

BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

UNDER the Education Act 1989

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

BETWEEN **THE COMPLAINTS ASSESSMENT COMMITTEE**

Referrer

AND **MARGARET SIAN JONES**

Respondent

DECISION OF THE TRIBUNAL
Dated 16 January 2023

Tribunal: Hannah Cheeseman (Deputy Chair)
N Parsons and K Turketo (Members)

Hearing: 23 August 2022

Representation: C Paterson and H Smaill for the Referrer
The Respondent in person

Introduction

- [1] The Complaints Assessment Committee ("CAC") has charged the respondent with one charge of engaging in serious misconduct and/or conduct otherwise entitling the Disciplinary Tribunal to exercise its powers.
- [2] The CAC alleges that the Respondent is a registered teacher, and that on various dates while working at [REDACTED] ("the Centre") engaged in any or all of the following conduct:
- (a) On a date in February 2020, used inappropriate restraints to keep Child Z [REDACTED] [REDACTED] from moving around in his bed.
 - (b) On a date between 8 and 10 July 2020, forcefully tried to push spoonfuls of food into the mouth of Child Y [REDACTED] to the extent that Child Y became upset.
 - (c) On a date in July 2020, grabbed Child X [REDACTED] by the forearm and pushed her away from the kai trolley.
 - (d) On a date in July 2020, grabbed and/or pulled Child W's [REDACTED] [REDACTED] forearm to the extent that she cried after the incident.
 - (e) On a date in July 2020, withheld food from Child V [REDACTED] [REDACTED]
 - (f) On various dates in 2020 made inappropriate comments to and about children at the Centre and their parents, including:
 - (i) stating to Child U [REDACTED] that he "ate like a dog"; and/or
 - (ii) screaming and yelling at various children; and/or
 - (iii) telling children to "sit your arses down" and/or
 - (iv) threatening children by stating "would you like a smacked bottom?"; and/or
 - (v) telling children they were not going to be given any more food and that the reason provided was "have you seen your mother?"
 - (g) On a date in December 2019, consumed alcohol on the Centre's premises during her rostered work hours.

Procedural History

- [3] The matter was heard on the papers.

[4] A summary of facts was filed by the CAC and the parties agreed that the matter could be heard on the papers. The summary of facts is not signed by the Respondent, however it was confirmed that she wished to proceed on the basis of that summary of facts and on the papers.

[5] The CAC filed submissions on penalty and costs.

Evidence

Summaries of Fact (SoF)

[6] The SoF for the charge is set out in full as it forms the majority of the evidence available to the Tribunal:

Background

1. Margaret Sian Jones is a registered teacher with full certification. Her practising certificate expired on 13 May 2021, on a voluntary undertaking not to teach. Ms Jones became a fully registered teacher from 2012.
2. At all relevant times, Ms Jones was employed as a teacher at [REDACTED], an early childhood centre located in [REDACTED], Auckland.
3. Ms Jones began work at the Centre on 6 May 2019. Ms Jones was appointed as the Head Teacher from 25 November 2019. Ms Jones held the Head Teacher role at the time of the conduct.

Inappropriate restraint

4. On an occasion in February 2020, Ms Jones was working at the Centre.
5. On this occasion, Ms Jones put a child (**Child Z**), [REDACTED] down for a sleep. Child Z was moving around and crying. Ms Jones restrained Child Z tightly into the bed by taking the loose part of the sheet and tying in the corner in a knot. Child Z was not able to get up as a result of being restrained in this way.
6. This was witnessed by two other teachers, [REDACTED] and [REDACTED]. Ms Jones told [REDACTED] that she had tied Child Z to the bed because he was being a monkey.
7. [REDACTED] untied Child Z and helped him up. Child Z subsequently cried and was scared for between two and five minutes before falling asleep on [REDACTED].
8. [REDACTED] and [REDACTED] recreated the manner that Child Z was restrained in the bed for the investigator. Two photographs of their recreation are attached to this summary of facts and marked "A".

Force feeding

9. On a date between 8 and 10 July 2020, Ms Jones was feeding Child Y, [REDACTED]. [REDACTED] Child Y was crying and showing that he did not want to eat.

10. Ms Jones placed her hand over his hand and forced a spoon into his mouth while saying “you need to eat”. Child Y was crying throughout and demonstrating that he did not want to eat.
11. This was witnessed by [REDACTED] and [REDACTED].
12. [REDACTED] stated that Child Y was shaking and crying as a result. [REDACTED] needed to hold him for 20 minutes before he would settle.
13. Another teacher, [REDACTED], witnessed Ms Jones put her hand over Child Y’s hand and holding a spoon to eat on more than one other occasion. [REDACTED] witnessed Child Y becoming upset by this and crying.

