

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

SHARON MARTIN

Respondent

DECISION OF TRIBUNAL

Dated 10 December 2020

| | |
|-----------|---|
| Tribunal: | Sam Wimsett (Deputy Chair) Nikki Parsons Neta Sadlier |
| Hearing: | 24 November 2020 |
| Decision: | 10 December 2020 |
| Counsel: | C Paterson and A-R Davies for the Committee Respondent: Self-represented |

1. INTRODUCTION AND SUMMARY OF DECISION

- 1.1. On 28 March 2019, Sharon Martin, a registered teacher, was working as a relief teacher at Rototuna EEC. An incident occurred. Specifically, Ms Martin hit a two-year-old child (Child A) on the head with an open palm. She also called Child A a “little shit.” The incident was witnessed by the centre cook and was immediately reported to the team leader and centre manager.
- 1.2. When questioned on the same day, Ms Martin stated as follows:
 - a) That she had asked Child A on several occasions not to aggravate another child (Child B). Ms Martin was particularly minded in this regard because Child B had been known to bite.
 - b) Ms Martin said that she had held Child A’s hands down at his side and spoken to him.
 - c) Child A then headbutted Ms Martin on the nose/forehead.
 - d) Ms Martin responded by striking Child A on the forehead with an open palm.
- 1.3. In an email, later sent to the Education Council, Ms Martin added that after lightly striking Child A on the forehead, she said “you little shit.”
- 1.4. As a result of the incident, Ms Martin was charged with serious misconduct and/or conduct otherwise entitling the Disciplinary Tribunal to exercise its powers.
- 1.5. While the Tribunal accepts that the force used was at the lower end of the spectrum and that it was a spontaneous reaction to the child headbutting Ms Martin, it finds that it amounts to serious misconduct.
- 1.6. The following penalties are imposed:
 - a) Censure.
 - b) Annotation of the Register.
 - c) There is to be a condition on Ms Martin’s practising certificate that requires her to inform any employer of this decision. This condition is to remain in force for a period of 12 months from the date of the decision.
 - d) It is a condition of Ms Martin’s practising certificate that if she begins new employment in the education sector, she is to complete the Incredible Years Teacher programme (IYT), or other behaviour management program/course approved by the manager of professional responsibility at the Teaching Council.

1.7. Pursuant to s 405(6)(c) of the Education Act 1989, the child's name and any identifying particulars are suppressed and may not be published. No other suppression orders are made.

1.8. Ms Martin is ordered to pay 35% of the Committee's costs. There is no order in relation to the Tribunal's costs.

2. HEARING

2.1. The matter was heard on the papers. Notice of this procedure was given to Ms Martin and Counsel for the Committee. Neither party objected to the Tribunal following this course.

3. EVIDENCE

3.1. Prior to the hearing, the Tribunal received an affidavit of Daniel Rakic, an investigator for the Teaching Council of Aotearoa New Zealand. The affidavit exhibited 18 documents, which included:

- a) A mandatory report filed by a representative of the Waikato Kindergarten Association/Early Education Waikato and the centre manager of the Rototuna EEC.¹
- b) Email dated 12 April 2019 from Ms Martin to the Teaching Council.²
- c) A statement of [REDACTED] (the centre cook) dated 28 March 2019.³
- d) Email dated 8 May 2019 from Ms Martin to Mr Rakic.⁴
- e) Character references from the centre manager at the Rototuna EEC and the centre manager at Te Rapa EEC.⁵

3.2. The facts of the incident are not in dispute. Ms Martin accepts that she hit Child A and called him a "little shit". The hearing proceeded on the basis that the incident occurred as described by Ms Martin. The Tribunal accepts that the hit was with an open hand to the head and that it immediately followed a headbutt by Child A. At the time of the headbutt, Ms Martin was holding Child A's hands by his sides.

3.3. Relevant background includes that Ms Martin has been a registered teacher since September 2008. This is her first disciplinary matter. The Tribunal accepts, based on the character references, and lack of previous disciplinary matters that she is of good character and has been a good early childhood teacher.

¹ DR2 at page 17 of the bundle of documents.

² DR4 at page 27 of the bundle of documents.

³ DR9 at page 35 of the bundle of documents.

⁴ DR10 at page 36 of the bundle of documents.

