

BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

UNDER the Education Act 1989

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

BETWEEN **THE COMPLAINTS ASSESSMENT
COMMITTEE**

Referrer

AND **TRACEY LEE MITCHELL**

Respondent

DECISION OF THE TRIBUNAL

15 March 2021

Tribunal: Hannah Cheeseman (Deputy Chair)
Lyn Evans and Puti Gardiner (Members)

Hearing: 23 December 2020

Representation: R Scott for the referrer
K Dalziel for the respondent

Introduction

- [1] The Complaints Assessment Committee ("CAC") has charged the respondent with one charge of engaging in serious misconduct and/or conduct otherwise entitling the Disciplinary Tribunal to exercise its powers.
- [2] The CAC alleges that the respondent, on or about 9 July 2019, at [REDACTED] used unjustified or unreasonable physical force on a 4-year old when she grabbed and/or pulled the child causing him to leave the ground.
- [3] The CAC alleges that this conduct amounts to serious misconduct pursuant to section 378 of the Education Act 1989 ("the Act") and Rules 9(1)(a) and/or (k) of Teaching Council Rules 2016 ("the Rules"), or alternatively amounts to conduct which otherwise entitles the Disciplinary Tribunal to exercise its powers pursuant to section 404 of the Act.

Procedural History

- [4] The matter was heard on the papers.
- [5] Agreed summaries of facts were filed and the parties agreed that the matter could be heard on the papers.
- [6] The CAC filed submissions on penalty and costs.
- [7] The respondent filed submissions on penalty and costs and in support of her application for name suppression.
- [8] The CAC opposes the application for name suppression.

Evidence

Agreed Summaries of Fact (ASoF)

- [9] The ASoF for the charge are set out in full as they form the majority of the evidence available to the Tribunal:
- 1. Between August/September 2010 and December 2019, Tracey Mitchell worked as an early childhood teacher at [REDACTED] and then subsequently [REDACTED] and then [REDACTED].*
 - 2. On the morning of 9 July 2019, Ms Mitchell was engaged in "rough and tumble" play with five or six children. They had set out some soft blue mats in the outdoor play area. Under some of the mats were some tyres, creating a hump. The kids were climbing, sliding, jumping and rolling off the hump.*
 - 3. Ms Mitchell lay down on one of the mats with her head slightly raised on the hump. There were four children around her. One of the children, a four year old boy called [REDACTED], was kneeling on top of the hump by Ms Mitchell's head. [REDACTED] was of average height and weight for his age.*
 - 4. [REDACTED] begin hitting Ms Mitchell's head in an attempt to get her attention, as he wanted to join in the "roughhouse" play. Ms Mitchell shielded her face*

with her hands and said to him "██████████, you're hurting me". ██████████ hit her again. When Ms Mitchell tried to set up, she realised someone- possibly ██████████ - was kneeling on her hair. ██████████ hit her head again. Ms Mitchell again said "██████████, that's hurting". ██████████ then hit her in the eye, causing stinging pain to Ms Mitchell.

5. Ms Mitchell reacted by taking one of his wrists in each of her hands and pulling him over her body and onto the mat so as to stop him from hitting her and to release her hair. Ms Mitchell then set up, holding her hand over her eyes and forehead. Ms Mitchell told ██████████ that he had hurt her eyes, to which he responded by asking her if she wanted a cold cloth. Ms Mitchell replied, "yes please ██████████". ██████████ went inside to get Ms Mitchell a cloth. He was observed to be in a happy state, smiling and giggling.
6. As she made her way inside, Ms Mitchell briefly recounted what had happened to Tania Small, head teacher at the centre, as Tania had seen ██████████ give Ms Mitchell a wet hand towel.
7. Ms Mitchell caught up with ██████████ parents, ██████████ and ██████████, when they collected him and his older brother that afternoon. Ms Mitchell didn't think to mention what occurred that day to them. No other staff member reported any incident to ██████████ parents that day. ██████████ mother later confirmed that there were no bruises or any sign of injury on ██████████, and that, in response to a direct question, ██████████ reported he hadn't been hurt by a teacher or another child at ██████████.
8. Incident was observed by one of the other teachers, Kathrine Walker. That night Walker sent an email to Emma Ward, the centre manager, expressing her concerns about what she had seen and heard. On that basis, ██████████ commenced a disciplinary investigation. Ms Mitchell was suspended for a week during the conduct of the investigation, and then returned to work subject to a final written warning and an 8-week action plan which she completed to the satisfaction of her supervisor. Ms Mitchell reported that the action plan, and the associated monitoring by Jan Greaves, was of great benefit in helping her reflect on the practise of positive guidance with children.
9. As required under the Education Act 1989, ██████████ reported the matter to the Teaching Council on 23 July 2019, but noted it had never had any previous concerns about Ms Mitchell's physical or verbal interactions with the children.
10. The matter went before the Complaints Assessment Committee (CAC) on 21 May 2020. The CAC accepted that Ms Mitchell acted on instinct without any intention to harm ██████████. it was noted that, while ██████████ was not harmed, Ms Mitchell's actions nevertheless created a serious risk of harm to him and to the other children.
11. The CAC concluded that Ms Mitchell's conduct breached code 1.3 and 2.1 of the Code of Professional Responsibility, may possibly constitute serious