Grabbing children

14. Children at the Centre played sometimes by jerking open the sliding door at the Centre and pushing their bottoms against the door because it made a sound.
15. Ms Jones was witnessed by [REDACTED] and [REDACTED] on various occasions during 2020 grabbing children by the forearms or biceps abruptly to stop them doing from banging their bums playing like this.
16. The witnesses describe the force used as being a 7 out of 10. Ms Jones also yelled at the children to “stop doing that”. Sometimes the children would cry and get upset, while others would continue playing with the sliding door.
17. On other occasions, Ms Jones was witnessed by [REDACTED] grabbing children by their forearms or on their elbows and pulling them over to her, saying “come here” in an abrupt manner. The force used was a 5 or 6 out of 10. [REDACTED] stated that the children looked “a little bit scared”.

Pushing a child

18. On or about 14 July 2020, Child X, [REDACTED] put their fingers into a container of hummus on the kai trolley at lunchtime.
19. Ms Jones grabbed their forearm/wrist and turned Child X away. Ms Jones let go of Child X’s forearm/wrist and pushed Child X away from the kai trolley on her back and shoulder. This was using a force of 4 or 5 out of 10.
20. Ms Jones said to Child X words to the effect that “I have already told you to move away” and “you need to go” with an impatient tone.
21. Child X responded by laughing.

Withholding food

22. On a date in July 2020, Child V, [REDACTED] was standing at the window. Ms Jones yelled at Child V to come to the table. Child V did not come. Ms Jones told [REDACTED] to get Child V to come to the table.
23. [REDACTED] said to Child V words to the effect that “let’s just see what is there and if you don’t like it, you don’t have to eat it”. [REDACTED] took Child V into the kitchen to see what lunch was.

24. Ms Jones raised her voice at [REDACTED] and told [REDACTED] and Child V to get back into the room. Child V was crying and said he did not want to sit at the table. Ms Jones said words to the effect that “he can get out, if he is not sitting at the table, he is not getting anything to eat”.

Inappropriate comments

25. In addition to the incidents detailed above at paragraphs 4 to 24, Ms Jones also made inappropriate comments to and about children at the Centre and their parents. On the following occasions in 2020, Ms Jones:
- a. said to Child U, [REDACTED], that he “ate like a dog” and that he was “troublemaker”;
 - b. called Child U and another child “bullies”;
 - c. said to children that they are naughty and naughty monkeys;
 - d. told children “all they do is cry”;
 - e. screamed or yelled at children, and the tone used was aggressive and angry. The tone of voice is described as an 8 to 9 out of 10. This led to children being tearful and upset;
 - f. told children that they were not going to be given any more food. Ms Jones stated that this was for the reason that “have you seen your mother?”; and
 - g. stated that parents who ask to reduce the amount of sleep their child is having at the Centre are lazy.
26. On or about 10 July 2020, Ms Jones put the children’s snack on the table without wiping the table, and the children were not asked to wash their hands before eating. Ms Jones said to the children “let’s have some cardboard and plastic with a swipe of dairy”, told the children to “sit your asses down”, and asked them “would you like a smacked bottom”.

Consuming alcohol on Centre premises

27. On a date in December 2019, Ms Jones consumed alcohol on the Centre premises during her rostered work hours.
28. It was the end of the day and Ms Jones said to another teacher, [REDACTED], that she was going to have a good weekend. Ms Jones asked the teacher to smell her drink bottle. It smelt like wine.
29. [REDACTED] informed the Centre Manager.
30. Ms Jones admitted the conduct in a disciplinary meeting. Ms Jones explained that she had been having a “rough time” recently in her personal life, and that she had kept a small amount of wine in a drink bottle at work to drink a few sips on the way home to relax.
31. The Centre did not take further action on this at this stage.

