



**EDUCATION COUNCIL**  
NEW ZEALAND | Mātātū Aotearoa

## **Complaints Assessment Committee (CAC) v Deslie Takanini McClutchie-Mita** NZ Disciplinary Tribunal Decision 2017/3

Registered teacher Deslie McClutchie-Mita appeared before the New Zealand Teachers Disciplinary Tribunal (Tribunal) to respond to allegations of serious misconduct at the centre where she was teaching.

Ms McClutchie-Mita was referred by the Education Council's Complaints Assessment Committee (CAC) to the Tribunal after staff at the centre reported instances of Ms McClutchie-Mita physically and verbally abusing children. These allegations were contested by Ms McClutchie-Mita, and the Tribunal heard evidence from witnesses for both the CAC and Ms McClutchie-Mita.

Following the witness testimony, the Tribunal deliberated and considered the evidence was limited and not sufficient to satisfy them that specific instances of allegations were proved, given inconsistencies within it and a lack of corroborating witnesses. The Tribunal stated, "the CAC and Ms McClutchie-Mita presented starkly different versions of events, which meant that the case turned on our conclusions regarding the credibility and reliability of the witnesses from whom we heard."

While an allegation that the teacher had made an admission that she had smacked a child was found to more likely to have occurred than not, because it lacked specificity (ie there is no evidence of who she smacked, what was meant by "smacked", when it was alleged to have happened, or the circumstances), it was insufficient to constitute physical abuse on its own.

Following the hearing, Ms McClutchie-Mita asked for costs to be awarded against the CAC. The Tribunal set out the legal principles in relation to costs in the context of a professional disciplinary matter and declined the application. The Tribunal noted the threshold for referral of the case for serious misconduct was met in this case, and that given the serious nature of the allegations it was reasonable for the CAC to proceed against the teacher: "Indeed, given the threshold in s 401(4), it would have been in breach of its duty had it not referred the matter to the Tribunal."

**BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL**

**UNDER** the Education Act 1989

**IN THE MATTER** of 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** **DESLIE TAKANINI MCCLUTCHIE-MITA**

Respondent

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**DECISION OF TRIBUNAL**

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Tribunal: Nicholas Chisnall (Deputy Chair), David Spraggs and Nikki Parsons

Hearing: 7-8 June 2017

Decision: 3 August 2017

Counsel: K Lawson-Bradshaw for the Referrer  
W Lawson and S Mills for the Respondent

## **Introduction**

[1] The referrer, the Complaints Assessment Committee (the CAC) charged the respondent, Ms McClutchie-Mita, with serious misconduct and/or conduct otherwise entitling the Tribunal to exercise its powers. The respondent denied the allegations contained in the notice. As such, we heard this matter on 7 and 8 June 2017 and reserved our decision at the end of the hearing.

[2] The CAC alleged that the respondent, while teaching at an early childhood centre, Te Ara Ki to Reo Kuirau (the Centre), engaged in:

- (a) Physical abuse of a child; and/or
- (b) Acts or omissions that bring, or are likely to bring, discredit to the teaching profession.

[3] The CAC filed an amended notice of charge when the hearing commenced that alleged specific instances of physical abuse by the respondent. The particularised allegations, in the order they appear in the notice, are that the respondent:

- (a) In 2012, after a child (Child A) wet her pants, “reacted by pulling Child A by the arm, then pulling Child A’s pants down and smacking her on the bottom” (Particular 1).
- (b) On one occasion in a staff meeting, referred to a child at the Centre as a “naughty little fucker” (Particular 2).
- (c) On or about 2 August 2012, during a library visit, picked up Child A and took her behind a bookcase, where she smacked her (Particular 3).
- (d) In or about September or October 2014, at the Centre, slapped Child B’s foot off the table with an open palm. Shortly afterwards, she did the same thing to the foot of Child C (Particular 4).
- (e) On 1 December 2015, admitted to Eric Hollis that she had struck a child while working at the Centre (Particular 5).

[4] The CAC’s application to amend its notice of charge responded to Ms McClutchie-Mita’s request for particularisation of the charge to ensure she knew, and could therefore answer, the case against her. As will be apparent, the charge as originally framed did not make it clear that it encompassed separate allegations of physical abuse involving three different children (and two separate allegations in respect to Child A). The way in which the CAC elected to present the particularised allegations in its amended notice was unorthodox. Instead of particularising the charge itself, the CAC included a “summary of facts” in the notice in which it outlined the circumstances of each specific allegation. We were sympathetic to Mr Lawson’s concern that the Tribunal, as fact-finder, was “referred to a denied summary of facts which has not been established”. However, context is everything and Mr Lawson realistically conceded that use of the label “summary of facts” in a fixture before a specialist panel carried minimal risk to the respondent’s right to a fair hearing, and the amended notice achieved its purpose by identifying the specific allegations Ms McClutchie-Mita was required to answer. On that basis, the respondent did not oppose the CAC’s application to amend the notice.

### **An overview of the hearing**

[5] The parties filed and served briefs of evidence in accordance with timetabling orders made by the Chair during a pre-hearing conference. The CAC filed briefs for three witnesses, and the respondent, five. We heard oral evidence from all the CAC’s witnesses, and from the respondent and two of her witnesses. The evidence of the remaining two witnesses for the respondent were admitted by consent. We also took the step of requiring the Centre’s manager, Beverley Waru, to attend and give evidence on the second day.<sup>1</sup>

### **The burden and standard of proof and the test for serious misconduct**

[6] The CAC and respondent presented starkly different versions of events, which meant that the case turned on our conclusions regarding the

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<sup>1</sup> Under s 406 of the Education Act 1989. It became apparent during the hearing that Ms Waru may be able to comment on certain aspects of other witnesses’ evidence. We were advised by counsel that Ms Waru had professed reluctance to be involved in the hearing, which is why we took the step of summoning her to attend.

credibility and reliability of the witnesses from whom we heard. With that in mind, we reminded ourselves that the burden rests on the CAC to prove the charge. While the standard to which it must be proved is the balance of probabilities, the consequences for the respondent that will result from a finding of serious professional misconduct must be borne in mind.<sup>2</sup>

[7] Mr Lawson drew our attention to the recent High Court decision in *Cole v Professional Conduct Committee of the Nursing Council of New Zealand*.<sup>3</sup> There, David Gendall J observed that while the burden rests on the prosecution throughout, in disciplinary cases there is an expectation that the practitioner “must be prepared to answer the charge once a prima facie case has been made out”.<sup>4</sup> Mr Lawson’s point was that the respondent had met this expectation by giving and calling evidence.

