

**BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL**

**NZTDT 2020/42**

**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** **FIONA MARY HUTCHINSON**  
**Respondent**

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**TRIBUNAL DECISION DATED 3 MAY 2021**

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**HEARING:** Held on the papers on 10 March 2021

**TRIBUNAL:** Theo Baker (Chair)  
Megan Cassidy and Sharon Coulton (members)

**REPRESENTATION:** Ms B Tatham for the CAC  
Ms T Hutchinson for the respondent

1. In an Amended Notice of Charge dated 16 December 2020,<sup>1</sup> the Complaints Assessment Committee (**CAC**) alleged that the respondent:
  - a) Pushed a 3-year-old child [child Q], causing Child Q to fall to the ground;
  - b) Following this incident swore as she was leaving the class and/or early childhood centre.
2. The CAC contended that the conduct amounts to serious misconduct under section 378 of the Education Act 1989 and Rule 9(1)(a) and/or (j) and/or (k) of the Teaching Council Rules<sup>2</sup> 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.

### **Evidence**

3. Before the hearing, the parties conferred and filed an Agreed Summary of Facts (**ASF**). We must still be satisfied that the evidence supports the allegations in the charge. The relevant facts for each particular are set out below:

### **Background**

4. The respondent was first registered as a teacher in January 2009 and moved to full certification on 21 May 2012. She was employed as an early childhood teacher on a part time contract at Kawatiri Kids Westport (formerly Artemis Early Learning Centre called 'Leap and Bounds') (**the Centre**) from 20 November 2013 until she resigned on 12 March 2019, effective 27 March 2019.

### ***Allegation 1: Pushed a 3-year-old child [child Q], causing Child Q to fall to the ground***

5. On 27 March 2019, the respondent was teaching in the Kowhai Room at the Centre. This was the respondent's last day of work at the Centre as she had given her resignation earlier in the month.
6. Around lunchtime in the Kowhai Room, a 3 ½ year old child (Child Q) was sitting with the respondent. The respondent was sitting on the floor and Child Q who, in the midst of a tantrum, was pushing his weight back into the respondent. The respondent was

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<sup>1</sup> Amended and recorded in a minute of a pre-hearing conference on 18 January 2021

<sup>2</sup> Although the charge referred to rule 9(1)(b), in submissions the CAC confirmed that this ground was not to be pursued

getting annoyed with Child Q's behaviour.

7. Child Q went to climb over the respondent's legs to leave her lap, tripped over her legs, and at the same time, the respondent pushed him to the side. This caused Child Q to fall to the ground.
8. One of the witnesses to this incident saw Child Q bang his head against the lino floor. The respondent did not see Child Q bang his head.

***Allegation 2: Swore as she was leaving the class and/or early childhood centre***

9. The respondent stood up and said, in front of children and nearby colleagues, something along the lines of *"fuck this place; fuck the kids; I don't give a fuck what happens it is my last day; stick this fucking job up your arse"* and left the Kowhai room, slamming the door.
10. The respondent then swore again in the staff room in front of some colleagues and left the Centre.
11. The respondent called the Centre Manager that evening and apologised for "losing it" in the Kowhai Room.

***Response to Complaints Assessment Committee (CAC)***

12. In her response to the CAC, the respondent acknowledged that the incident with Child Q happened. The respondent accepts that she swore as she was leaving the Kowhai Room and the Centre.
13. The respondent stated that she was not aware that Child Q had hit his head.
14. The respondent stated that she was at "breaking point" and "snapped" and that working conditions at the Centre, staff turnover, paperwork and lack of help with children with behavioural issues added to her stress at the time.
15. The respondent advised the CAC that she was struggling with serious mental health concerns at the time of the incident.

### ***Factual findings***

16. We are satisfied that the evidence supports the charge and the factual allegations are proved.

### **Serious misconduct**

17. The respondent does not dispute that her conduct amounts to serious misconduct. We must still be satisfied that it reaches that threshold.
18. Section 378 of the Act is an interpretation section. Serious misconduct is defined as follows:

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

(a) *that –*

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

(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.*

19. The criteria for reporting serious misconduct referred to in section 378 (b) are found in rule 9 of the Rules and the CAC relies on rule 9(1)(a), (b), (j) and (k):

### **9 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:*

...