Disciplinary process

32. On or about 13 July 2020, ██████████ a parent at the Centre, raised concerns with the Centre Manager as her child was due to transition into Ms Jones' care. ██████████ ██████████ had concerns about how Ms Jones had been speaking to and about her son. The parent provided a written statement of her concerns to the Centre on 16 July 2020.
33. On or about 15 July 2020:
 - a. ██████████ emailed the Centre Manager to advise her of concerns about Ms Jones' conduct toward children on 10 July 2020.
 - b. ██████████ raised her concerns with Ms Jones' practice including the restraint of Child Z and force-feeding of Child Y.
34. On that day, Ms Jones was informed of the concerns that had been raised and the Centre Manager had a meeting with Ms Jones to discuss.
35. The Centre commenced a formal investigation including interviewing the Centre's staff. In the course of this, the balance of issues were raised which are detailed above.
36. On 17 July 2020, the Centre Manager met with Ms Jones to discuss the allegations. Ms Jones was suspended from the Centre.
37. On 20 July 2020, the Centre advised Oranga Tamariki. Oranga Tamariki in turn informed the New Zealand Police.
38. On 23 July 2020, another disciplinary meeting with Ms Jones occurred.
39. On 28 July 2020, Ms Jones was dismissed from the Centre, effective immediately.

Mandatory report

40. On 27 July 2020, the Centre Manager notified the Teaching Council of allegations about Ms Jones' conduct.
41. On 2 August 2020, Ms Jones signed a voluntary undertaking not to teach.
42. On 6 August 2020, ██████████ ██████████ at ██████████, lodged a mandatory report with the Teaching Council (**Council**) on behalf of the Centre.

Police process

43. On 17 July 2020, the Centre notified the New Zealand Police (**Police**) regarding the allegations reported about Ms Jones.
44. The Police commenced an investigation into the allegations. This involved interviewing staff who witnessed conduct at the Centre.
45. On 27 August 2020, the Police gave Ms Jones a formal warning for the offence of "assaults a child". Police did not lay a criminal charge against Ms Jones.

Response to Committee

46. Ms Jones provided a response to the Committee. Ms Jones stated that:

- a. In respect of restraining Child Z, that she did not recall the incident and that it was not something that she had done before in her teaching career. Ms Jones also noted that it was strange that the incident was alleged to have occurred in February 2020 but not reported until July 2020.
- b. With respect to force-feeding Child Y, she only ever fed one child while she was at the Centre. She admitted that the child was upset when she sat down next to him, but after she talked to him the crying stopped. Ms Jones said that she did place her hand on top of the child's, but that she guided him to eat using a spoon. Ms Jones stated that she did not use force and that the child was not placed in a dangerous situation where he could choke.
- c. With respect to pushing Child X, she did try to stop a child from putting her hand into food on the kai trolley, but that this was because the food would have had to be thrown away if her hand had touched the hummus. Ms Jones stated that she did it before thinking, and that she did not use unreasonable force.
- d. She admitted that she had moved children away from the sliding door and explained she placed one hand behind their back and her other hand on their arm to guide them away. Ms Jones stated that she had told the children to stop banging on the sliding door several times and to move away, but they had not listened. Ms Jones stated that there was no force used and it was dealt with quickly.
- e. With respect to withholding food from Child V, the child was over at the window, and she said that he needed to come to the table to eat. Ms Jones also stated that it was a big debate at the Centre about whether children should be offered other food if they did not eat what was originally offered. Ms Jones said that the manager said that children should only be given the food that is provided for them.
- f. With respect to the alcohol, Ms Jones emphasised that she did not drink the wine on the premises or during or before work hours. The wine was for after her shift was finished.

The Law

[7] Section 10 of the Act defines "Serious misconduct" as behaviour by a teacher that has one or more of three outcomes. Under Section 10(1)(a), it is conduct which:

- (i) Adversely affects, or is likely to adversely affect, the wellbeing or learning of one or more children, or
- (ii) Reflects adversely on the teacher's fitness to be a teacher; or
- (iii) May bring the teaching profession into disrepute.

[8] Further, the conduct must be of character or severity that meets the Teaching Council's criteria for reporting serious misconduct (s10(1)(b)).

