BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

NZTDT 2022-37

COMPLAINTS ASSESSMENT COMMITTEE
Prosecutor

V

CAROLINE STAIRMAND
Respondent

Date of hearing:	15 February 2023
Representatives:	L van der Lem and A Mitra for CAC
	Ms Stairmand in person
Tribunal:	T Mackenzie, L Arndt, M Johnson
Date of decision	28 March 2023

DECISION OF THE TRIBUNAL ON CHARGE

Introduction

[1] The Complaints Assessment Committee (CAC) has brought a charge of Serious Misconduct against Mrs Stairmand. Mrs Stairmand was a teacher in an Early Childhood Service (ECS). The charge alleges various excessive physical contact with two children. This is the Tribunal's decision on the charge.

Charge

[2] The charge reads:[1]

> 1. The CAC charges that Caroline Anne STAIRMAND, registered teacher, of Levin, on one occasion between 18 October 2020 and 1 November 2020:
>
> a. That after witnessing Child X (aged 3 years 6 months) with a pair of scissors in his mouth, removed the scissors and held him with his legs in front of her legs, incapacitating him.
>
> b. Carried Child X to mat time with his feet on her feet and head below her chin and physically restrained him during mat time by putting her arms around his torso.
>
> c. Carried Child X to kai time and then sat on a chair with arms wrapped around his stomach, pinning his arms.
>
> 2. Further, the CAC charges that Caroline Anne STAIRMAND, on 2 November 2020:
>
> a. Stood behind Child X while he was holding a paintbrush then directed him, by using her hands to hold his arms and her legs to move his body, to the craft area to return the paintbrush.
>
> b. Directed Child Y (aged 4 years 11 months) to kai time by holding his forearms and moving his body with her legs.
>
> 3. The conduct alleged in paragraph 1 and 2 separately or cumulatively amounts to serious misconduct pursuant to section 10 of the Education and Training Act 2020 and Rule 9(1)(a) 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 500 of the Education and Training Act 2020.

Facts

[3] The parties have provided agreed evidence via a Summary of Facts. This reads:

> **Background**
>
> 1. The respondent, **CAROLINE ANNE STAIRMAND,** is a registered teacher. She became fully registered on 9 November 1994. Her practising certificate is due to expire on 5 October 2022.

[1] As amended by consent.

2. Between mid-September 2020 and 11 December 2020, Mrs Stairmand worked as an ECE teacher at [redacted], [redacted] ("the Centre"). At the time of the relevant incidents detailed below, she worked as Team Leader at the Centre. On 12 November 2020, Mrs Stairmand was suspended with pay, as part of the Centre's internal investigation. She resigned on 11 December 2020.

The incidents

The incident involving the scissors

3. Child X was one of the learners who attended the Centre at the time that Mrs Stairmand starting working there in mid-September 2020. At that time, he was 3½ years' old. Child X is autistic, was non-verbal, and posed significant and frequent behaviour management challenges.

At the end of her morning tea break after 11:00am, (Mrs Stairmand cannot recall the exact date but the incident was between 18 October 2020 and 1 November 2020), Mrs Stairmand noticed Child X sitting down playing by the only exit door, a blind spot, inside the upstairs junior room of the Centre. Child X was holding scissors in his mouth. Mrs Stairmand responded by approaching him in order to remove the scissors. Child X stood up, took the scissors out of his mouth and dropped them on the floor. Mrs Stairmand attempted to encourage Child X to come with her. When he refused to hold her hand, Mrs Stairmand stepped behind Child X, placed her arms over the child's arms and placed his legs in front of her legs, so that Child X was prevented from moving - she held Child X in that position. She then walked Child X to the mat area, with Child X's feet on top of her feet, moving him along with her feet, while maintaining Child X's balance by holding onto his arms or hands further inside the Centre. Child X reacted by crying out (but not getting teary-eyed) and yelling.

The incident at mat time

4. Following on from the incident with the scissors referred to above, upon arriving at the mat area for mat time, Mrs Stairmand sat on a small chair and sat Child X on her lap. Then, she placed her arms around the child's torso to prevent him from moving away as there would be no other teacher to supervise him. Mrs Stairmand then moved the small chair to the lunch tables, a few steps away, while holding Child X. Then, she wrapped her arms around the child's torso to prevent him from leaving.

5. Child X continued to cry out and struggle as Mrs Stairmand moved him using her feet, with his feet placed on top of her feet, to mat time and then held him on her lap,

The incident at kai time

6. Less than a minute after the mat time incident, Mrs Stairmand moved the chair she was sitting on from the mat time area to the nearby dining tables for kai time, holding Child X on her lap as she did so. She maintained contact with Child X by wrapping her arms around the child's torso to hold Child X at the kai table. She called out to nearby staff words to the effect of "I'm restraining [Child X) for his safety".