⁵ DR11 and 12 at pages 38 and 39 of the bundle of documents.

- 3.4. At the time of the incident, Ms Martin was working as a relief teacher with Early Education Waikato and Waikato Kindergarten Association. She had previously relieved at Best Start for seven years.
- 3.5. On 15 April 2019, Ms Martin contacted the Teaching Council and provided a more detailed account of events:

...I had an incident with a child two weeks ago where that child, whom I was trying to keep away from another toddler who bites and whom he seemed intent on annoying to provoke a confrontation and, having moved him away twice, I was on my knees in front of him to convey the seriousness of what I was about to say when he lifted himself up on his toes and smashed his head into my face.

Now, I have been bitten, scratched, spat on, kicked, had hard things thrown at my head and been punched in the face and called a F***** C*** and managed to contain my reaction, but on this occasion the shock was so absolute I struck his forehead, lightly, with my palm and said "You little sh*t!"

I knew immediately that was a mistake. I apologised to the staff member who witnessed it, passed the child to staff outside and went to inform the team leader what had happened. I also told the 2IC. I expected a reprimand, possibly disciplinary action. I certainly did not expect to lose my job much less have my career ended. The manager sent me home, even after I explained the context. (Incidentally, that same manager had sent me a glowing reference via email just the day before to support my application for a permanent position)...

..."Struck a child" does sound heinous and I do not deny it, but even in my shock I did not intend to hurt the child, indeed they hardly blinked...

- 3.6. Ms Martin refers in that account to the fact that she lost her job because of this incident. The documents before the Tribunal confirm that this is true.

4. SUBMISSIONS

- 4.1. The Tribunal received written submissions from Counsel for the Complaints Assessment Committee.
- 4.2. The Tribunal also received a submission from Ms Martin in the form of an email dated 10 January 2020. The email was a mix of submission and evidence.

5. CHARGE AND LEGAL FRAMEWORK

- 5.1. The wording of the charge is as follows:

1. The CAC charges that **SHARON ANNE MARTIN**, registered teacher, of HAMILTON, while relieving at the **ROTOTUNA EEW CENTRE** on 28 March 2019:

- a. Hit a two-year old child on the head with her palm; and
- b. Called the child a “little shit”.

2. The conduct alleged in paragraph 1 amounts to serious misconduct pursuant to section 378 of the Education Act 1989 and Rule 9(1)(a) and/or (b) and/or (d) and/or (k) 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.

5.2. Section 378(1) 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 well-being or learning of 1 or more students; or
- (ii) reflects adversely on the teacher’s fitness to be a teacher; or
- (iii) may bring the teaching profession into disrepute; and

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

5.3. The test for serious misconduct is conjunctive.⁶ As well as having one or more of the three adverse professional effects or consequences described in section 378(1)(a), the conduct must also be of a character and severity that meets the Teaching Council’s criteria for reporting serious misconduct, contained in rule 9 of the Education Council Rules 2016.

5.4. Rule 9(1) states that a teacher’s employer must immediately report to the Council if the employer has reason to believe that the teacher has committed a serious breach of the Code of Professional Responsibility which was introduced in June 2017. Rule 9(1) also states that serious breaches of the Code include, but are not limited to, examples of conduct set out in rule 9(1)(a) to (k). Rules 9(1)(a), (b), (d) and (k) are relevant in this case and state as follows:

⁶ Teacher Y v Education Council of Aotearoa New Zealand [2018] NZDC 3141, 27 February 2018, at [64]

9 Criteria for reporting serious misconduct

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

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

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

...

(d) failing to protect a child or young person due to negligence or misconduct, not including accidental harm:

...

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

6. DECISION ON LIABILITY

6.1. The Tribunal finds that Ms Martin's conduct meets each definition of serious misconduct at s378(1)(a). It was clearly likely to adversely affect the well-being of Child A, it reflects adversely on her fitness to be a teacher, and it risked bringing the teaching profession into disrepute.

6.2. Further, Ms Martin's conduct is of a character and severity that meets the criteria for reporting serious misconduct contained in r 9 of the Rules. Specifically:

a) r 9(1)(a): unjustified or unreasonable physical force on a child. Unreasonable physical force in this case relates to the hit with a palm on the child's forehead.

b) r 9(1)(d): failing to protect a child due to negligence or misconduct. The respondent's misconduct is proven in this case and it amounts to a failure to protect.

c) r 9(1)(k): an act or omission that brings, or is likely to bring, the teaching profession into disrepute. The Tribunal has no difficulty accepting that physical violence against a young child is likely to bring the profession into disrepute.