- [9] The Court of Appeal recently affirmed that test for serious misconduct in section 378 of the Education Act¹ is conjunctive.² As well as having one or more of the three adverse professional effects or consequences described in section 378(1)(a)(i)-(iii), set out above, the conduct concerns must be of a character and severity that meets the Teaching Council's criteria for reporting serious misconduct. The Teaching Council Rules 2016 ("the Rules") describes the types of behaviour that are of a prima facie character and severity that constitutes serious misconduct.³
- [10] The criteria for reporting serious misconduct are at Rule 9 of the rules. Rule 9 provides that a teacher's employer must report serious breaches of the Code of Professional Responsibility ("the Code"). In the present case the CAC alleges that the Respondent conduct breaches Rule 9(1)(a), and/or 9(1)(b) and/or 9(1)(j) and/or 9(1)(k).
- [11] Rule 9(1)(a) relates to using unjustified physical force on a child or young person, or encouraging another person to do so.
- [12] Rule 9(1)(b) relates to emotional abuse that causes harm or is likely to cause harm to a child or young person.
- [13] Rule 9(1)(j) which relates to an act or omission that may be the subject of a prosecution for an offence punishable by imprisonment for a term of three months or more.
- [14] Rule 9(1)(k) which relates to an act or omission that brings, or is likely to bring, the teaching profession into disrepute.
- [15] In addition to the Rules, the Code sets out the standards of expected conduct, and the criteria in section 10(1)(b) of the Act will be satisfied where the conduct alleged amounts to a serious breach of the Code, irrespective of whether the conduct fits into one of the examples in Rule 9.
- [16] If the test for serious misconduct in section 10 of the Act is not met, it remains open to the Tribunal to find that the conduct alleged amounts to misconduct, provided there has been a breach of accepted professional standards. It is noted that not all departures from accepted professional standards will amount to misconduct.
- [17] In the event of a finding of a serious misconduct or misconduct, the Tribunal may exercise its powers under section 500 of the Act.

¹ As it was then. However, s378 of the Education Act defines serious misconduct in the same terms as section 10 of the current Act.

² *Teacher Y v Education Council of Aotearoa New Zealand* [2018] NZCA 637.

³ These came into force on 1 July 2016 and had a name change from the Education Council Rules 2016 to the Teaching Council Rules 2016, in September 2018.

Submissions

[18] CAC submits that the necessary criteria in section 10(1)(a) of the Act are met, and that the definition of serious misconduct is made out.

[19] In particular the CAC submits that the Respondent's conduct is likely to adversely affect the wellbeing of the students involved, it adversely reflects on the Respondent's fitness to be a teacher, and it may bring the teaching profession into disrepute. The CAC further submits that the offending is of such a character or severity that it meets the Teaching Council's criteria for reporting of serious misconduct.

Adverse effect on the wellbeing of students.

[20] The CAC submits that the Respondent's ill-treatment, in the form of inappropriate restraint, force-feeding and rough housing, has obvious implications for the physical and emotional wellbeing of all of the students involved.

[21] The CAC points to the fact that a number of the children who were the subject of the Respondent's ill-treatment and rough handling were visibly upset or crying directly after the relevant events. For example, in the incident involving Child Y, Child Y was described as shaking and crying and not calming down for 20 minutes after being force-fed by the respondent. Similarly, Child Z cried and was observed to be scared for between two and five minutes after being restrained in bed while sleeping. The CAC submits that the respondent's conduct in shouting at children and making inappropriate comments towards them was also conduct that was likely to intimidate children and make them feel belittled, thereby impacting their emotional and psychological wellbeing.

Adversely reflects on the respondent's fitness to be a teacher.

[22] The CAC submits that the course of conduct engaged in by the respondent reflects adversely on her fitness to be a teacher.

[23] In support of that submission the CAC refers to previous decisions of the Tribunal where it is stated that any breaches of the Code would be highly relevant to consideration of whether there has been serious misconduct, particularly when assessing whether a teacher's conduct reflects adversely on their fitness to teach⁴. In the present case the CAC submits that the Respondent's conduct was contrary to professional obligations under the Code in the following ways:

- a. The Respondent's conduct in engaging in ill-treatment and rough handling as well as directing inappropriate comment towards them failed to promote the wellbeing of those learners and failed to protect them from harm, in

⁴ For example, NZTDT 2014/18, 5 June 2016 at 5 to 6.

contravention of clause 2.1 of the Code. The CAC submits that the guidance in clause 2.1 specifically refers to inappropriate handling (such as grabbing, shoving, pushing, using physical force to manage behaviour) and using inappropriate verbal language (for example, aggressive humiliating language) as examples of behaviour that would not promote learners' wellbeing.

- b. That the Respondent's rough handling of children and inappropriate comments also involve the Respondent failing to demonstrate a high standard of professional behaviour and integrity, in breach of clause 1.3 of the Code. Further, this failed to contribute to a professional culture that supports and upholds the Code, which is in breach of clause 1.5 of the Code.
- c. Finally, that by making disparaging comments about children's families and parents, the Respondent acted in a way which was inconsistent with her obligation to act in a professional and respectful way towards families and whānau of learners, in breach of clause 3.1 of the Code.