misconduct and, accordingly, that it was required to refer the matter to the Teachers Disciplinary Tribunal pursuant to s 401(4) of the Education Act 1989.

- [10] In addition to the ASoF set out above, the tribunal had the benefit of a written statement from Ms Mitchell and a statement in support from [REDACTED] mother, [REDACTED]
- [11] We note that [REDACTED] does not want action taken against Ms Mitchell and she seeks suppression of Ms Mitchell's name, her son's name and any identifying details, including the name of the centre.

The Law

- [12] Section 378 of the Education Act defines "serious misconduct" as behaviour by a teacher that has one or more of three outcomes. Under s 378(1)(a)(i) to (iii), it is conduct which:
- (a) Adversely affects, or is likely to adversely affect, the well-being or learning of one or more children; and/or
 - (b) Reflects adversely on the teacher's fitness to be a teacher; and/or
 - (c) May bring the teaching profession into disrepute.
- [13] The Court of Appeal recently affirmed that the test for serious misconduct in s 378 of the Education Act is conjunctive.¹ As well as having one or more of the three adverse professional effects or consequences described in s 378(1)(a)(i)-(iii), set out above, the conduct concerned must be of a character and severity that meets the Teaching Council's criteria for reporting serious misconduct. The Teaching Council Rules 2016 ("the Rules") describe the types of behaviour that are of a prima facie character and severity to constitute serious misconduct.²
- [14] Criteria for reporting serious misconduct are at rule 9 of the Rules. Rule 9 provides that a teacher's employer must report serious breaches of the Code of Professional Responsibility ("the Code"). In the present case, the CAC alleges that they respondent's conduct breaches rule 9(1)(a) and/or rule 9(1)(k).
- [15] Rule 9(1)(a) relates to the use of unjustified or unreasonable physical force on a child or young person, or encouraging another person to do so.
- [16] Rule 9(1)(k) relates to an act or omission that brings, or is likely to bring, the teaching profession into disrepute.
- [17] If the test for serious misconduct and section 378 of the act is not met, it remains open to the tribunal to find that the conduct alleged amounts to misconduct, provided there has been a breach of accepted professional standards. It is noted

¹ *Teacher Y v Education Council of Aotearoa New Zealand* [2018] NZCA 637.

² Which came into force on 1 July 2016 and had a name change from the Education Council Rules 2016 to the Teaching Council Rules 2016 in September 2018.

that not all departures from accepted professional standards will amount to misconduct.

- [18] In the event of a finding of either serious misconduct or misconduct, the tribunal may exercise its powers under section 404 of the act.
- [19] The CAC emphasises clause 2.1 of the Code which requires teachers to promote the wellbeing of learners and protect them from harm. By way of example, the Code provides that “inappropriate handling such as physically grabbing, shoving or pushing, or using physical force to manage a learner’s behaviour” does not promote the wellbeing of learners.