(j) *an act or omission that may be the subject of a prosecution for an offence punishable by imprisonment for a term of 3 months or more:*

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

20. We agree with the CAC that the conduct meets all three criteria in section 378(a). The respondent's rough handling of Child Q was likely to adversely affect the child's wellbeing, and the verbal outburst was likely to adversely affect the wellbeing of all the children present. The circumstances of this in front of the children and colleagues also clearly reflect adversely on the respondent's fitness to be a teacher and may bring the teaching profession into disrepute.
21. For the second part of the definition of serious misconduct, we agree that the respondent has used unreasonable or unjustified force. We recognise that her actions were more likely careless than intentional, but the fact remains that she applied some unreasonable physical force to a child. Rather than carefully lifting the child, which might have been reasonable and justified, she was reckless and acted in a way that was likely to cause a child some harm. It is not the way teachers are expected to handle young children.
22. We are reluctant to find that this matter would have been the subject of a prosecution (for assault). On its own, it might not be likely to bring the teaching profession into disrepute, but together with the verbal outburst, it clearly does so.
23. A teacher swearing in the classroom is not appropriate conduct and would meet with the disapproval of peers and members of the public. One expletive is not likely to lead to a charge of serious misconduct. In fact it is the angry outburst that is the most concerning aspect of the respondent's behaviour, but her repeated use of swearwords certainly elevates this conduct to a more serious level. Both her language and her demeanour would have been distressing to those around her.
24. In conclusion the first particular of the charge is a breach of rule 9(1)(a), the second breaches rule (1)(o) and the combination of the two also breach rule 9(1)(o). We are satisfied that reasonable members of the public, informed of the facts of this matter would consider the reputation of the teaching profession is lowered. The charge of serious misconduct is lowered.

## Penalty

25. 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**

26. The CAC referred to previous cases: *CAC v Carmen* NZTDT 2018/21,<sup>3</sup> *CAC v Griffiths* NZTDT 2017/22 5 February 2018, *CAC v Williams* 2019/24, 19 October 2019; *CAC v Kaufusi* NZTDT 2019/58. The CAC submitted that the conduct was of a similar gravity to Griffiths, involving a teacher's frustration with a child, but notes

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<sup>3</sup> *CAC v Carmen* NZTDT 2018/21, 5 February 2019

the respondent's acceptance that her conduct was wrong and has apologised.

27. The CAC submitted that an appropriate penalty is:
- a) Censure
  - b) Annotation of the register for two years
  - c) A condition on her practising certificate that she attend further training on behavioural management of young children.
28. The CAC submitted that the respondent's reaction to the child's behaviour suggest that she lacked the coping skills to react appropriately to situations that arise commonly in her role.

### ***Respondent***

29. Ms Tania Hutchinson submitted that the respondent was "under stress" in her position at the Centre and that the support she received was inadequate and not the correct approach given the seriousness of the Respondent's mental distress. Stress was caused in part by instability at the Centre. She had to change rooms repeatedly and teachers changed because of ratio needs. This was unsettling for the children.
30. The respondent worked part-time, with 25 hours a week being the optimum number of hours for her to maintain her overall health and wellbeing. After the Centre changed hands in 2017, the respondent's hours progressively increased due to staffing demands, which inevitably had a negative effect on her mental health. Her hours were reduced from July 2017. She informed her employer that she was not well, had been attending her doctor, but was not getting better. She had lost her passion and said it would be better if she left. The Centre was keen to retain her because of the need for staff.
31. The respondent was having to complete significant paperwork at home in her personal time because the Centre did not have capacity for teachers to have regular non-contact time and had no internet or printing facilities. Therefore the reduction in hours had no benefit.