[8] Section 378 of the Education Act 1989 defines “serious misconduct” as behaviour by a teacher that has one or more of the following outcomes, in that it:

- (a) Adversely affects, or is likely to adversely affect, the well-being or learning of one or more children; or
- (b) Reflects adversely on the teacher’s fitness to be a teacher; or
- (c) May bring the teaching profession into disrepute.

[9] The test under s 378 is conjunctive. As such, as well as having one or more of the adverse professional effects or consequences described above, the conduct concerned must also be of a character and severity that meets the Education Council’s criteria for reporting serious misconduct, which, for the purposes of this proceeding, are those found in the New Zealand Teachers Council (Making Rules and Complaints) Rules 2004 (the Rules). Those relied upon by the CAC in its notice are:

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<sup>2</sup> *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1 (SC).

<sup>3</sup> *Cole v Professional Conduct Committee of the Nursing Council of New Zealand* [2017] NZHC 1178, 31 May 2017.

<sup>4</sup> At [36], referring to *Auckland District Law Society v Leary* HC Auck, M1471/84, 12 November 1985.

- (a) Rule 9(1)(a), which describes “the physical abuse of a child or young person (which includes physical abuse carried out under the direction, or with the connivance, of the teacher)”; and
- (b) Rule 9(1)(o), which refers to “any act or omission that brings, or is likely to bring, discredit to the profession”.

[10] Ms Lawson-Bradshaw helpfully explained in her closing submissions that the CAC’s position was that each of the allegations described at [3](a) to (c) meets the definition of “physical abuse” in r 9(1)(a), and therefore constitutes serious misconduct in its own right. Ms Lawson-Bradshaw did not strongly advance her case on the basis that the allegation in [3](e) (the purported admission made to Mr Hollis) was standalone misconduct or serious misconduct. Rather, the CAC submitted that (assuming we found the admission had been made) it lent weight to the likelihood that the other allegations of physical abuse were true.

[11] We have approached our assessment of the charge on the basis that each particular must be established on the balance of probabilities – thus whether it happened is more probable than not. If one or more particulars is or are proved to the requisite standard, we must then consider whether it individually, or they together, amount to serious misconduct.

## **The CAC’s evidence**

### ***Particular 5***

#### *Eric Hollis*

[12] It is convenient to commence with Mr Hollis’ evidence, and the final particular, as the CAC’s investigation had its genesis in two disclosures made to him – by a former member of the Centre’s staff and, allegedly, by the respondent herself.

[13] Mr Hollis owns and operates an early childhood centre and has approximately 35 years’ experience in the education sector, albeit his involvement in the early childhood area is more recent – 2010.<sup>5</sup> He routinely provides special project work to the Ministry of Education, and

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<sup>5</sup> Mr Hollis gave his evidence via AVL, rather than in person. This was agreed to by the parties.

was engaged on 7 November 2015 to provide services he described as “Strengthening Early Learning Opportunities” (SELO) support to the Centre’s trustees and staff. Mr Hollis said SELO has a child protection focus, but it encompasses “a huge range of work”.<sup>6</sup>

[14] Mr Hollis had a lengthy involvement with the Centre, as his contract ran from 7 November 2015 through until 30 June 2016. The context of Mr Hollis’ retention by the Ministry was an allegation that a teacher at the Centre had smacked children. We emphasise that it was not the respondent who was the alleged perpetrator. Mr Hollis’ brief was to put processes in place to ensure there was no repetition.<sup>7</sup> Mr Hollis’ purpose for being at the Centre was made clear to those associated with the Centre when he arrived.<sup>8</sup>

[15] Mr Hollis worked closely with the Centre’s trustees and its manager, Ms Waru. He supported the Centre while it and the Police undertook investigations into the allegation. He also assisted the Centre to revise its policies and processes in various areas. Mr Hollis met with a number of the Centre’s teachers and whānau of the children, to discuss their concerns. On 24 November 2015, he met with Ariana Walker, who previously taught at the Centre. Mr Hollis said that during his meeting with Ms Walker, she “disclosed to me allegations of child abuse by Deslie McClutchie-Mita against some of the children at the centre in the past”. Mr Hollis described these as “historic incidents”.<sup>9</sup>

[16] It was not in dispute that Mr Hollis and the respondent met on 1 December 2015. Mr Hollis explained that this was the first occasion he spoke to the respondent, and that she initiated the meeting. Mr Hollis said that, because of his meeting with Ms Walker:<sup>10</sup>

I had in the back of my mind that there were other allegations hovering. I was cautious not to raise these specifically with [the respondent] because I had encouraged Ariana Walker to make a formal complaint to the Board of Trustees, which is the appropriate process. I had alerted the Ministry of Education there was another matter about to come to the fore.

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<sup>6</sup> NOE 16.

<sup>7</sup> NOE 16.

<sup>8</sup> NOE 24.

<sup>9</sup> NOE 19.

<sup>10</sup> NOE 20.

[17] Mr Hollis said he and the respondent had a “wide ranging discussion around behaviour management of children and it was a very extensive meeting, probably two hours in duration. We really couldn’t see eye to eye, I have to say, about what was appropriate, what was an appropriate approach to managing children’s behaviour within the service”.<sup>11</sup>

[18] The nub of Mr Hollis’ evidence was that he asked the respondent whether she had ever seen a kaiako (teacher) smack a child. According to Mr Hollis, the respondent said she had never seen this occur. However, Mr Hollis’ follow-up question was whether the respondent had herself ever smacked a child - she allegedly said “yes”. Mr Hollis asked if this occurred within the Centre’s boundary and the respondent answered in the affirmative. According to Mr Hollis, he asked the respondent why she was disclosing this, but she did not answer the question. The meeting came to an end shortly after this.<sup>12</sup>

[19] Mr Hollis formed the opinion that the respondent’s “views on practices of disciplining children at home might be at odds with what constitutes appropriate practice in a professional environment”.

[20] Mr Hollis accepted that the respondent had been appointed as the Centre’s administrator as part of a process to correct systemic issues. He also accepted the general proposition that those who initiate change within an organisation can become the target for criticism by those resistant to change. He accepted that, at a point subsequent to his meeting with the respondent, he was made aware that there was a pre-existing “issue” between the respondent and Ms Walker.<sup>13</sup> Mr Hollis said during cross-examination that Ms Walker had sought him out, and that he did not explore with her whether she had an “agenda” in respect to the respondent. Mr Hollis emphasised that he did not see his role to investigate or judge the merits of Ms Walker’s complaint, but rather to leave that to the Centre’s trustees.<sup>14</sup> He explained that, after Ms Walker’s disclosure on 24

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<sup>11</sup> NOE 20. Mr Hollis characterised the respondent’s approach to behaviour management as “controlling”, where children must learn rules, rather than what he described as a “guidance approach”, which involves generating a “desire to comply” in children (NOE 21).