Discussion

- [20] We are not satisfied that the respondent's conduct amounts to serious misconduct. While we accept there was some physical force used, it was not of the level where the threshold for serious misconduct is met.
- [21] We consider the respondent’s conduct amounts to misconduct.
- [22] To find misconduct rather than serious misconduct is not to condone the conduct. The professional disciplinary regime under the act clearly provides for degrees of wrongdoing.
- [23] We are persuaded that the test for misconduct is met as a result of the risk of injury that arose from lifting the child off the ground, in the manner that the respondent did. We accept there was no actual injury, but risk of harm remained such that we are satisfied that the threshold for misconduct is met.
- [24] However, judged against her background as a teacher for a significant period, with no previous disciplinary concerns, we do not consider that this is a pattern of behaviour that reflects adversely on the respondent’s fitness to be a teacher.
- [25] We do not consider that the respondent’s conduct had the potential to bring the teaching profession into disrepute, although any incidents of violence against children gives pause of thought.
- [26] The High Court in *Collie v Nursing Council of New Zealand*³ confirmed that the test is an objective one. In making its determination, the Tribunal must ask itself whether reasonable members of the public fully informed of the facts of the case could reasonably conclude that the reputation and good standing of the profession has been lowered by the respondent's actions.
- [27] We conclude that while the use of physical force against children of this age carries significant risks of harm, we are not satisfied that reasonable members of the public, informed and with knowledge of all the factual circumstances – particularly the respondent’s actions in managing the incident in a manner that reinforced positive learning for the child - could reasonably conclude that the reputation and standing of the profession is lowered by the behaviour of the respondent.

³ *Collie v Nursing Council of New Zealand*, [2001] NZAR74 at [28].

Therefore, it does not meet the criterion in r 9(1)(k) or the definition of serious misconduct in paragraph (a)(iii) in s 378.

[28] For completeness we turn now to look at whether the respondent's conduct is of a character or severity that makes the Teaching Council's criteria for reporting serious misconduct, we note that we only need to find contravention of one of the specific rules covered in Rule 9(1) for this limb to be satisfied. The CAC has alleged that the respondent has breached Rules 9(1)(a) and/or (k).

[29] In the case of *CAC v Teacher*⁴ we looked at the issue of what constitutes a physical abuse under the previous version of Rule 9(1)(a). We considered the cases of *Rowlingson*⁵ and *Haycock*⁶ and how a full contextual enquiry is required when considering whether a teacher's conduct amounts to abuse (as was required then). In *Rowlingson*, when considering what amounted to an act of physical abuse, we noted that "*in our view, the answer to that lies in whether or not it was a violent use of force. Context is everything...*". We further noted, in *Haycock* that it was not necessary for there to be a degree of aggression or violence for an act to constitute physical abuse and concluded

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

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

[31] In the present case, the force involved holding the child's wrists and pulling him over the respondent's body. The force used was primarily designed to stop the child hitting the respondent. The respondent did not strike or push the child. We consider there is a difference between striking a child in anger or frustration and using some degree physical force to direct a child. We wish to be clear that the respondent's conduct is not acceptable practice against a child of this age. However, we consider this is a case where we need to consider the context in which the respondent acted, and in doing so, we conclude that her actions do not amount to a "serious" breach of under Rule 9(1)(a), such that a finding of serious misconduct is warranted.

⁴ *CAC v Teacher* NZTDT 2016/50

⁵ *CAC v Rowlingson*, NZTDT 2015/54, 9 May 2016

⁶ *CAC v Haycock* NZTDT 2016-2

[32] As discussed above, we consider that the use of physical force in this manner is conduct which the public is likely to consider inappropriate, but we do not consider that it is likely to bring the teaching profession, as a whole, into dispute, in contravention of Rule 9(1)(k).

PENALTY

[33] CAC accepts that the respondents conduct was not motivated by frustration or anger, or used to manage a child's behaviour, but rather was a reaction to the need to extract the respondent and the child from what had become an unsafe situation. The CAC further accept that there was no ongoing emotional or physical harm caused.

[34] The CAC accept that there were no aggravating factors and there were a number of mitigating features to the respondent's conduct, highlighting:

- (a) it was a fleeting and isolated incident.
- (b) the incident was not provoked by anger, frustration, or an attempt to manage behaviour.
- (c) The respondent has had no previous complaints against her.
- (d) There was no emotional or physical harm caused.
- (e) The respondent is supported by the child's mother.
- (f) The respondent has expressed remorse and insight.
- (g) The respondent has participated in a performance plan and has undertaken mentoring.
- (h) The respondent employer has advised that "the likelihood of this occurring again in the future is very small."