[24] The CAC also submits that the Respondent's conduct in force-feeding children and engaging in rough handling was contrary to the Regulations which apply to early childhood centres, the Education (Early Childhood Services) Regulations 2008. Regulation 56 specifically prohibits the physical ill-treatment of children and ill-treatment includes the immobilisation of children and the deprivation of food.

Conduct likely to bring the teaching profession into disrepute.

[25] The CAC submits that given the impact of her actions on children's wellbeing and the myriad of ways in which the Respondent's actions departed from the acceptable professional standards, the Respondent's conduct was likely to bring the profession as a whole into disrepute. It is the CAC's submission that reasonable members of the public, looking at the Respondent's conduct objectively, would consider that the reputation and good standing of the teaching profession was lowered by her conduct.

[26] The CAC alleges that the Respondent's conduct is also of sufficiently serious character and severity to meet the reporting criteria in Rule 9 of the Rules.

[27] The CAC alleges that the relevant rules for the present case are, as set out above, Rule 9(1)(a), 9(1)(b), 9(1)(k) and 9(1)(j). The CAC further submits that the "discredit" test referred to in Rule 9(1)(k) will be satisfied if reasonable members of the public, informed of the facts and circumstances, could reasonably conclude that the reputation and standing of the profession was lowered by the Respondent's behaviour.⁵

[28] The CAC submits that the use of inappropriate restraint, force-feeding children, rough handling them, and yelling and making disparaging comments towards and about

⁵ *Collie v Nursing Council of New Zealand* [2001] NZAR 74 at [28]; *CAC v Collins* NZTDT 2016/43 24 March 2017.

children engages Rules 9(1)(a), which prohibits unjustified or unreasonable force on a child, together with Rule 9(1)(b), which prohibits the emotional abuse of children.

- [29] In relation to Rule 9(1)(j), assault on a child is an offence pursuant to section 194 of the Crimes Act 1961 and carries a maximum sentence of two years imprisonment. Accordingly, this meets the criteria under the r9(1)(j)
- [30] In relation to Rule 9(1)(k), the CAC refers to its previous submissions and submits that taken as a whole, the Respondent's conduct is likely to bring the profession into disrepute, and that the conduct accordingly meets the criteria under Rule 9(1)(k).
- [31] The CAC submits that the Tribunal has previously stated that any breaches of the Education Council's Code of Ethics for certified teachers (which has now been replaced by the Code of Professional Responsibility) will be highly relevant to consideration of whether the conduct amounts to serious misconduct. The CAC submits, as set out above, that the Respondent's conduct breaches the Code.
- [32] Accordingly, the CAC further submits that each limb of the test for serious misconduct is made out.
- [33] In relation to penalty, the CAC noted that available options penalty and the purposes of professional disciplinary proceedings. In particular the CAC highlighted the Tribunal's ability to order censure and cancellation of the teacher's registration under sections 501(b) and (g) of the Act, respectively.
- [34] The CAC referred us to the decision in *Fuli-Makaua*,⁶ where the Tribunal considered the areas in which cancellation of a teacher's registration would be appropriate. The CAC also noted that that approach was endorsed in the decision of Ormsby, which involved a teacher engaging in physical ill-treatment of a student.⁷
- [35] The CAC referred us to a number of decisions which they considered may assist in determining the appropriate penalty in the present case.

*Trow cases*⁸. In the Trow cases, the Tribunal was considering the conduct of two related staff members at an early childhood centre. K was the mother of G and was the centre manager. Both K and G engaged in repeated ill-treatment of children over the course of a few months in 2018, including secluding children, withholding food and blankets, putting children to sleep for excessive periods and letting children cry themselves to sleep, force-feeding children, belittling children, and engaging in rough handling. Neither of the Trows defended the charges and there was no evidence to suggest that either teacher was remorseful for their actions or had taken any remedial or rehabilitative steps to indicate insight into their conduct. The Tribunal ordered

⁶ *CAC v Fuli-Makaua* NZTDT 2017/40, 5 June 2018.

⁷ *CAC v Ormsby*, NZTDT 2017/33, 24 October 2018.

⁸ *CAC v Grace Trow*, NZTDT 2019/82, 28 July 2020; *CAC v Kelsie Trow*, NZTDT 2019/95, 28 July 2020.

censure and cancellation of both registrations. Cancellation was the only available outcome having regard to the nature and gravity of the conduct and to ensure the ongoing safety of children.

