

**BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL**

**NZTDT 2021/58**

**IN THE MATTER** of the Education and Training Act 2020

**AND**

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

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

Referrer

**AND**

**NORA FA'AMELEA LEPAILA**

Respondent

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**DECISION OF THE TRIBUNAL ON CHARGES**

**4 July 2022**

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**HEARING:** Held on 16 June 2022 on paper via Teams

**TRIBUNAL:** Rachael Schmidt-McCleave (Deputy Chair)  
Dr Will Flavell and Celeste Harrington (members)

**REPRESENTATION:** A J Brosnan (Luke Cunningham & Clere) for the Complaints  
Assessment Committee  
A Kennerley/B Irvine (Taylor Shaw) for the respondent

## Hei timatanga kōrero – Introduction

1. Pursuant to section 497(4) of the Education and Training Act 2020 (the “Act”), the Complaints Assessment Committee (“CAC”) referred the respondent’s conduct to the Tribunal, on the basis that the CAC considers that it constitutes “serious misconduct” as defined in section 10(a) of the Act.
2. The charge alleges that the respondent, a registered teacher of Christchurch, on or about 21 August 2020, hit a student, age 3, on the head using her knuckles.
3. The CAC alleges that the conduct above amounts to serious misconduct pursuant to section 10 of the Act and any or all of Rules 9(1)(a) of the Teaching Council Rules 2016 or, alternatively, amounts to conduct which otherwise entitles the Disciplinary Tribunal to exercise its powers pursuant to section 500 of the Act.
4. The matter was heard on the papers via Teams on 16 June 2022.

## Ko te hātepe ture o tonono nei – Procedural History and Preliminary Matters

5. A pre-hearing conference (“PHC”) was held on 15 February 2022. The parties agreed to various timetabling matters. An interim name suppression order was made in respect of the respondent to stay in place until the charge is disposed of.

## Kōrero Taunaki - Evidence

### *Agreed Summary of Facts*

6. The ASoF is set out in full below:

#### ***“Background***

1. *The respondent, **NORA FA’AMELEA LEPAILA**, is a registered teacher with a full practising certificate. She was first registered on 13 March 2014 and has continuously maintained practising certificates since.*
2. *Ms Lepaila was an Early Childhood Education (**ECE**) teacher during the relevant period at Tino e Tasi Preschool (the **preschool**). On 2 September 2020 Ms Lepaila resigned from the preschool.*
3. *Ms Lepaila is currently employed as an ECE teacher at Just Kids Community Preschool.*

#### ***The Incident***

*Charge: On or about 21 August 2020, hit a student, age 3, on the head using her knuckles.*

4. *On or about 21 August 2020, Ms Lepaila asked Child A to share a toy with Child B. Child A did not do so despite Ms Lepaila repeating his name six or seven times. These interactions took place in the outside play area of the preschool.*
5. *Ms Lepaila then held Child A's hand and walked him into the Lupe room inside the preschool. Once inside she hit Child A on the head with her knuckles. The hit made a knocking noise that was heard by Teacher A, who did not see the incident but was also in the Lupe room.*
6. *Soon after the incident Child A told Teacher B "Nora sasa me".<sup>1</sup>*
7. *Teacher A and Teacher B both described Child A being upset and on the verge of tears after the incident.*

#### **Ms Lepaila's Response**

8. *During the investigation of the incident undertaken by the preschool Ms Lepaila admitted that she had hit Child A on the head and provided clarification that she had hit him with her knuckles, which was previously not known.*
9. *However, Ms Lepaila denied hitting Child A on two subsequent occasions: first in a letter to the Teaching Council's Triage Committee on 2 November 2020 in response to receiving the mandatory report made in relation to this matter; and secondly in a response to the CAC dated 6 August 2021 in response to the Investigation Report.*
10. *Ms Lepaila has now reflected on the incident and has decided not to defend the charge.*
11. *Ms Lepaila provided a number of reference letters to the CAC, including one from her current employer, all of which spoke positively about her."*

#### **Te Ture - The Law**

7. Section 10 of the Act defines serious misconduct:

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

- (a) that –
  - (i) adversely affects, or is likely to adversely affect, the wellbeing or learning of 1 or more students; or
  - (ii) reflects adversely on the teacher's fitness to be a teacher;

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<sup>1</sup> "Sasa" means "hit" in Samoan.