<sup>12</sup> NOE 22.

<sup>13</sup> NOE 26.

<sup>14</sup> NOE 33.



November, he immediately brought the allegation to the attention of both the Ministry and the trustees so that an investigation could be initiated. He accepted that, with the benefit of hindsight, it might have been preferable had he also put the respondent on notice of what Ms Walker had alleged, but it did not occur to him to do that on 1 December, as it was not the reason why he and Ms McClutchie-Mita were meeting.<sup>15</sup>

[21] It was put to Mr Hollis by Mr Lawson that the respondent had not made the purported admission at all. Mr Lawson's proposition was that, given the wide-ranging nature of the conversation between Mr Hollis and the respondent, during which use was made of hypotheticals, the witness might have been mistaken. Mr Hollis rejected this. He said:<sup>16</sup>

Well, I'm afraid I can't accept that because the question was very specific, have you ever smacked a child? And the answer was clear. I clarified it by asking, was that within the boundary of the service? And the answer was yes.

[22] Mr Hollis was asked whether the respondent conversed predominantly in Maori during the meeting. Mr Hollis said that the majority of the conversation took place in English, other than the occasional word.<sup>17</sup> In re-examination, Mr Hollis said that the conversation during which the alleged admission was made by the respondent was entirely in English.

### ***Particular 1***

#### *Te Aira Kingi*

[23] Ms Kingi was employed at the Centre until 27 July 2012, and worked with the respondent. She was the team leader until her resignation.

[24] Ms Kingi alleged that she saw the respondent smack Child A on the bottom. In her oral evidence, she identified the day, date and time this happened with precision – 10:45am on Monday June 25, 2012. Ms Lawson-Bradshaw asked her to explain why she could be so precise and Ms Kingi said that she had “refreshed” her memory after she made her initial statement to the CAC. She knew that on the day in question Ms Waru was away from the Centre on a course. Ms Kingi clarified, following

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<sup>15</sup> NOE 33-34.

<sup>16</sup> NOE 36.

<sup>17</sup> NOE 38-39.

a question from one of our members, that she had gone and met with Ms Waru the night before the hearing and asked her what date she had been away from the Centre.<sup>18</sup> She said that she could be specific about the time it happened, as she remembered that the children were playing outside at the time, and it was after morning tea.<sup>19</sup>

[25] Ms Kingi said that she observed the respondent walk Child A from the outside play area, inside, and into the toilet. Ms Kingi walked into the toilet area and stood in the doorway. Ms Kingi said that she and the respondent were about half a metre apart.<sup>20</sup> She stated that she saw the respondent on her knees, at which point the assault occurred.<sup>21</sup> She said that she could see both the respondent's and Student A's faces, and the latter was in tears after being smacked.<sup>22</sup> Ms Kingi said she could see the respondent but Ms McClutchie-Mita could not see her.

[26] Ms Kingi said that she reacted by stating in Te Reo, "What are you doing? That's not ok". Ms McClutchie-Mita responded, "It's alright, I'll speak to the mother myself and the centre manager". Ms Kingi said that she found the way the respondent said this to be intimidating.<sup>23</sup> Later, she said that she wanted to "interfere", but did not feel she could do so because the respondent was the Centre's licensee.<sup>24</sup> Rather, she said she took the respondent's word that she was going to speak to Child A's mother and the Centre's manager, Ms Waru.<sup>25</sup> However, Ms Kingi said she confided in Ms Walker.

[27] Mr Lawson cross-examined Ms Kingi about the differences between her oral testimony and her statement made to the CAC on 22 March 2017. In her statement, Ms Kingi said that the alleged assault had happened in "summer 2012", and it occurred "in a corridor [at the Centre] near the bathrooms".<sup>26</sup> Moreover, Ms Kingi said, "I cannot remember the exact date or time that it happened". We interpolate that the first time Ms Kingi

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<sup>18</sup> NOE 64.

<sup>19</sup> NOE 58.

<sup>20</sup> NOE 56.

<sup>21</sup> NOE 53.

<sup>22</sup> NOE 55.

<sup>23</sup> NOE 53.

<sup>24</sup> NOE 56.

<sup>25</sup> Mr Lawson cross-examined on the lack of complaint by Ms Kingi at NOE 72.

<sup>26</sup> BOE 11.

nominated 25 June, at 10:45am, as the date and time the alleged assault took place, was when she was spoken to by the CAC the night before the hearing. This information was very properly immediately disclosed by Ms Lawson-Bradshaw to the respondent.<sup>27</sup> When Ms Kingi was asked to explain the difference between the way she described the assault in March and what she had said in evidence, she said, "Walking down the hallway, standing at the doorway, is the same thing, in my eyes".<sup>28</sup>

[28] In cross-examination, Mr Lawson explored with Ms Kingi the nature of her relationship with Ms Walker. She said they are cousins and friends. Ms Kingi said that she had resigned because of the way she was treated by the respondent during a staff meeting, and contended that she felt bullied. She said that her immediate act at the time she resigned was to recommend that Ms Walker be her replacement as team leader, but this did not happen – the proposition, which we did not take Ms Kingi to dispute – was that the respondent had stood in the way of this happening.<sup>29</sup>

#### ***Particulars 2, 3 and 4***

##### *Ariana Walker*

[29] Ms Walker taught at the Centre between 2008 and late 2014. She said that, when she first started at the Centre, the respondent was licensee. However, she later took over the administrative duties, and would relieve staff from time to time.

[30] Ms Walker was asked to discuss in some detail the Centre's policies around the management and discipline of children, and the fact this was the topic of discussion on a regular basis.<sup>30</sup> It suffices to say that Ms Walker confirmed that the Centre had a policy prohibiting the use of physical force to discipline children.<sup>31</sup>

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<sup>27</sup> It was placed into a supplementary brief of evidence dated 6 June 2017. Ms Kingi's explanation for why she had not provided the information regarding date and time in her March statement was that she did not like talking to people on the telephone: NOE 71.

<sup>28</sup> NOE 74.

<sup>29</sup> NOE 68-69.

<sup>30</sup> NOE80.

<sup>31</sup> NOE 83.