*CAC v Jamasbnejad*⁹. The teacher engaged in repeated rough handling and ill-treatment of children, including her own daughter, in the early childhood context over a period of two years. The contact had occurred over two years prior to the charge being laid with the Tribunal. The teacher accepted her conduct, provided the evidence from her employer regarding improvements in her practices the conduct had taken place. The Tribunal accepted that the improvements in her practice since the conduct occurred demonstrated that the teacher was unlikely to repeat the relevant behaviour in future. Taking that into account, the Tribunal considered it could step back from cancellation and imposed censure and strict conditions on the teacher's practising certificate, together with annotation of the Register.

*CAC v Tregurtha*¹⁰ In this case a teacher regularly used force over a number of months to prevent children from moving during nap time and mat time, forcibly held children in certain positions, and made a child sit at the kai table for prolonged periods. The Tribunal imposed a penalty of cancellation noting 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.

*CAC v Julia Costello*¹¹. Finally, in the recent case of Julia Costello, which involved a teacher who was engaged in repeated ill-treatment of children at an early childhood centre, the teacher defended the charges, but the Tribunal found a number of instances of rough handling and ill-treatment had occurred. The teacher's registration was cancelled, and she was censured, given the nature and gravity of the relevant conduct. The Tribunal accepted that the matters of Grace Trow and Kelsie Trow involved allegations which were very similar to those proved against Miss Costello and which resulted in cancellation, and further noted that cancellation was not ordered in another similar case *Jamasbnejad*, because of demonstrated improvements in the teacher's practice.

[36] In relation to the present charge, the CAC submits that the Respondent's conduct was a relatively serious example of inappropriate and ongoing ill-treatment of children in her care, taking into account the following factors:

⁹ *CAC v Jamasbnejad*, NZTDT 2015/25, 25 February 2016.

¹⁰ *CAC v Tregurtha* NZTDT 2017/39, 21 June 2018.

¹¹ *CAC v Julia Costello*, NZTDT 2020/29, 8 October 2021, and *CAC v Julia Costello* NZTDT 2020/29, 14 January 2022.

- a. The conduct was not an isolated one-off incident. This was repeated behaviour involving multiple instances of concerning conduct over a number of months. The prolonged nature of the conduct and the differing types of inappropriate conduct suggest that the Respondent's ill-treatment of children was an ingrained part of her teaching practice.
- b. The conduct was directed towards a number of different children and affected the wellbeing of those children, as evidenced by their responses to the Respondent's actions for some of the incidents.
- c. The children were young and particularly vulnerable given that they were toddlers at the time. Children were reliant on the Respondent to provide a safe and supportive environment and she failed to do so. The CAC submit there is a highlighted risk of harm to their physical and emotional wellbeing, particularly in the case of incidents involving rough handling of children.
- d. The Respondent was in a position of elevated responsibility when the majority of the incidents occurred as she was head teacher at the Centre where the conduct took place.
- e. The CAC accepts that there are no aggravating features personal to the Respondent which are relevant to the issue of penalty.
- f. In relation to mitigating factors, the CAC acknowledges that the Respondent has no previous disciplinary history and that she has accepted the conduct as set out in the agreed Summary of Facts. The CAC note that she did not accept responsibility at the earliest stage; however, it did avoid the need for a full in-person hearing.
- g. The CAC does note that as yet there is no demonstration of meaningful insight into or remorse for her actions and the Respondent has not provided evidence of having undertaken any rehabilitative steps to improve her teaching practice or to mitigate any risk of her engaging in similar conduct in future.
- h. The CAC submits that it is relevant that the Respondent has indicated she does not intend to return to the teaching profession and accordingly, it is the CAC's view that any rehabilitative penalty orders would serve no or a very limited purpose. That being the case, the CAC submits that public protection is the key purpose in the present proceeding, given the nature and extent of the Respondent's conduct, and that even if the teacher does not intend to teach again in the future, the maintenance of proper professional standards (through both individual and general assurance) is an important consideration.

[37] The CAC submits that to meet the purposes and principles of disciplinary proceedings, in particular the maintenance of proper professional standards, the starting point for the Tribunal must be one of cancellation.

- [38] The CAC submits that for the Tribunal to impose a penalty short of cancellation, there would need to be strong personal factors demonstrated by the Respondent together with steps demonstrating insight and remorse for her conduct, along with rehabilitation to mitigate the risk of conduct such as this happening again. It is the CAC's submission that such material is not available to the Tribunal.
- [39] No submissions were received from the Respondent in relation to the characterisation of the conduct or in terms of penalty.