7. Child X responded by crying out and twisting his body in an attempt to get away. Once the child had settled and was quiet, which took approximately 10 seconds, Mrs Stairmand released him and sat him down on another chair next to her and he began to eat his lunch.

The incident involving the paintbrush

8. On 2 November 2020, Mrs Stairmand was returning from non-contact just after 11.00am and *moved* to the outdoor area, she was rostered as an outdoor supervisor. She noticed Child X attempting to climb a fence in the sandpit while he was holding a paintbrush, Mrs Stairmand ran to Child X and placed her arms around his torso then placed him on the ground and redirected Child X to another activity in the outdoor area. Child X ran back to the sandpit and again attempted to climb the fence. While Mrs Stairmand was listening to a small group of children outside, she noticed Child X climbing up on a small windowsill frame in the sandpit, giving him more height to get to the top of the fence. In response, she quickly moved to Child X again, and held him by the torso to lower him from the fence. Then, she directed him to the door leading to the inside area. However, he did not want to go inside. She stood behind the child, held his arms gently and placed his feet on her feet in front of the doorway and walked him towards the craft area by moving her feet with his feet on top, so that she could encourage him to return the paintbrush he was holding to the Centre's craft table.

9. Child X made distressed sounds, grimaced and attempted to pull away from Mrs Stairmand. When she released him, 10-12 seconds later (nearly reaching the craft area}, Child X ran away from her. He still had the paintbrush in his hand.

The incident involving Child Y

10. Child Y was another of the learners who attended the Centre in November 2020. At that time, he was 4 years and 11 months old.

11. About an hour later on the same day as the incident involving Child X, Mrs Stairmand and Child Y were both in the outdoor area at the Centre. When the teachers at the Centre started getting the learners ready for lunchtime and mat time, Mrs Stairmand directed Child Y to go inside to the mat time area. He did not want to do so. Mrs Stairmand then stood behind Child Y, in front of the doorway, gently placed her hands on his arms and moved him inside by moving her feet with his feet on top of hers forwards into the mat time area just inside the doorway.

12. Child Y struggled and attempted to pull away from Mrs Stairmand in the doorway, but was unable to do so, the incident lasting about 5 seconds.

Teacher's response

13. At a meeting before the Complaints Assessment Committee ("the CAC"), Mrs Stairmand addressed each of the allegations. She explained that her practice of restraining and moving students (by standing behind them holding their arms and moving them forward with her feet) was a widely used practice called the 'crane technique' which she had been taught by a special education teacher. Mrs Stairmand advised that, in response to the CAC investigation, she had now advised several other teachers to stop employing the crane technique.

14. Mrs Stairmand said that neither she nor the other teachers had been shown how to manage Child X's particular needs by her employer at the Centre, and considered that her approach to moving him (and other children) about the Centre was appropriate, and safer than the techniques employed by her colleagues. She stressed that Child X posed some specific challenges; he would regularly climb on furniture and on several occasions had been found chewing or sucking on hammers and nails, and on one occasion had been found after drinking a full bottle of red food colouring at the Centre.

15. In relation to the incident with the paintbrush, Mrs Stairmand advised that the antecedent to her using the crane technique on that occasion was that Child X had attempted to climb a fence in the outdoor area of the Centre. When she was unable to redirect the child away from continuing to climb on the fence, it was necessary to bring him indoors, where other teachers could supervise him, as there is a three-storey drop on the other side of the fence.

16. Mrs Stairmand advised she did not intend to return to teaching within the early childhood education sector due to her ongoing health condition.

Further response

17. Following the meeting before the CAC, Mrs Stairmand clarified that the 'crane technique' was taught to her early on in her ECE career while she was working with children with special needs at Whitireia ECE. At that time, she was working alongside specialist teachers from the Ministry of Education.

[4] Following the agreed facts being reached the matter was then set down for a hearing on the papers, with a timetable set for Mrs Stairmand to file submissions and a personal statement. When filed however there was a lengthy statement which introduced new factual material. Several large attachments were also included. This led to some concern from the Tribunal as to what facts the Tribunal was being asked to proceed on. The hearing date was then vacated.[2]

[5] Previous counsel for Mrs Stairmand then ceased acting and she has been self-representing since that time.

[6] Mrs Stairmand then advised that she no longer wished to submit her statement. The Tribunal however directed that instead of wholesale removal, the CAC should advise which portions are not in dispute. The CAC has now done that, by helpfully providing an amended version of the respondent's statement which only includes that material which is not disputed. Below we have included this further evidence and it now becomes part of the agreed facts before us. We have set aside and not considered the balance of the original statement and attached material.