[31] Turning to Particular 3, Ms Walker explained that the three and four-year-old children were taken to visit the public library every Thursday. Twelve children were taken to the library on each occasion, and three adults were required to supervise. On Thursday 2 August 2012, Ms Walker said that she, the respondent and the respondent's son, who also taught at the Centre, were the supervisors.<sup>32</sup> According to Ms Walker, the respondent did not normally participate in library visits, but had a personal reason to do so on 2 August. She disagreed with the proposition put to her by Mr Lawson that another teacher, Helena Butler, also attended the library that day.<sup>33</sup>

[32] Children from other schools were also visiting the library on 2 August. The children from the Centre seated themselves at the back of the library and the respondent's son, Tenia McClutchie-Mita, read them a story.<sup>34</sup> Once the children were settled, the librarian joined them and read a story. According to Ms Walker, the respondent had Child A seated beside her, about an arm's-length from a set of bookshelves.

[33] Ms Walker said that she saw the respondent:<sup>35</sup>

[Pick] up [Child A's] arm and direct her through the crowd because there's a lot of people sitting around them, so she's guiding Student A around the bookshelf...And then all I heard was muffled voices and then aloud smack because at that time during the reading session, it's quite quiet and then all we heard was a [witness makes loud smacking noise] and then everybody sort of paused for a moment, looked in the direction of the bookshelf and then Whaea Ana, the librarian, she kept on, she carried on reading to draw everybody's attention back. And then she brought Student A back around, sat her down and the session just carried on from there.

[34] Ms Walker said that Student A was restless at the time, and that was why the respondent removed her.<sup>36</sup> She emphasised that she did not see what happened behind the bookcase, and could only comment on what she heard.<sup>37</sup>

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<sup>32</sup> NOE 84.

<sup>33</sup> NOE 114.

<sup>34</sup> NOE 86. Ms Walker produced a diagram showing the seating arrangements and layout of the library.

<sup>35</sup> NOE 88-89.

<sup>36</sup> NOE 114.

<sup>37</sup> NOE 116.

[35] Ms Walker said that the sound of the smack drew the attention of other library users. The fact that other adults not associated with the Centre were present in the library at the time of the alleged assault, but did nothing when the respondent supposedly smacked Child A, was emphasised during Ms Walker's cross-examination.<sup>38</sup>

[36] Ms Walker stated that when the group returned to the Centre, the respondent immediately went to Ms Waru and told her "I smacked [Child A]". Ms Walker moved away at this point, but later asked Ms Waru whether it was okay that the respondent had smacked Child A in public, and Ms Waru responded "no".<sup>39</sup> Ms Walker said she left it at that, as she did not think that Ms Waru wanted to discuss it further.

[37] Moving to Particular 4, Ms Walker said that in October 2014, just before she went on maternity leave, she was in the kai area getting the children ready for lunch and the respondent was assisting, as was Ms Waru and another staff member, who was feeding the children aged under two. Ms Walker said:<sup>40</sup>

One of the children [Student B] put their foot up on the table and he's busy talking to his mate, his buddy beside him. Lei approached him, told him to put his feet down on the floor, so he removed his feet, put them down and then she walked away and he put his foot back up on the table and then without warning she came along and whacked it off the table...She used an open palm and it was the length of her fingers, so it was a smack with her fingers.

[38] Ms Walker said that Student B recoiled when struck and "sort of shrivelled up". The respondent had asked Student B to put his feet on the floor. Ms Walker said the staff member feeding a baby turned towards the sound of the smack, but "quickly turned back".

[39] After that, the respondent did the same thing to Child C, as he had also put his foot up on the table. This time the respondent came over to Child C and, without warning, smacked his foot off the table. Child C recoiled and briefly cried.

[40] In cross-examination, Mr Lawson suggested it was implausible that Ms Waru and another teacher were supposedly present when the

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<sup>38</sup> NOE 114.

<sup>39</sup> NOE 90.

<sup>40</sup> NOE 91.

respondent had slapped the children's feet off the table, but had not intervened.<sup>41</sup> Ms Walker emphasised that she had raised issues in the past and they had not been acted on, and suggested that the other teacher may have been reluctant to be involved.<sup>42</sup>

[41] Ms Walker said that she confided in another member of staff, Helena Butler, a week later. According to Ms Walker, Ms Butler was not happy about discussing the issue.<sup>43</sup>

[42] The following Monday, Ms Walker said she was present at a staff meeting attended by the respondent, Ms Waru, Helena Butler and another teacher. Towards the end of the meeting, the respondent "opened up" about the previous week. Ms Walker said:<sup>44</sup>

Well, she had issues. She said I've got something to talk about. She singled me out straight away and brought up the smacking incident and that she wasn't happy about it, she's got a problem with me. She said a lot of things, a lot of hurtful things and Helena jumped in as well. She was more concerned that I went to Helena and told her about what I saw and I shouldn't have done it that way. If I had a complaint, go to the complaint, do it that way. It was really hard that day because being singled out and being made to feel so small, with no support from anybody. Nobody had anything to say, so I was kind of on my own being attacked by two people, so yeah. I also told her that I wasn't happy about what I had seen and Lei told me that she had already addressed it with the mother of [Student C]. She had already spoken to her. She didn't discuss what the discussion was about...

[43] Ms Walker explained that she had told Ms Butler that she had kept a record of the incidents she had witnessed involving the respondent - what she described as her "reflections". She said she had raised issues with Ms Waru on past occasions, but nothing was done about it.<sup>45</sup>

[44] In relation to Particular 2, Ms Walker said that the respondent, at a staff meeting in 2009, called a child a "naughty little fucker".

[45] Ms Walker was cross-examined about the fact that she said this had supposedly occurred in 2009. Ms Walker explained that she was not able to be more specific about the date, but knew it happened soon after she

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<sup>41</sup> NOE 116.

<sup>42</sup> NOE 117.

<sup>43</sup> NOE 94.

<sup>44</sup> NOE 95.

<sup>45</sup> NOE 97.

commenced employment with the Centre. Mr Lawson challenged her evidence on the basis that the respondent had not commenced at the Centre until after 31 March 2010, which is when she finished in her previous role.<sup>46</sup>

[46] During cross-examination, Ms Walker accepted the proposition that the respondent is “pretty straight up”, and if she sees something that is wrong, she speaks up.<sup>47</sup> Ms Walker also accepted that the respondent has very high standards and does not suffer fools. It was suggested to the witness that she was angry that the respondent was attempting to improve standards at the Centre. In response, Ms Walker explained that:<sup>48</sup>

It's not what she was doing for the centre. It was how she treated staff and children. She's somebody different to the parents and the whanau but when the parents are not around and behind, inside the centre, she's totally different, especially to kaiako and children. She's a bully. She yells, she name calls, she swears, if she is really frustrated, and I believe that, yes, she does become frustrated.