[35] The CAC accepts that given the respondent's successful completion of a performance plan and mentoring, the imposition of professional development conditions may be unnecessary.

[36] The CAC seeks censure under section 404(1)(b) of the Act.

[37] The respondent accepts that a finding of misconduct is appropriate in the present case. The respondent does not accept that further penalty is required given the steps that have been undertaken to date.

- [38] The respondent notes that her conduct was a momentary lapse in judgement, the incident was short lived and did not involve retaliation or anger or a disciplinary exercise. The respondent submits that the conduct did not involve risk of harm to any other child given the care that the respondent took and pulling the child over her and onto the mat, away from other children. In the respondent's submission, the fact that no child was injured or harmed as a testament to her care in that respect.
- [39] The respondent notes that the child's mother is supportive of the respondent and does not hold either the respondent or the teaching profession in disrepute.
- [40] The respondent cooperated with the investigation and accepted an 8-week action plan to address what happened. This action plan was completed satisfactorily and evidence of that was provided to the Tribunal.
- [41] Further material in support of the respondent's character speak highly of her work ethic and professionalism and this is supported by the child's mother.
- [42] The respondent submits that the finding of misconduct in itself is appropriate recognition of the seriousness of the incident. Given the supervision and disciplinary warning given to the respondent by her employer, no further penalty is required.
- [43] We agree with the submissions of the CAC in relation to the mitigating features of this incident. We also accept the submissions of the respondent, that a finding of misconduct is a penalty in and of itself, and that finding is sufficient penalty in the circumstances of this offending.
- [44] Taking into account the low level of the respondent's conduct, her acceptance of responsibility, the action plan completed by the respondent, and the lack of any previous disciplinary complaints, we consider that the finding of misconduct is sufficient penalty and decline to impose any further penalties.

COSTS

- [45] The CAC seeks an order for costs against the respondent towards the CAC's actual and reasonable costs incurred in undertaking its investigative and prosecutorial functions.

- [46] The CAC submits that the starting point, in accordance with the Tribunal's practise note of 17 June 2010, is an award of 50% of the cost of investigation, the hearing, and the Tribunal's costs.
- [47] Taking into account that the respondent has accepted responsibility and has agreed to proceed with the hearing on the papers with the benefit of an agreed summary of facts, the CAC submits that a reduction in the costs awarded is warranted. The CAC seeks a reduced award of 25% of actual costs.
- [48] The respondent submits that costs should lie where they fall in the present case.
- [49] The respondent submits that this was a matter which should always have been dealt with as misconduct rather than serious misconduct. Accordingly it was not necessary to refer this to the Disciplinary Tribunal.
- [50] The respondent refers the Tribunal to the decision in *CAC v Teacher S*⁷ in support of this submission. In that case, the CAC and the teacher involved agreed that the conduct amounted to misconduct, rather than serious misconduct. The reason the matter was referred to the disciplinary tribunal, rather than being dealt with by the CAC, was because the school involved did not agree to the outcome the CAC originally proposed.
- [51] That case is not entirely on point, given that in the present case, the CAC has alleged serious misconduct, and it is that allegation which resulted in the matter coming before the Tribunal. Further, in the present case, the CAC seeks costs, whereas no order was sought in *CAC v Teacher S*.
- [52] That said, despite charging the respondent with serious misconduct, the CAC's submissions appear to accept that misconduct is the appropriate finding.
- [53] We have no hesitation in accepting that misconduct rather than serious misconduct was the appropriate charge. We anticipate that the matter could well have resolved without need for referral to the Tribunal, had the CAC charged this matter appropriately.

⁷ *CAC v Teacher S* NZTDT 2018/5, 21 August 2018

[54] Accordingly, we accepted the submission from the respondent at that costs should lie where they fall. We decline to award costs, even on a reduced basis.

NON-PUBLICATION

[55] CAC opposes the application for non-suppression orders sought by the respondent and the child's mother.

[56] That said, the CAC supports the application for suppression of the name of the child, given his age, inherent vulnerability and the need to protect his privacy and wellbeing;

[57] The CAC submits that the starting point is the principle of open justice, however, accepts that section 405(6)(c) of the Act it gives the Tribunal a discretion to make a non-publication order if, having regard to the interest of any person (including the privacy of the complainant) and the public interest, it is of the opinion that it is proper to do so.

