and ██████ have been untruthful. Rather, we are not prepared to make a determination that Mr Forbes has been untruthful.

- 5.6. Having determined that the allegations have not been proven. The charge is dismissed.
- 5.7. The Tribunal considered whether the charge should be amended to include a further particular relating to Mr Forbes putting his hand on [REDACTED] shoulder to prevent her from walking away. That is a fact proven on the balance of probabilities. The Tribunal has determined that the charge cannot be amended, as Rule 25 requires such amendment to be done before or during the hearing. Had an application been made during the hearing, we would have considered it.
- 5.8. For completeness, we note that had the charge included a particular relating to the hand on the shoulder, we would not have deemed it to be serious misconduct but would likely have decided that it was conduct that warranted a disciplinary response. That response would not have been a harsh one given the length of time since the incident and that fact that Mr Forbes is no longer in the teaching profession (we heard evidence that he has retired to look after his grandchildren of whom he has custody).

6. NAME SUPPRESSION

- 6.1. The CAC has applied for name suppression for [REDACTED]. If such an order is made, then [REDACTED] name should also be suppressed [REDACTED].
- 6.2. The application of the principle of open justice to proceedings before the Tribunal is contained in section 405(3) of the Act. The Tribunal has previously stated that the primary purpose behind open justice in a disciplinary context, is the maintenance of public confidence in the profession concerned through transparent administration of the law.¹
- 6.3. Section 405(6)(c) of the Act provides that the Tribunal may make an order prohibiting publication of the name or particulars of the affairs of any person if the Tribunal is of the opinion that it is proper to do so, having regard to the interest of any person ... and to the public interest.
- 6.4. The application for suppression of [REDACTED] name is made on health grounds. [REDACTED]
[REDACTED]
[REDACTED]

¹ *Complaints Assessment Committee v Teacher NZTDT* 2016/27 @ [66] citing *X v Standards Committee No. 1 of the New Zealand Law Society* [2011] NZCA 676 @ [18].

- 6.5. The Tribunal accepts that it is proper to suppress [REDACTED]. The interest in ensuring she is in good health outweighs any public interest in knowing her name. Accordingly there is an order suppressing [REDACTED] name and any identifying particulars.
- 6.6. It is also accepted by the Tribunal that [REDACTED] name should be suppressed to give proper effect to [REDACTED] suppression. An order is therefore made suppressing [REDACTED] name and any identifying particulars.
- 6.7. Evolve Education Group Limited (“Evolve”) has applied for suppression of the name of the Centre. The issue was briefly discussed at the hearing when Mr Nettleton appeared on behalf of Evolve. An interim suppression order was made. This was to allow Evolve time to consider the Tribunal’s decision and subsequently whether an application for permanent suppression is to be pursued.
- 6.8. A copy of this decision is to be delivered to Mr Nettleton. Any application for suppression should be filed within 14 days. That application should be supported by evidence and submissions. It will be determined on the papers unless the Tribunal deems a hearing to be necessary.
7. **COSTS**
- 7.1. Mr Forbes is self-represented. There are therefore no orders as to costs. Had Mr Forbes been represented, it would not necessarily have followed that costs would have been awarded. The Tribunal would have invited submissions on the issue.

Dated at Auckland this 11th day of August 2022



S N B Wimsett
Deputy Chair

BEFORE THE NEW ZEALAND TEACHERS' DISCIPLINARY TRIBUNAL

IN THE MATTER of the Education Act 1989

AND

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BETWEEN **COMPLAINTS ASSESSMENT
COMMITTEE**

Referrer

AND **DAVID FORBES**

Respondent

AND **EVOLVE EDUCATION GROUP**

Applicant for suppression/non-
publication order

DECISION OF TRIBUNAL RE SUPPRESSION

Dated 4 October 2022

Introduction

1. On 11 August 2022, the Tribunal dismissed a charge of serious misconduct laid by the Complaints Assessment Committee against Mr Forbes.
2. Permanent name suppression was ordered in relation to two of the witnesses. An interim suppression order was made in relation to Evolve Education Group (“Evolve”) which operated the Active Explorers Mayfair ECE Centre (“the Centre”).

Application for Suppression

3. Having considered the Tribunal’s decision, Evolve now applies for permanent suppression of its name and the name of the Centre. The application is based on a comment made by the witness, [REDACTED] [REDACTED] [REDACTED] That comment was referred to in the substantive decision at paragraph 3.13.
4. Evolve refutes the assertion made by [REDACTED] and submits that she is a disaffected former employee who contributed to any workplace issues.
5. The essence of Evolve’s argument is that publication of its name and that of the Centre will lead to unfairness in the following ways:
 - a. The allegations unfairly malign Evolve and the Centre.
 - b. If the remarks by [REDACTED] were circulated to the public, it would lead to a misleading view of Evolve and the Centre.
6. It is noted by Evolve that as a non-party, it did not have the opportunity to refute the allegations of [REDACTED]. It argues that publication of those allegations would be particularly unfair in those circumstances.
7. If the Tribunal declines the application to suppress the names of Evolve and the Centre, an alternative application is made to suppress the final sentence of paragraph 3.13. Within that sentence is the sole reference to the Centre [REDACTED] [REDACTED]
8. By way of further background, it is noted that [REDACTED] was not the only witness to comment [REDACTED] at the Centre. All witnesses

did that; however, this was not replicated in the Tribunal's decision.

[REDACTED]
[REDACTED]. It is accepted that this finding of fact was made without Evolve having the opportunity to respond.

Legal principles

9. The application of the principle of open justice to proceedings before the Tribunal is contained in section 405(3) of the Act. The Tribunal has previously stated that the primary purpose behind open justice in a disciplinary context, is the maintenance of public confidence in the profession concerned through transparent administration of the law. ¹
10. Section 405(6)(c) of the Act provides that the Tribunal may make an order prohibiting publication of the name or particulars of the affairs of any person if the Tribunal “is of the opinion that it is proper to do, having regard to the interest of any person ... and to the public interest.”
11. The Tribunal therefore has jurisdiction to make the Orders sought by Evolve but should only do so if its interests outweigh the general principles of open justice.
12. The Tribunal has determined that the competing interests are best balanced in this case by granting the alternative application to suppress the final sentence of paragraph 3.13. This is for the following reasons:
 - a. Evolve's application is based upon the comments of [REDACTED] set out at paragraph 3.13. It is that part of the decision that it takes issue with and says will cause damage to its business. No argument is put forward as to why Evolve should not otherwise be associated with the decision.
 - b. There is public interest in knowing the Centre at which the alleged incident took place and who was responsible for overseeing it.
 - c. Given that all witnesses seemed to agree that the Centre [REDACTED]
[REDACTED], that contention was unchallenged. As a non-party Evolve did not have the opportunity to present evidence or

¹ *Complaints Assessment Committee v Teacher NZTDT* 2016/27 @ [66] citing *X v Standard Committee (No.1) of the New Zealand Law Society* [2011] NZCA 676 @ [18].

arguments to challenge the shared view. As such, the Tribunal's decision does not refer to a counter-narrative or position. It is accepted that this could result in unfairness to Evolve – although only in relation to the specific reference at paragraph 3.13.

13. Accordingly, having balanced the competing interests, the Tribunal orders that prior to its decision being made publicly available, there should an edit made as follows:

3.13 [REDACTED] described Mr Forbes as a passionate, creative, and involved teacher who gave the job a lot of his time and energy. She believed that he was somewhat stressed and overwhelmed at that time. [REDACTED]

14. No other orders are made.

Dated at Auckland this 4th day of October 2022



S N B Wimsett
Deputy Chair