[47] Ms Walker was asked why she said that the respondent supposedly swore in English when there was an expectation that Te Reo be spoken at the Centre. She explained that the rule was implemented later and that she and two others were not fluent, which was why English was used. Ms Walker's evidence was that the respondent, who is a fluent Te Reo speaker, switched to English when she swore.<sup>49</sup>

[48] Ms Walker said she felt moved to raise the issue of what she had witnessed with Mr Hollis after attending a whānau meeting he was present at.<sup>50</sup>

[49] It was put to Ms Walker that she had fabricated or exaggerated her allegations to extract revenge on Ms McClutchie-Mita for the way she had been treated – and the hurtful things the respondent had said about her. Ms Walker acknowledged that things the respondent had said had

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<sup>46</sup> NOE 126. It was not in dispute at the hearing that this was the date that the respondent's past employment ended.

<sup>47</sup> NOE 124-125.

<sup>48</sup> NOE 125.

<sup>49</sup> NOE 127.

<sup>50</sup> NOE 98.

bothered her, but denied that she had made a false complaint out of spite.<sup>51</sup>

[50] Mr Lawson had the witness affirm that she and Ms Kingi are related, and they are very good friends. Mr Lawson asked Ms Walker if Ms Kingi was making arrangements, when she left, to hand on the team leader role to her.<sup>52</sup> Ms Walker accepted that the respondent, during the meeting, raised the point that the appointment procedure was not being followed.<sup>53</sup> Ms Walker was asked whether, “Effectively, you saw that as her trying to stop you becoming the team leader; correct?” Ms Walker responded:

No, I was not upset about her becoming involved in the process. What I was more upset about, was that whole incident that happened prior to that, what actually happened on that day, the yelling, the abuse, the bullying at another staff member. That was what I was upset about the whole morning. It was Lei's behaviour about how she delivered the programme planning, how it was going to be, but it was how she addressed other issues.

[51] As such, Ms Walker denied having a motive to lie.

### **The evidence given and called by the respondent**

#### *The respondent's evidence*

[52] The respondent commenced teaching at the Centre in 2010 and is fluent in Te Reo. She started as a volunteer after she ended her fulltime position at Te Whare Wananga at the end of March 2010 and then became a reliever.<sup>54</sup>

[53] The respondent described the Centre as being in a state of disarray when she started, as the previous administrator had misappropriated funds and salaries had not been paid. The respondent explained that she became involved in the Centre's financial management and liaised with the Ministry of Education in respect to that. After this, the respondent's role expanded to encompass the development and implementation of new policies.

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<sup>51</sup> NOE 118-119.

<sup>52</sup> NOE 122.

<sup>53</sup> NOE 122.

<sup>54</sup> NOE 143.



[54] The respondent said that Ms Kingi proposed that Ms Walker become the team leader when she resigned in July 2012. The respondent said that Ms Kingi did not accept that the role could not be handed over without, “the process of having meetings with and discuss with whānau, Trust members, staff, so that includes everybody”.<sup>55</sup> Ms McClutchie-Mita denied that she was a bully, and later explained that her management style is “passionate”.<sup>56</sup> However, she fairly conceded during cross-examination that some might perceive her “forthright, straight up way” as bullying.<sup>57</sup> She posited that staff might have developed that perception:<sup>58</sup>

Due to the changes that were in place and continued to come into place, as such, in regard to policies, procedures, outline is one I'd say, and not everybody is going to agree to changes. It's like sending someone into a company, a contractor, and downsizing, as such.

[55] The respondent said that she considered that Ms Walker and Ms Kingi had difficulties adjusting to the changes, and she also explained that she had raised concerns with Ms Walker about, for example, the fact she was smoking during her pregnancy.<sup>59</sup> According to the respondent, Ms Walker did not accept her criticisms. However, she also acknowledged that there did not appear to be any lasting effect or damage to her relationship with Ms Walker as a result of voicing her opinions.<sup>60</sup>

[56] Mr Lawson asked the respondent to comment on the specific allegations. Starting with Particular 1, she denied taking Child A into the bathroom and smacking her. She said, “I just don't know where the allegation came from, I just don't”.<sup>61</sup> When asked to identify a possible motive for the complaint, the respondent suggested that “the team leader incident” might have upset Ms Kingi. The respondent said that the first time she became aware of the allegation was in March or April 2016. Ms Lawson-Bradshaw explored with the respondent the fact that she and Ms

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<sup>55</sup> NOE 148.

<sup>56</sup> NOE 153.

<sup>57</sup> NOE 190.

<sup>58</sup> NOE 148.

<sup>59</sup> NOE 149.

<sup>60</sup> NOE 192.

<sup>61</sup> NOE 155.

Kingi had shared a good relationship until the day of the Kaiako in July 2012.<sup>62</sup>

[57] The respondent denied that she had ever called a child a “naughty little fucker”. She said there is no such word in Maori that approximates to that word, and she spoke Maori the majority of the time, even around those such as Ms Walker who were not fluent in Te Reo. She said that, Te Reo was exclusively the language that was used at Te Araki Te Reo”.<sup>63</sup>

[58] In terms of the library allegation, the respondent acknowledged that she had attended with Child A in August 2012. During cross-examination, she said that she had attended the library with Ms Walker, her son and Helena Butler.<sup>64</sup> The latter, she said, went as a whānau member. Ms McClutchie-Mita was adamant that Ms Butler was present on 2 August.<sup>65</sup>

[59] The respondent said, “No, I didn’t remove [Child A] and take her around the shelves to smack her, no I didn’t”.<sup>66</sup> Further, she denied that she returned to the Centre and “confessed” to Ms Waru.<sup>67</sup>

[60] Turning to Particular 3, the respondent acknowledged that she had removed Child B’s foot from the table. She said that she asked Child B to take his foot off the table and explained to him in Te Reo that what he was doing was “not good” and “do you do that at home?” The respondent said that Child B put his foot back on the table so “I grabbed his foot and lifted it off the table, placed it down on the floor”. The respondent denied slapping Child B’s foot off the table. She was asked if Child B’s behaviour frustrated her, which she denied. She also disputed that Child B had recoiled.

[61] The respondent denied having smacked Child C’s foot off the table, or that he cried.<sup>68</sup>

[62] The respondent said that Child B’s mother came to her office either that day or the following day and she told her about it.<sup>69</sup> She explained that

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<sup>62</sup> NOE 190.

<sup>63</sup> NOE 154.

<sup>64</sup> NOE 177.

<sup>65</sup> NOE 179-180. She accepted in cross-examination that it was possible that there were other occasions when Ms Butler was not present: NOE 214.

<sup>66</sup> See NOE 185.

<sup>67</sup> NOE 156 and 185.