- 6.3. There is a degree of overlap between the criteria, particularly once it was found that there was unjustified/unreasonable physical force that adversely affected the well-being of Child A. The short point is that the Tribunal is satisfied that there was serious misconduct and points out that it could have been reached via several different routes.
- 6.4. The Committee submitted that r 9(1)(b), which relates to emotional abuse, was applicable on the basis that physical abuse is a way of causing emotional abuse. The Tribunal does not accept that emotional abuse is a factor here. The concept of emotional abuse involves elements of premeditation which are not present. It is also a separate act, or course of conduct, distinct from physical abuse. Applying the rule in this case could lead to a suggestion of 'double counting'.

7. **PREVIOUS DECISIONS RELEVANT TO PENALTY**

CAC v Duval-Smith⁷

- 7.1. The teacher worked at a kindergarten. On one occasion, during circle time, a child who demonstrated challenging behaviour was repeatedly lunging into the centre of the circle despite the teacher asking him not to. The teacher moved the child back and put his hand on the child's hand. The child then spat on the teacher. The teacher took the child to wash the spit off his hand. The child refused to. The teacher hit the child firmly on the head with an "open handed hit", causing the child to cry. The teacher apologised to the child, and reported the incident to his colleague, employer, and the child's mother. He self-reported and resigned from the kindergarten shortly after.
- 7.2. The Tribunal found that this conduct constituted serious misconduct. In terms of penalty, the Tribunal analysed the seriousness of the conduct in light of what were considered the aggravating features of force used to a child's head, and the age of the child. This was balanced against the teacher's conduct after the incident in apologising, self-reporting to his colleagues and the child's parents, and to the Education Council.
- 7.3. The Tribunal were persuaded that the teacher's conduct and attitude meant that cancellation was not necessary. The teacher was censured, with conditions to inform future employers of the decision. Before starting any new role, he was required to have mentoring in place, and to report to the Education Council.

⁷ *CAC v Duval-Smith* NZTDT 2017-31 (18 April 2018).

CAC v Griffiths⁸

- 7.4. The teacher, a part-time early childhood teacher, was trying to get a child to sit down. In doing so, the teacher pushed the child forcefully down onto the floor to a seated position. When the child stood up, she pulled him forcefully by the arm to the office where she, again, pushed him to the floor into a seated position. The teacher stated that she moved the child towards the office because the child was violent towards her.
- 7.5. The Tribunal considered that the teacher's use of force was inappropriate and warranted an adverse finding. The use of force was not necessary in order to prevent harm to anyone, including the child. The Tribunal considered that there were also alternative ways of managing the child's behaviour in the circumstances.
- 7.6. The Tribunal imposed cancellation as a penalty, on the basis that the teacher continued to maintain that she had done nothing wrong and had been a victim of violence herself. The teacher had also indicated that she wished to be removed from the register, so a penalty with a rehabilitative focus would serve little purpose.

CAC v Carmen⁹

- 7.7. The teacher picked up a two-year-old child by the back of her sweatshirt by one hand and let her go, at height, causing the child to drop to the floor.
- 7.8. The Tribunal considered that the teacher's actions were not a case of carelessness. Rather, the Tribunal found that the teacher was feeling frustrated with the child for not getting out of bed. The Tribunal concluded that the teacher's conduct amounted to serious misconduct, though it considered that the conduct was not at the most serious end of the scale.
- 7.9. The Tribunal censured the teacher, ordered annotation of the register for one year, and imposed conditions on the teacher's practising certificate requiring her to inform employers of the Tribunal's decision and to undergo mentoring.

Committee's submission on previous cases

- 7.10. The Committee submitted that the conduct in the present case is comparable to that in each of the cases. Each involved inappropriate use of force towards young children in the early childhood context. This is accepted.
- 7.11. Like the above cases, it was acknowledged that the conduct here falls at the lower end of the spectrum in terms of seriousness, having regard to the nature of the force used, and the lack of physical harm to the child.