Discussion

- [40] We start with the preliminary note that we do not consider that the allegation of consuming alcohol at work is made out. There is no evidence to rebut the respondent's explanation that she drank alcohol to unwind after work. There is no evidence indicating that the respondent was under the influence of alcohol while caring for children.
- [41] However, we consider the remaining aspects of the charge are proved, and we have no hesitation in concluding that the behaviour of the Respondent meets the threshold for serious misconduct.
- [42] In relation to the criteria set out in section 10 of the Act, we are satisfied that the Respondent's conduct adversely affected the wellbeing or learning of all the students involved, it reflects adversely on her fitness to be a teacher, and that it may bring the teaching profession into disrepute. We accept the CAC submissions in relation to the impact the respondent's conduct had on the children, and we agree that this would have adversely affected their wellbeing and learning.
- [43] We also accept the submission that the Respondent's conduct went beyond simply being inappropriate to the point of being illegal. That said, we do not overlook the fact that it was not tested by way of a formal charge and criminal court proceeding. That, however, does not have significant bearing on the impact that such conduct has on the Respondent's fitness to be a teacher.
- [44] In the case of *CAC v Teacher*¹² we looked at the issue of what constitutes a physical abuse under the previous version of Rule 9(1)(a). We considered the cases of *Rowlingson*¹³ and *Haycock*¹⁴ and how a full contextual enquiry is required when considering whether a teacher's conduct amounts to abuse (as was required then). In *Rowlingson*, when considering what amounted to an act of physical abuse, we noted that "*in our view, the answer to that lies in whether or not it was a violent use of force. Context is everything...*". We further noted, in *Haycock* that it was not necessary for

¹² *CAC v Teacher* NZTDT 2016/50

¹³ *CAC v Rowlingson*, NZTDT 2015/54, 9 May 2016

¹⁴ *CAC v Haycock* NZTDT 2016-2

there to be a degree of aggression or violence for an act to constitute physical abuse and concluded

“...we think it is difficult to see how an act of force for the purposes of coercion or punishment, which is an unlawful behaviour on a teacher’s part, can be otherwise than regarded as abusive.”

[45] We consider that the cases outlined above remain relevant following the change of the wording of rule 9(1)(a) from a defined list of “serious misconduct” to the present wording which requires a “serious breach of the Code of Professional Responsibility.” Under the previous wording the requirement for consideration of the context and seriousness of the conduct was required to reach a finding of physical abuse. Similarly, under the present rule, while the use of “using unjustified or unreasonable physical force” might imply a lower threshold, we note that a finding of serious misconduct requires a “serious” breach of the rules. Not all breaches will be serious enough to warrant a finding of serious misconduct.

[46] In the present case, the force used involved pushing, holding, grabbing and force-feeding the children, and in relation to one child, physically restraining them. We wish to be clear that the respondent’s conduct is not acceptable practice, and while we are mindful that all actions must be considering context, there is no excuse of prolonged, repeated rough handling of very young children. We conclude that the respondent’s actions do amount to a “serious” breach of under Rule 9(1)(a), such that a finding of serious misconduct is warranted.

[47] As discussed above, we consider that the use of physical force in this manner is conduct which the public is likely to consider inappropriate, and we consider that it is likely to bring the teaching profession, as a whole, into dispute, in contravention of Rule 9(1)(k).

[48] We find that the conduct alleged is of such a character or severity that it reaches the Teaching Council’s criteria for reporting serious misconduct.

[49] We agree with the aggravating and mitigating features submitted by the CAC.

Penalty

[50] 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.

500 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 497(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 Education Council in respect of the costs of conducting the hearing:*
 - (j) direct the Education 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 493 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.*

[51] The CAC submits that the starting point for penalty in this case must be cancellation. The CAC acknowledges that whether it is necessary to cancel a teacher's registration in order to discharge the Tribunal's disciplinary obligations will often turn on the teacher's rehabilitative prospects and the degree of insight he or she has demonstrated into the causes of the behaviour.¹⁵

[52] The CAC referred us to the cases set out above in support of this submission.

¹⁵ CAC V Adams NZTDT 2018/11 13 September 2018 at para [25].