<sup>68</sup> NOE 213.

she raised the issue when Child B's mother after she asked how her son had been that day. She denied Ms Lawson-Bradshaw's proposition that she had raised the issue as a form of pre-emptive strike before it was reported back to Child B's parents.<sup>70</sup>

[63] The respondent agreed that there was a discussion about the incident at a teacher meeting, and she raised the issue herself after she had spoken to Child B's mother.

[64] Mr Lawson asked the respondent to discuss her meeting with Mr Hollis. She explained that she had been the person who triggered Mr Hollis' appointment by informing the Ministry about an allegation that another teacher had smacked a child.<sup>71</sup> She went to see Mr Hollis on 1 December 2015 to talk to him about how he intended to provide support to the Centre's staff. She accepted that the meeting lasted about two hours. When asked to describe the conversation, the respondent said:

That discussion was based around the kaupapa or the philosophy of Te Araki Te Kuirau, tikanga Maori, policies, child behaviour management, piri paua was used...

[65] The respondent said that Mr Hollis' questions became interrogative, and she accepted that Mr Hollis asked her if she had smacked a child, but denied that she admitted doing so. She said:<sup>72</sup>

I did not, did not say that to Eric Hollis. That would be career suicide. Why would you even go there? Why would I do that?

[66] The respondent was asked why Mr Hollis might have thought she had made an admission and said that he might have misinterpreted what she was saying because she was speaking both Maori and English.<sup>73</sup> Ms Lawson-Bradshaw explored with her what her response was when asked by Mr Hollis whether she had smacked a child. The respondent said her answer was to the effect, "No, I have not smacked a child at Te Araki Te

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<sup>69</sup> NOE 158-159.

<sup>70</sup> NOE 214.

<sup>71</sup> NOE 161 and 209.

<sup>72</sup> NOE 163.

<sup>73</sup> NOE 164.

Reo Ki Kuirau". She agreed this was a clear answer, not capable of misinterpretation.<sup>74</sup>

[67] The respondent acknowledged that she and Mr Hollis did not see eye to eye, and this was because his practices were "mainstream", which clashed with the way the Centre operated.<sup>75</sup> In cross-examination, the respondent stated that her opinion was that Mr Hollis did not understand Maori teaching practices.<sup>76</sup> However, she also accepted that the discussion did not become heated, and it ended on good terms. Nonetheless, Ms McClutchie-Mita opined that Mr Hollis may have been part of an agenda against her:<sup>77</sup>

My view is that [Mr Hollis] had previous meetings with other staff members, Trust Board members, that perhaps discussion was held around obviously myself and allegations were formed to discredit myself, to discredit my integrity, my mana, my career and my whanau.

*The evidence from the parents of Child B and Child C*<sup>78</sup>

[68] The mother of Child B explained that she was aware of the allegation that the respondent had "smacked" her son's foot off the table in 2014. She said that she:<sup>79</sup>

[Discussed] the matter with Ms McClutchie-Mita at the time. Ms McClutchie-Mita called me into her office and told me that [Child B] had his feet on the table. She told me that she told him to take his feet off the table which he did. Shortly after he then put his feet back on the table. She told me she growled him and physically removed his feet from the table. She did not say she smacked his legs.

[69] The witness said that she considered that Ms McClutchie-Mita's response was "entirely appropriate".

[70] The father of Child C said that he too was aware of the allegation against the respondent in respect to his son. He stated that the respondent had always openly discussed Child C's behaviour and performance with him, and that they spoke about [Child C] placing his feet on the table, and

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<sup>74</sup> NOE 170-171.

<sup>75</sup> NOE 163.

<sup>76</sup> NOE 166.

<sup>77</sup> NOE 172-173.

<sup>78</sup> The CAC did not require either witness for cross-examination. We have not named either parent, so as to protect the identity of Child B and Child C.

<sup>79</sup> BOE 20.

Ms McClutchie-Mita told me that she removed his feet from the table by lifting the foot and placing it on the floor”.<sup>80</sup>

*Helena Butler*

[71] Ms Butler was employed at the Centre from about March 2013 until August 2014, when she moved to Australia. She had extensive involvement with the Centre before she became an employee, as she had children who attended.<sup>81</sup> She accepted that she and the respondent are friends and that Ms McClutchie-Mita is someone she looks up to.<sup>82</sup>

[72] Ms Butler explained that Ms Walker confided in her when they were sharing a room at a hotel in Palmerston North, and asked whether Ms Butler had witnessed the respondent hit Child B’s foot off the table. Ms Butler said that Ms Walker then “went on to explain a whole bunch of other events that she told me that night”. According to the witness, Ms Walker told her that she had been documenting incidents she had observed during her time at the Centre and she had a “little black book up her sleeve” in which she had been documenting incidents.<sup>83</sup>

[73] Ms Butler said that she raised what she had been told by Ms Walker with Ms Waru and the respondent the following week. She said that the respondent brought up the issue in the next staff meeting, and asked her to speak. Ms Butler did so, as she “felt it was best so that it’s all out on the table so we can speak about it like adults in front of each other”.<sup>84</sup> According to Ms Butler, Ms Walker was told that if she wanted to make a complaint, she should do it directly rather than “hiding it in her little book, maybe start putting it in incident reports”.<sup>85</sup>

[74] Ms Butler said that she regularly went on visits to the library in 2012. She said that she could not confirm that she went on every trip to the library in August 2012, but, “I can definitely say that I’ve been on more than 10 trips throughout that year alone to the library alongside the kohunga”, and she recalled going on a trip where the respondent, her son and Ms

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<sup>80</sup> BOE 19.

<sup>81</sup> NOE 197.

<sup>82</sup> NOE 206.

<sup>83</sup> NOE 200,

<sup>84</sup> NOE 201.

<sup>85</sup> NOE 202.

Walker also attended. She said this constitution of supervisors was not common, as staff took turns. In cross-examination, Ms Butler said she attended the library with the same set of supervisors at least twice, possibly three times.<sup>86</sup> The witness also fairly conceded that it was possible that Ms Walker, the respondent and Tenia McClutchie-Mita might have attended the library on other occasions without her.

[75] In terms of the specific allegation, Ms Butler said, “I don’t recall ever seeing Lei take Child A around the corner and smacking her. I can absolutely confirm that I never witnessed – I was never a witness to that. I do not remember hearing of anything like that, of that incident occurring”.<sup>87</sup>

*Tenia McClutchie-Mita*

[76] Mr McClutchie-Mita is the respondent’s son, and is studying towards his teaching qualification. He was working at the Centre in 2012.

[77] The witness said that he attended the library on 2 August 2012, and said that the other supervising adults were Ms Walker, his mother and Ms Butler, whom he was “very sure” was present.<sup>88</sup> However, he accepted that it was possible that there might have been an occasion when the supervisors were him, the respondent and Ms Walker, without Ms Butler.