[58] The CAC submits that the Tribunal should not exercise its discretion in favour of the respondent. The CAC notes that in the absence of exceptional circumstances, the respondent's privacy interests are likely to be outweighed by the principle of open justice and the right to freedom of expression.

[59] The respondent seeks suppression of her name, the child's name, and the location of the centre.

[60] The respondent accepts the general submissions on suppression orders set out by the CAC.

[61] In support of the application for suppression, the respondent notes:

(a) protection of the public or consumers is not an explicit purpose of the Act, but in any event, there is no threat created by the respondent's conduct.

(b) The unchallenged evidence of [REDACTED] is that she is concerned that if the respondents name is published it will lead to identification of her and her whanau.

(c) The respondent shares the concern about the risk of identification of the child and his whanau.

- (d) There is a risk to the child and his whanau if their personal information is discussed and shared.

Suppression of Children's names

- [62] Rule 34(4) of the Rules requires the Tribunal to consider whether suppression of the details of any child is proper, under s405(6) of the Act.
- [63] Taking into account the age and inherent vulnerability of the child we consider that such an order is proper in this case.

Suppression of the respondent's name and that of the centre

- [64] The respondent applied for suppression of her name. As we said at the beginning of this decision, the CAC opposed the respondent's application.
- [65] The default position is for Tribunal hearings to be conducted in public and the names of teachers who are the subject of these proceedings to be published. That open justice principle is now contained in s 405(4) of the Education Act.
- [66] The Tribunal's powers around non-publication are located in s 405(6) of the Education Act. In brief, it can only make one or more of the orders for non-publication specified in s 405(6)(a) to (c) if it is of the opinion that it is proper to do so, having regard to the interest of any person (including, without limitation, the privacy of the complainant, if any) and to the public interest.
- [67] In *CAC v Teacher*⁸ we considered the threshold for non-publication and said that our expectation is that orders suppressing the names of teachers (other than interim orders) will only be made in exceptional circumstances. The test will be satisfied where an individual's interests "demand" such an order. We note, however, that in *CAC v Kippenberger* we said in reference to our earlier decision that:⁹

The term "exceptional" in that passage may overstate the position. But otherwise the approach described in NZTDT 2014/52P is the approach which the Tribunal adopts.

- [68] As we recently said in *CAC v Finch*,¹⁰ the "exceptional" threshold that must be met in the criminal jurisdiction for suppression of a defendant's name is set at a higher level to that applying in the disciplinary context.¹¹ What this means, as we said in *Kippenberger*, is that a teacher faces a high threshold to displace the presumption of open publication in order to obtain permanent name suppression, but it is wrong

⁸ *CAC v Teacher* NZTDT 2014/52P, 9 October 2014

⁹ *CAC v Kippenberger* NZTDT 2016/10S, 29 July 2016, at [11]

¹⁰ *CAC v Finch* NZTDT 2016/11 at [14] to [18]

¹¹ Section 200 of the Criminal Procedure Act 2011 ("Court may suppress identity of defendant"), unlike its predecessor, s 140 of the Criminal Justice Act 1985, codifies the threshold that must be met by a defendant for suppression - "extreme hardship". This term was meant to replicate the "exceptional" threshold that applied under s 140

to place a gloss on the term "proper" that imports the standard that must be met in the criminal context.

- [69] We are of the opinion that, having regard to the interests specified in s 405(6), it is not proper to suppress the respondent's name.
- [70] We consider that there is insufficient evidence to indicate a risk to the respondent which would outweigh the public interest in open justice.
- [71] In relation to the centre involved, we consider that there is a risk of identification of the child arising from the naming of the location of the centre. Accordingly, the location of the centre is suppressed.

ORDERS

[72] The Tribunal's formal orders under the Education Act are as follows:

- (a) There is order pursuant to s 405(6)(c) permanently suppressing:
- (i) The names of the child, the child's whanau, and any details that might identify them.
 - (ii) The location of the Centre involved.



Hannah Cheeseman
Deputy Chairperson

NOTICE - Right of Appeal under Section 409 of the Education Act 1989

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).