⁸ *CAC v Griffiths* NZTDT 2017-22, 5 February 2018.

⁹ *CAC v Carmen* NZTDT 2018/21, 5 February 2019.

7.12. The Committee submitted that the current matter is similar to *Griffiths*, in that, Ms Martin lacks proper insight into her actions. This argument is addressed fully later in the decision. At this point it is simply noted that this is not entirely accepted by the Tribunal.

8. PENALTY

8.1. In imposing the penalties below, the Tribunal takes into account the previously decided cases referred to above. It also acknowledges that the violence was at the lower end of the spectrum so far as cases involving violence against children is concerned. It is accepted that the hit was a spontaneous reaction to child A headbutting Ms Martin. The fact that she called child A a “little shit”, tells the Tribunal that she temporarily “lost it” during this short incident.

8.2. The Tribunal considers that the following factors aggravate the incident:

- a) Child A was very young and therefore vulnerable.
- b) At the time of the incident, Ms Martin was holding child A by his wrists. This in itself was not a particularly serious error, but it was an inadvisable way of reasoning with child A. Looking at it from the child’s perspective, their movement was restricted which is never best practice.

8.3. Counsel for the Committee submitted that Ms Martin’s attitude to the conduct and towards these proceedings aggravates the matter. It was argued that her responses to the investigator demonstrated an unacceptable attitude towards her conduct. The Tribunal is not convinced that this is the case. Ms Martin instantly admitted wrongdoing and the matter was reported without delay. Her responses to the investigator need to be read in the context of immediately losing her employment because of this incident. The Tribunal reads her comments as not being an attempt to excuse her behaviour but rather taking issue with the way the matter was dealt with – including the fact that she lost her job. Ms Martin refers to the fact that since the incident, she has had to work a nightshift, “doing menial labour”¹⁰ to earn a living. She takes issue with this outcome rather than seeking to excuse her act of violence. In all the circumstances, the Tribunal is prepared to give Ms Martin the benefit of the doubt and concludes that the Committee’s submissions on this issue are a little harsh.

8.4. In terms of mitigating factors, the Tribunal accepts the following:

- a) Ms Martin admitted her conduct immediately. She says that she has learned from this incident and acknowledges that holding the wrists of child A may have caused him to act violently.
- b) Ms Martin apologised to the staff member who witnessed the incident.

¹⁰ DR14 at p. 44 of the bundle of documents

- c) Ms Martin has no disciplinary history and character references provided suggest that she has been a good teacher prior to this incident.

8.5. Considering all of the factors referred to, the Tribunal imposes the following penalties:

- a) Censure.
- b) Annotation of the Register.
- c) There is to be a condition on Ms Martin's practising certificate that requires her to inform any employer of this decision. This condition is to remain in force for a period of 12 months from the date of the decision.
- d) It is a further condition of Ms Martin's practising certificate that if she begins new employment in the education sector, she is to complete the Incredible Years Teacher programmes (IYT) or other behaviour management program/course approved by the manager of professional responsibility at the Teaching Council.

9. **NAME SUPPRESSION**

- 9.1. Pursuant to section 405(6)(c) of the Act, the child's name and any identifying particulars are suppressed and may not be published. No other suppression orders are made.

10. **COSTS**

- 10.1. The Committee seeks a contribution to its costs pursuant to section 404(1)(h) of the Act.
- 10.2. A contribution of 50% is standard where a matter has been defended and a charge of serious misconduct proven. A contribution of 40% is common where a matter has been determined "on the papers." This is because of the savings in time and cost to those involved in the proceedings. The Tribunal is prepared to reduce the costs contribution further, considering Ms Martin's financial and personal circumstances.
- 10.3. The Tribunal orders Ms Martin to pay a contribution of 35% of the Committee's costs. I confirm that the Tribunal has reviewed the Committee's costs. They are reasonable.

10.4. Ordinarily, the Tribunal would also order a contribution towards its own costs. A contribution of 35% would have been imposed were it not for the fact that there has been significant delay in this matter reaching its conclusion. None of the delays have been caused by Ms Martin. The Tribunal accepts that they will have added to the stress and anxiety suffered because of this proceeding. No order is made in relation the Tribunal's costs.

Dated at Auckland this 10th day of December 2020



S N B Wimsett
Deputy 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).