[78] Mr McClutchie-Mita said that he stood behind the children at the library while he supervised them.<sup>89</sup> He said his mother was close, as they usually stayed in a “bunch together” to make room for other school groups. He said that Child A was amongst the other children. As such, he disputed Ms Walker’s evidence that he was sitting on the sofa at the time the alleged assault occurred.<sup>90</sup>

[79] The witness said that Child A was not taken away from the group by the respondent. He said, “No, I was at the end and my job was to

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<sup>86</sup> NOE 205.

<sup>87</sup> NOE 203.

<sup>88</sup> NOE 227.

<sup>89</sup> NOE 227.

<sup>90</sup> NOE 237.

supervise and that did not happen". He said that there was no possibility that his mother might have removed Child A without him seeing that.<sup>91</sup>

[80] Ms Lawson-Bradshaw cross-examined the witness about his obvious loyalty to his mother. When asked whether the allegations against the respondent upset him, Mr McClutchie-Mita said, "It's upsetting to hear someone say something that wasn't true when I was present". He accepted that he wished to protect the respondent, but disputed the proposition that he was lying to protect his mother.<sup>92</sup>

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<sup>91</sup> NOE 229.

<sup>92</sup> NOE 234 and 236.

### ***The witness summonsed by the Tribunal***

[81] As we explained earlier, we summonsed Beverley Waru to give evidence, as we felt it important to hear from her since she was alleged to have either been in close proximity to, or had disclosed to her the fact of, the alleged assaults.

[82] The parties helpfully agreed upon the questions to be asked of Ms Waru. What follows is taken from the transcript:<sup>93</sup>

**CHAIR:** Ms Waru, at any time did you see Ms McClutchie-Mita smack or treat any child improperly?

A. No.

**CHAIR:** Did Miss McClutchie-Mita ever admit to you that she smacked [Child A] at the library?

A. No.

**CHAIR:** Did Miss McClutchie-Mita ever admit to you that she smacked any child at the centre?

A. No.

**CHAIR:** Did you ever witness Miss McClutchie-Mita slap a child's foot off the table at the centre?

A. No.

**CHAIR:** Did you turn a blind eye or ignore inappropriate behaviour from Miss McClutchie-Mita?

A. No.

**CHAIR:** And the final question is, we've heard evidence from Ms Kingi, who obviously was a previous member of staff. She said that she remembered that a particular incident occurred on a date which is the 25th of June 2012 and the reason that she nominated that date is because that was when she said you were away on a course studying, so away from the centre.

A. That's correct.

**CHAIR:** Is that right, you were away on that particular date?

A. Yes.

**CHAIR:** Okay. Perhaps just to close that question line off, have you spoken to Ms Kingi about this case? Did she contact you about that date?

A. No. Oh, she did sorry, she did. She came and asked me what date I was out on study. That was it.

**CHAIR:** When did you have that conversation with her?

A. That was when Kate had asked her to go and look for the dates.

**CHAIR:** Okay. Are you able to be a bit more precise about when that was? It doesn't have to be the specific date but perhaps just how long ago it was.

A. A couple of days ago, well yesterday.

**CHAIR:** Okay. And did she ring you or did she see you in person?

A. She rang me and then she came in because I had to go through all my study books to actually find that information out.

**CHAIR:** Okay. Now, you've provided a record?

A. Mm-Mmm.

**CHAIR:** I take it that what that is - I will just ask for that document to be put in front of you.

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<sup>93</sup> NOE 242 on.



(Document handed to witness). Can you perhaps explain for us what that is?

A. The dates they went to the library, how many children they took, which is 12, 3 adults, it hasn't got any names but Ariana has signed it off because she attended that date. They also took the cellphone. They also took first aid and a rope which the children hold onto. They left at 1.35 and returned at 3.08.

**CHAIR:** Okay. And, just to be clear, the date that you're talking about?

A. 2.8.12.

## **Our findings**

### ***The first particular***

[83] We do not consider that the CAC has discharged its burden by proving that it is more likely than not that Ms McClutchie-Mita smacked Child A on 25 June 2012. Simply put, we did not consider that the evidentiary threshold, based on Ms Kingi's testimony, is reached.

[84] We did not consider the potential motivations, explored in evidence, for Ms Kingi to fabricate the complaint years after her apparent falling out with the respondent to be particularly plausible. That being said, we do not approach our assessment on the basis that the respondent bore a responsibility to demonstrate that the witness had a motive to lie. To do so would be a speculative exercise.

[85] There were material discrepancies between what Ms Kingi told the CAC in her first statement dated 22 March 2017 and what she said in evidence; not least of which is the fact that she changed the location of the alleged assault from the hallway to the bathroom. Moreover, it represents a significant shift that Ms Kingi amended the date of the alleged assault from "summer 2012" to a specific date and time of day in June 2012; particularly when she said in her original statement that she could not remember the exact date or time the assault occurred.

[86] We consider that the delay between when the alleged assault occurred and when Ms Kingi made her complaint is a significant factor in terms of our assessment of the witness's reliability and credibility. Ms Kingi's explanation why she elected not to disclose to her employer at the time what she says she observed – because Ms McClutchie-Mita said she would do so herself – also appeared somewhat odd.

[87] Ms McClutchie-Mita directly confronted the allegations in her evidence. Ultimately, she left us in a position where we were unable to prefer Ms Kingi's evidence over hers, which is what was required to enable the CAC to satisfy us that the particular is proved on the balance of probabilities.

***The second particular***

[88] We do not find this particular proved. There was a clear conflict in the evidence and we were not left able to prefer Ms Walker's evidence on this point to the respondent's denial. We also hold a degree of disquiet regarding whether this is the type of allegation that ought to invite scrutiny from the Tribunal. While it may be ill-conceived for a practitioner to use language of the type alleged inside an early childhood centre – in light of the expectation that teachers model the behaviours expected of their charges - it was not alleged that the respondent was in close proximity to any children when she swore, thus risked affecting their wellbeing. Nor is it particularly obvious how the use of bad language in the context alleged reflects adversely on the respondent's fitness to teach, or brings the profession into disrepute. However, our factual finding does not require closer consideration of this issue.

***The third particular***

[89] We say at the outset that we found Ms Walker to be an impressive witness, who presented as both credible and reliable.<sup>94</sup> However, so too did Ms McClutchie-Mita, Ms Butler and Tenia McClutchie-Mita. Therein lies the rub in this case – there was not a principled basis for concluding that the CAC had discharged its burden because we could prefer its witness's evidence over that called by and on behalf of the respondent.