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.*

8. As confirmed by the District Court in relation to the identical test under section 378 of the Education Act 1989 (the “former Act”),<sup>2</sup> the test under section 10 is conjunctive, meaning that as well as meeting one or more of the three adverse consequences, a teacher's conduct must also be of a character or severity that meets the Teaching Council's criteria for reporting serious misconduct, pursuant to Rule 9 of the Teaching Council Rules 2016.
9. The criteria for reporting serious misconduct are found in the Teaching Council Rules 2016 (the “Rules”). The Tribunal also accepts the CAC's submission that, if established, the respondent's conduct would fall within the following sub-rules of Rules 9(1):
  - (a) Rule 9(1)(a): unjustified or unreasonable physical force on a child:
10. The Tribunal also considers that Rule 9(1)(k) is engaged. The test under 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.<sup>3</sup>

## **Ngā Kōrero a te Kōmiti – CAC and Respondent Submissions**

### *CAC submissions*

11. In summary, the CAC submits that the conduct constitutes serious misconduct under section 10 of the Act, and Rule 9(1)(k) of the Rules. The CAC points particularly to the fact the force used by the respondent was enough for Teacher A, who was in the same room, to hear the hitting as a knocking sound, and to upset Child A to the verge of tears. The CAC also submits that the respondent hit Child A on the head as a form of punishment for ignoring her earlier instructions to share the toy.

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<sup>2</sup> *Teacher Y v Education Council of Aotearoa New Zealand* [2018] NZDC 3141, 27 February 2018 at [64]

<sup>3</sup> *Collie v Nursing Council of New Zealand* [2001] NZAR 74 at [28]; *CAC v Collins* NZTDT 2016/43, 24 March 2017.

12. The CAC also relies on clause 2.1 of the Code of Professional Responsibility,<sup>4</sup> which reads “*I will work in the best interests of learners by promoting the wellbeing of learners and protecting them from harm.*” The Code is supplemented by Examples in Practice which provide examples of how the principles in the Code can be positively applied as well as examples of behaviour that constitute a failure to uphold the principle.
13. The CAC points out that an example of behaviour that does not promote learners’ wellbeing under clause 2.1 and may cause harm is, “*Inappropriate handling such as physically grabbing, shoving or pushing, or using physical force to manage a learner’s behaviour.*”
14. Further, points out by the CAC, section 24(1)(a) of the Act states that a person must not use force, by way of correction or punishment, toward a child enrolled at or attending an early childhood service.
15. The CAC refers to the many previous decisions of the Tribunal confirming that the use of physical force on children is not acceptable, pointing out that incidents in such cases are often preceded by challenging behaviour on the part of the student, but that this does not justify the use of physical force, let alone the use of force to correct or punish a child. The CAC says that ECE teachers are expected to face challenging behaviour from children and stressful situations within the workplace as a result of that challenging behaviour and their position requires that they are capable of maintaining composure and acting professionally when they face those stresses in the workplace.
16. The CAC submits that reasonable members of the public would conclude that the reputation and good standing of the teaching profession is lowered when a teacher hits a child as a form of punishment.

#### *Respondent submissions*

17. The respondent, through her counsel, accepts the legal principles pertaining to serious misconduct as set out in the CAC’s submissions. She submits that:
  - (a) This was a brief and isolated incident.

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<sup>4</sup> *The Code of Professional Responsibility, Examples in Practice* (Education Council, Wellington, June 2017).

(b) Child A settled after the incident and remained at the kindergarten. There is no evidence his wellbeing was affected long term, and that there is any likelihood of further harm.

18. Notwithstanding the above, the respondent acknowledges that analogous conduct has been found to be serious misconduct.