Discussion

- [53] We agree that the start point for this type of conduct must be cancellation.
- [54] We then consider the decision in *CAC v Fuli-Makaua*¹⁶, where the Tribunal said that cancellation is generally required in two overlapping situations, which are:
- (a) Where the seriousness of the conduct is such that no outcome short of deregistration will sufficiently reflect its adverse effects on the teacher's fitness to teach, and/or its tendency to lower the reputation of the profession; and
 - (b) Where the teacher has insufficient insight into the cause of the behaviour and lacks meaningful rehabilitative prospects. In this scenario, there is an apparent ongoing risk that leaves no alternative to deregistration.
- [55] In determining penalty, the Tribunal must ensure that three overlapping principles are met, namely the protection of the public through the provision of a safe learning environment for students and the maintenance of both professional standards and public's confidence in the profession¹⁷. We also refer to the decisions of the superior courts which have emphasised the fact that the purpose of professional disciplinary proceedings for various occupations is not to punish the practitioner for misbehaviour, although it may well have that effect.¹⁸
- [56] In *Mackey* we looked at the principles the Tribunal must turn its mind to when considering penalty following a finding to exercise its power, and noted that they include:
- (A) Protecting the public.
 - (b) Setting the standards for the profession.
 - (c) Punishment.
 - (d) Rehabilitation.
 - (e) Consistency.
 - (f) The range of sentencing options.
 - (g) The least restrictive outcome.
 - (h) Fair, reasonable and proportionate outcomes.

¹⁶ *CAC v Fuli-Makaua* NZTDT 2017/40, 5 June 2018.

¹⁷ *CAC v McMillan* NZTDT 2016/52.

¹⁸ *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1NZLR 1 at [97]; in *re A Medical Practitioner* [1959] NZLR 784 at para [800] (CA).

- [57] We do not intend to repeat what we said in those decisions other than to note that we have turned our mind to these principles in reaching our decision on penalty.
- [58] We do agree with the submission from the CAC that the starting point for offending as serious as this must be one of cancellation. However, we do not consider that would be an inevitable outcome for conduct of this type. While this is clearly serious misconduct, given the respondent's previous good record, it is not without the possibility of redemption.
- [59] The hurdle the Respondent faces is the complete lack of material in relation to her insight, her acknowledgement and acceptance of responsibility, beyond accepting the charge or the conduct occurred, and any specific details into her rehabilitation or rehabilitative prospects.
- [60] We wish to make clear that had material indicating the Respondent's full acceptance of the seriousness of her conduct, her remorse for it and steps to ensure that such conduct was never repeated been available to us, it is possible that we would have imposed a penalty short of cancellation of registration. We note this because despite our orders, below, it remains open to the respondent should she wish, to undertake such counselling and engage in such rehabilitation as necessary to prove her insight and suitability to reapply for registration as a teacher.

Costs

- [61] The CAC seeks an order for costs against the Respondent towards the CAC's actual and reasonable costs incurred in undertaking its investigative and prosecutorial functions.
- [62] The CAC submits that the starting point, in accordance with Tribunal's practise note of 17 June 2010, is an award of 50% of the cost of investigation, the hearing, and the Tribunal's costs.
- [63] Taking into account that the Respondent has accepted responsibility and has agreed to proceed with the hearing on the papers, with the benefit of an agreed summary of facts, the CAC submits that a reduction in the costs award is warranted, and the CAC seeks a reduced costs award of 40% of actual costs.
- [64] We see no reason that the award of costs should be reduced, and order costs of 40%.

Non-Publication

- [65] The CAC seeks suppression of the name and identifying particulars of all the children involved in this matter, and the other teachers involved. They seek that this cover any documents before the Tribunal.

[66] We consider it would be proper to suppress those details, taking into account the ages of the children involved. We consider suppression of the witnesses names is appropriate to avoid identification of the children involved.

Orders

[67] The Tribunal's formal orders under the Education and Training Act 2020, are as follows:

- a) The Respondent's registration is cancelled pursuant to section 500(1)(g).
- b) There is an order preventing publication of the name and identifying details of all the children and the witnesses in this decision and any other material on the Tribunal file.
- c) Pursuant to section 500(1)(h) the Respondent is ordered to pay 40% of the costs shown in the CAC's Schedule files.
- d) The Respondent is also ordered to pay 40% of the Tribunal's costs pursuant to section 500(1)(i).



Hannah Cheeseman

Deputy Chairperson

Notice

1. A teacher who is the subject of a decision by the Disciplinary Tribunal made under section 500 of the Education and Training Act 2020 may appeal against that decision to the District Court (section 504(1)).
2. The CAC may, with the leave of the Teaching Council, appeal to the District Court against a decision of the Disciplinary Tribunal made under section 500 (section 504(2)).
3. An appeal must be made within 28 days of receipt of written notice of the decision, or any longer period that the District Court allows.
4. Clause 5(2) to (6) of Schedule 3 to the Education and Training Act 2020 applies to every appeal under section 504 as if it were an appeal under clause 5(1) of Schedule 3