[90] In simple terms, the issue we faced is that there is no way to benchmark the credibility of Ms Walker's evidence against other evidence, as there is none. In contrast, the respondent's denial is consistent with the evidence of her two witnesses that nothing happened at the library on 2 August. While we acknowledge the submission made by Ms Lawson-

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<sup>94</sup> We have turned our minds to the inherent danger in relying on a witness's demeanour as a primary way to determine credibility and reliability.

Bradshaw regarding the risk of partiality on the part of Tenia McClutchie-Mita, we agree with Mr Lawson's point that it is inherently improbable that, if the respondent had smacked Child A, one of the other adults present, who was not associated with the Centre, would not have intervened.

[91] In the end, the dispositive factor for us is Ms Waru's evidence. Ms Walker said that the respondent disclosed the fact she had smacked Child A to Ms Waru immediately after returning to the Centre. Ms Waru denied such an admission was made.

[92] The consequences for the respondent that will result from us finding this serious allegation proved obliges careful scrutiny on our part. We simply are not carried beyond indecision to the point of acceptance that the particular is proved on the basis of Ms Walker's evidence alone. For this reason, we are not satisfied that it is more probable than not that the respondent smacked Child A in the library on 2 August 2012.

#### ***The fourth particular***

[93] The respondent did not deny an element of the CAC's charge – that she physically removed Children B and C's feet from the table. It is not the fact that the respondent chose to achieve that goal through physical means per se that led to her being charged with professional misconduct, although we emphasise the point we have made in numerous earlier decisions regarding the risk posed to practitioners who choose to use force for a disciplinary purpose.<sup>95</sup> However, the way in which the CAC framed its charge obliged us to be satisfied to the requisite standard that the respondent "slapped" each child's foot off the table with an open palm; not that there was the technical use of force.

[94] While we might have held a degree of scepticism regarding the respondent's explanation that she was so deliberate as to lift each child's foot and "place" it on the floor if that evidence had stood on its own, we placed weight on what the mother of Child B and the father of Child C told us. It must be recalled that their evidence was not challenged by the CAC. We have considered but rejected the proposition that Ms McClutchie-Mita's decision to tell Children B and C's parents what she had done was pre-

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<sup>95</sup> Bearing in mind s 139A of the Education Act 1989.

emptive in nature, out of fear there would be a complaint. Rather, we accept what the respondent told us, which complements the undisputed evidence of the parents: that this comprised routine dialogue about the behaviour of Children B and C. We have also considered whether it is plausible that the Centre's manager, Ms Waru, would have stood by and done nothing if the respondent had used the degree of force alleged – after all, Ms Walker said she was nearby at the time. Ms Waru told us she did not witness such an act by the respondent, and nor did she turn a blind eye to, or ignore, inappropriate behaviour by the respondent.

[95] In conclusion, we were not satisfied that it was more probable than not that the respondent committed the specific acts alleged in the fourth particular.

#### ***The fifth particular***

[96] We considered Mr Hollis to be an honest and reliable witness and do not accept the respondent's assertion that he was hostile towards her because of their differing pedagogical viewpoints, or because he was biased against her in some respect and therefore lied about what he had heard her say.

[97] Notwithstanding the airing of their differing philosophical viewpoints, both witnesses described an amicable meeting on 1 December 2015. While there was a conflict in the evidence regarding whether the respondent predominantly conversed in Maori, we do not need to resolve it, as it was not disputed by the respondent that Mr Hollis directly asked her whether she had ever smacked a child at the Centre, and she provided a direct answer in response. The sharp evidential clash relates to how the respondent answered – she said she answered in the negative and Mr Hollis said he received an affirmative response. Again, while there is a dispute whether the respondent answered the question in English, or in Maori first, then in English, we do not accept that the answer provided was capable of misinterpretation by Mr Hollis – either for linguistic reasons or because he mistook a hypothetical example of behaviour described by the respondent as an admission.

[98] There is merit in the respondent's point in evidence that an admission of the type alleged would be counterproductive from a career perspective.

Nonetheless, admissions against interest can and are made – and it is conceivable that, given the context that resulted in the Ministry’s intervention – that another teacher had smacked a child – the respondent was candid with Mr Hollis when discussing issues surrounding the Centre with him, and subsequently regretted being so open. On balance, we prefer Mr Hollis’ evidence on this point and are satisfied that the admission was made.

[99] The issue is what impact our finding ought to have from evidentiary and disciplinary perspectives. Given its lack of specificity, we do not consider that the admission to smacking a child is sufficient to reach the threshold required to constitute physical abuse, and, in any event, the CAC did not advance its case on the basis that this was misconduct or serious misconduct in its own right.<sup>96</sup> With that in mind, we assessed whether the admission added sufficient weight to the CAC’s case on Particulars 1 and 4 to leave us satisfied those acts happened. We find it does not, as it does not overcome the evidential reservations that we have described in our earlier findings.

[100] In conclusion, while we have found the fifth particular proved, we do not consider that entitles us to exercise our powers under the Education Act.

### **Non-publication**

#### ***Suppression of the names of Children A, B and C***

[101] Rule 32(2) of the New Zealand Teachers Council (Conduct) Rules 2004, which is applicable to this proceeding, provides that no person may, in any report or act of a hearing of the Disciplinary Tribunal, publish the name of, or any particulars likely to lead to the identification of, inter alia, a child or young person.<sup>97</sup>

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<sup>96</sup> The threshold for physical abuse was discussed recently in *CAC v Teacher NZTDT 2016/50*, 19 September 2016 and *CAC v Mackey NZTDT 2016/60*, 24 February 2016. In those cases, we emphasised that whether the use of force amounts to physical abuse requires a context-specific enquiry.

<sup>97</sup> Child or young person is defined as anyone who is under the age of 16 years, or is, or was at the relevant time, a student at a school or early childhood education and care centre.

[102] The three children referred to in this decision are entitled to the presumptive protection offered by r 32 and the parties agreed we should suppress their names and identifying particulars. We so order. We have anonymised this decision to ensure that the order has efficacy.

### **Costs**

[103] The final determination regarding costs is delegated to the Deputy Chair. We ask the parties to confer and to file memoranda addressing costs.



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Deputy Chair

### **NOTICE**

- 1 A person who is dissatisfied with all or any part of a decision of the Disciplinary Tribunal under sections 402(2) or 404 of the Education Act 1989 may appeal to a District Court.
- 2 An appeal must be made within 28 days of receipt of written notice of the decision, or within such further time as the District Court allows.
- 3 Section 356(3) to (6) apply to every appeal as if it were an appeal under section 356(1).