### **Kupu Whakatau – Decision**

19. The Tribunal finds the charge is established to the requisite standard.

20. The Tribunal considers that the charge amount to serious misconduct pursuant to section 10 of the Act, and rules 9(1)(a) and (k) of the Rules. The Tribunal considers that the respondent's conduct:

(a) adversely affected, or was likely to adversely affect, the well-being or learning of the children involved (section 10(a)(i) definition);

(b) reflects adversely on her fitness to be a teacher (section 10(a)(ii) definition);

(c) may bring the teaching profession into disrepute (section 10(a)(iii) definition and Rule 9(1)(k));

(d) constituted unreasonable and unjustified physical force (Rule 9(1)(a).

21. This Tribunal has commented many times that the use of force for corrective purposes, even where they may be no aggression or anger involved, will typically amount to serious misconduct, while acknowledging that each case must be determined on its facts and having regard to the nature of the force used and the surrounding circumstances.<sup>5</sup>

22. The Tribunal acknowledges that the conduct is a one-off incident. Nonetheless, it was an extremely serious and concerning incident. For force to be applied to a child to the extent the sound is heard by another teacher in the room suggests to the Tribunal the extent of the force that was used. It was also enough force to make Child A cry and to refer to "sasa", the Samoan word for "hit", which demonstrates the impact on Child A.

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<sup>5</sup> CAC v Haycock NZTDT 2016/2, 22 July 2016.

23. Regardless of the force used in any case, as the various legal principles referred to by the CAC make clear, any force used by a teacher for the purposes of correction or punishment is unacceptable. There is no doubt that early childhood education is a challenging space, and the learners will demonstrate some difficult behaviours at times. Nonetheless, it behoves teachers in this space to ensure they have the resilience and tools to deal with such behaviours in a way that supports the mana and wellbeing of the children involved.
24. It is never acceptable to hit a child, and teachers must find a way to deal with stressors, and/or challenging behaviours, which does not in any way involve force. The respondent is required to find strategies in situations like those which occurred in this case, and never resort to lashing out as a solution.
25. As the CAC has submitted, the analogous cases support the Tribunal's finding in this case.
26. In *CAC v Martin*,<sup>6</sup> the respondent, while working as a relief teacher, hit a 2-year-old child on the head with an open palm and called him a little shit after he headbutted her. The Tribunal accepted that the force used was at the lower end of the spectrum and that it was a spontaneous reaction to the head butt. Nevertheless, the Tribunal held that the conduct met the elements of serious misconduct.
27. Similar findings were made in *CAC v Watson*,<sup>7</sup> which involved a teacher slapping a 4-year-old's face and *CAC v Carmen*,<sup>8</sup> where a teacher picked up a 2-year-old child by the back of her sweatshirt and let her go.

### **Whiu - Penalty**

28. Having determined that this case is one in which we consider serious misconduct to be established, the Tribunal 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*

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<sup>6</sup> *CAC v Martin* NZTDT 2019/110, 10 December 2020.

<sup>7</sup> *CAC v Watson* NZTDT 2019/75, 12 May 2020.

<sup>8</sup> *CAC v Carmen* NZTDT 2018/21, 9 October 2018.

*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 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 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.*

29. We note that, in determining penalty, the Tribunal must ensure that the three overlapping principles are met, that is, the protection of the public through the provision of a safe learning environment for students and the maintenance of both the professional standards



and the public's confidence in the profession.<sup>9</sup> We refer to the decisions of the superior Courts which have emphasised the fact that the purpose of professional disciplinary proceedings for various occupations is actually not to punish the practitioner for misbehaviour, although it may have that effect.<sup>10</sup>

30. In *McMillan* we looked at the principles the Tribunal must turn its mind to when considering penalty following a finding entitling it to exercise its powers<sup>11</sup>:
- (a) Protecting the public;
  - (b) Setting the standards for the profession;
  - (c) Punishment;
  - (d) Rehabilitation;
  - (e) Consistency;
  - (f) The range of sentencing options;
  - (g) Least restrictive;
  - (h) Fair, reasonable and proportionate.
31. The Tribunal does not intend to repeat what we said in that decision, other than to note that we have turned our mind to these principles in reaching our decision on penalty.
32. In its submissions on penalty, the CAC refers to the penalties imposed by the analogous cases discussed above, and submits that the appropriate penalty in this case is a combination of censure, annotation and conditions (including a requirement that the respondent attend a professional development course and notify future employers of the Tribunal's decision for 3 years).
33. The respondent has provided a positive reference from her current employer, who is aware of the current charge. She submits that suspension is not warranted and would be

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<sup>9</sup> *CAC v McMillan*, NZTDT 2016/52.