32. The Centre did provide some support to the respondent by providing a support teacher and changing the age of children, but her health and wellbeing needs were not supported and no further enquiries were made, and no EAP or counselling was offered.
33. On giving her notice to the Centre on 13 March 2019, the Respondent was required to work out her notice period.
34. Ms Hutchinson said that in July 2019 the respondent was offered an opportunity to participate in the Impairment Process, which she described as being trialled by the Teaching Council. We note that the Act does provide for an impairment assessment and so we are not sure what is meant by a "trial", but in any event the respondent considered it would not likely assist her given the impracticalities of providing copies of "medical records and counselling reports" to the Impairment Committee, when she had already faced significant difficulties receiving timely and consistent medical treatment, by the same medical professional. Instead, she continued to seek help from her G.P. and commenced counselling, and is taking anti-depressants.
35. The respondent accepts that her conduct is undoubtedly unacceptable in an early childhood education environment and submits that, in the ordinary course of events (i.e. when she is well), she will always treat a child with respect and care, so that it feels safe in both a home and learning environment.
36. Ms Hutchinson emphasised that the respondent's ongoing ill-health, and her frustration with the workload and with Child Q was no justification for what occurred when there were other behavioural management options available.
37. In the intervening 2 years since the incident occurred, the Respondent has had the opportunity to reflect both on the events that preceded the incident, her mental and physical health, as well as her desire to teach again in future. She indicated very early on this investigation process that she had no intention of returning to teaching. It could be understood if this was a kneejerk reaction, one attributable not only to the respondent's mental health at the time, but also from shame that the incident occurred.



38. At present, based on her ongoing health concerns, the respondent does not believe she will teach again. However in the event that she does seek to hold a practising certificate and return to the teaching workforce, she acknowledges she may require further training in respect to managing difficult behaviours.

### **Discussion**

39. In determining penalty, we consider the purpose of professional disciplinary proceedings as summarised in *CAC v McMillan* NZTDT 2016/52<sup>4</sup> and the penalty principles outlined in *Roberts v Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354.<sup>5</sup> In particular, we are mindful of the overlapping purposes of protection of the public, the maintenance of professional standards and accountability and the maintenance of public confidence in the profession.<sup>6</sup>
40. In particular, in imposing a penalty, we must also consider the appropriateness of rehabilitation, the need for a consistent approach, and the range of penalties available, and impose the least punitive that is fair, reasonable and proportionate.<sup>7</sup>
41. We acknowledge the challenges the respondent has faced both in her workplace and personally. We also appreciate her early apology and acknowledgement of wrongdoing, as well as her co-operation with this disciplinary process. She recognised that her behaviour was completely inappropriate and we accept that it was not characteristic of her usual conduct.
42. We will leave it to the respondent to consider what behavioural management professional she thinks she would benefit from if she returns to teaching. It seems to us that the most important requirement is for her to manage her mental wellbeing. We encourage her to continue to seek help from the appropriate

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<sup>4</sup> *CAC v McMillan* NZTDT 2016/52, 23 January 2017

<sup>5</sup> Summarised as: Protecting the public; Setting standards for the profession; The role of punishment; Rehabilitation; Consistency across decisions; Range of sentencing options; Least restrictive; Fair, reasonable and proportionate. And further discussed in *CAC v Cook* 2018/50, 11 April 2019

<sup>6</sup> As summarised in *CAC v McMillan*, above, note 4, at paragraph 21 citing *Dentice v Valuers Registration Board* [1992] 1 NZLR 720 and *Young v PCC* Wellington HC, CIV 2006-485-1002, 1 June 2007, Young J

<sup>7</sup> *Roberts v Professional Conduct Committee*, above, note 8; *Patel v The Dentists Disciplinary Tribunal* HC AK AP 77/02 8 October 2002; *B v B* HC Auckland HC4/92, 6 April 1993, [1993] BCL 1093

sources.

43. We also consider it important that any future employer is aware of this decision so that they can ensure the appropriate support is in place to provide a safe working environment for the respondent and the children.
44. Therefore, under section 404(1)(c), we place a condition on any future practising certificate for a period of two years from any return to teaching, that the respondent shows a copy of this decision to her prospective employer. The register is to be annotated accordingly under section 404(1)(e).
45. We have imposed no other penalty.

### **Non-publication**

46. The respondent has interim name suppression. She has not applied for permanent name suppression.
47. The parties agree that the name of Child Q should be suppressed and so we make a permanent order for non-publication of the child's name.

### **Costs**

48. The CAC has not applied for costs.
49. Where there has been agreement on the facts and the teacher had co-operated fully with the disciplinary proceedings it is usual to order 40% of costs. The Tribunal usually submits a schedule of nominal costs for \$1145, of which 40% is \$458. We therefore order the respondent to pay a contribution of \$458 towards the Tribunal's costs under section 404(1)(i).



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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).