<sup>10</sup> *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [97]; *In re A Medical Practitioner* [1959] NZLR 784 at p 800 (CA).

<sup>11</sup> Above n 16 at [40] – [62]

a disproportionate response given the respondent has acknowledged her conduct and will take steps towards rehabilitation so that she can continue to contribute to the profession.

34. The respondent further submits that in her 10 years of working as an early childhood teacher, she has never behaved in this way or been the subject of disciplinary investigation. She says she is passionate about teaching in early childhood, and feels privileged to help guide the next generation. She points to how much she is enjoying her current employment.
35. The respondent acknowledges she has a skill gap that could be addressed through professional development, particularly in terms of ways to deal with difficult behaviours. She agrees with the CAC proposal that a condition be required that she attend a professional development course, and has identified an online one she has already enrolled in.<sup>12</sup>
36. The respondent submits that the proposed condition requiring her to notify employers and the annotation on the register for 3 years are excessive (pointing to analogous cases with shorter time periods)<sup>13</sup>, and submits that 2 years was more in line with previous cases.
37. The Tribunal has taken into account both sets of submissions carefully and considered the cases referred to by both parties.
38. The Tribunal acknowledges the respondent's level of insight and willingness to engage in further education and development, and encourages her to continue to take such proactive steps.<sup>14</sup> The respondent may also wish to consider seeking a mentor.
39. Bearing in mind the above, as well as the obligation upon us to impose the least restrictive penalty in the circumstances, pursuant to section 404(1) of the Act, we therefore order as follows:
  - (a) Censure under section 500(1)(b) of the Act.

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<sup>12</sup> *"Understanding Childhood Trauma"* by Child Matters.

<sup>13</sup> *CAC v Teacher* NZTDT 2020/14 (one year) and *CAC v Hutchinson* NZTDT 2020/42 (two years).

<sup>14</sup> Work which may be of particular interest is that run by Dr Tafili Utumapu-McBride, Salā Dr Fa'asaulala Tagoilelagi-Leota and Dr Jacoba Matapo from the University of Auckland involving a Samoan pedagogical framework for Samoan children under two.

- (b) Annotation of the register for two years under section 500(1)(e) of the Act.
- (c) Conditions to be imposed on the respondent's practising certificate under section 500(1)(c) of the Act:
  - (i) The respondent to notify employers of the Tribunal's decision for a period of 2 years from the date of this decision.
  - (ii) The respondent to complete a course, approved by the Council, in managing child behaviours, and to provide evidence to the Council of completion of such a course.

### **Utu Whakaea – Costs**

- 40. The CAC submits that a 40% contribution to the CAC's overall costs is appropriate. This reflects a discount from the starting point of 50% to acknowledge the respondent's cooperation.
- 41. The Tribunal sees no reason to depart from the usual principles and therefore orders 40% costs in favour of the CAC. The CAC has provided a Costs Schedule setting out total costs of \$7,621.94, 40% of which is \$3,048.78.
- 42. The respondent is also ordered to pay 40% of the Tribunal's costs pursuant to section 500(1)(i).

### **He Rāhui tuku panui – Non-publication**

- 43. There is an interim order for non-publication. There is no application before the Tribunal for permanent suppression of the respondent's name and identifying details, although the CAC seeks permanent suppression of Child A's name (which the respondent does not object to and has indicated she will abide the Tribunal's decision).
- 44. The Tribunal's powers to prohibit publication is found in section 405(6) of the Act. It can only make one of the non-publication orders in (a) to (c) of section 405(6) if it is of the opinion that it is "proper" to do so having regard to the interests of any person, including but not limited to, the privacy of the complainant and to the public interest.

45. Under this provision, then, the Tribunal orders permanent suppression of Child A's name and identifying details.

*R. E. Schmidt-McCleave*

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Rachael Schmidt-McCleave  
Deputy Chair

NOTICE - Right of Appeal under Section 504 of the Education and Training Act 2020

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