[2] See the Tribunal Minute of 23 December 2022 for a full recitation of this and other events that required determination.

[7] The further evidence is as follows:

Introduction

1. The purpose of this statement is to provide more detailed context around the five incidents which are alleged to have occurred in the Notice of Charge (NOC) and which are subject of the Agreed Summary of Facts (ASF).
2. This information is provided to give the Tribunal a greater sense of context around what is alleged to have occurred and to provide an evidential framework for assessing penalty, costs and issues related to name suppression.
3. This statement is not intended to undermine or contradict the ASF.

84. I have read many books, articles and videos focussing on autistic young children since these incidents occurred and I am fully aware my actions are not currently acceptable teaching practices.

87. I am deeply regretful for my actions and understand my liability for them. I was unable to locate the teaching method I was shown by the Crisis Intervention Unit for preventing young children from harming themselves and others dating back to the late 1990's. Unfortunately, I discovered there are no archives that go back that far.

88. I am aware of the current ECE regulations. I will continue to ensure ECE teachers I may bump into in the future are aware of inappropriate practices and share my newfound knowledge of appropriate teaching practices and processes to follow in reporting concerning incidents.

89. I truly believe knowledge is power and sharing knowledge empowers others.

My health issues

90. I was diagnosed with skin cancer in January 2022. I have had the tumour removed. I have diabetes and in mid-2022 started on pen insulin injections which have side effects including dizziness, vertigo, and constant nausea.

91. I realised that I cannot return to ECE teaching because of my health. Depression and suicidal thoughts have been my biggest trauma.

92. But the hardest thing to deal with is that I cannot hold my head up high when I reflect on my life as an ECE teacher and how it has ended in the way it has, causing me to suffer deep pain and to feel embarrassed about my actions.

General legal principles that apply to the charge

[8] Section 10(1)(a) of the Education and Training Act 2020 (the Act) defines serious misconduct as follows:

> **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

[9] Regarding the first limb of this test (adverse effect). In *CAC v Marsom* this Tribunal said that the risk or possibility is one that must not be fanciful and cannot be discounted.[3] The consideration of adverse effects requires an assessment taking into account the entire context of the situation found proven.

[10] Direct evidence from the child as to effects is not mandatory and indeed is rare, particularly in an ECS setting. Nor does the ambit of section 10 call for direct evidence. The use of the term "likely" permits the Tribunal to draw reasonable inferences as to effects or likely effects, based on the proven evidence in a case and its own knowledge.

[11] The second limb (fitness) has been described by the Tribunal as follows:[4]

> We think that the distinction between paragraphs (b) and (c) is that whereas (c) focuses on reputation and community expectation, paragraph (b) concerns whether the teacher's conduct departs from the standards expected of a teacher. Those standards might include pedagogical, professional, ethical and legal. The departure from those standards might be viewed with disapproval by a teacher's peers or by the community. The views of the teachers on the panel inform the view taken by the Tribunal.

[12] The third limb of the test (disrepute) is assisted by reference to the High Court decision in *Collie v Nursing Council of New Zealand.*[5] The Court held that a disrepute test is an objective standard for deciding whether certain behaviour brings discredit to a profession. The question that must be addressed is whether reasonable members of the public, informed of the facts and circumstances, could reasonably conclude that the reputation and good standing of the profession is lowered by the conduct of the practitioner. This test is regularly applied in this Tribunal.

[13] Part (b) of the serious misconduct test requires that the conduct be of a character or severity that meets the Teaching Council's criteria for reporting serious misconduct. This criteria is found in the Teaching Council Rules 2016.

[14] The Court of Appeal has held that the test for serious misconduct[6] is conjunctive with paragraph (b) of the section 10 test.[7] Therefore for serious misconduct to be made out, as well as meeting one or more of the three limbs set out above (in (a)), the conduct concerned must at the same time meet one or more of the Teaching Council's criteria for reporting serious misconduct (as per (b)).

[15] The Tribunal therefore will approach its task by first considering the tests in part

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[3] *CAC v Marsom* NZTDT 2018/25, referring to *R v W* [1998] 1 NZLR 35.
[4] *CAC v Crump* NZTDT 2019-12, 9 April 2020.
[5] *Collie v Nursing Council of New Zealand* [2001] NZAR 74, at [28].
[6] In section 378 of the (now repealed) Education Act 1989, the equivalent of section 10 of the 2020 Act).
[7] *Teacher Y v Education Council of Aotearoa New Zealand* [2018] NZCA 637.

(a) of the test. If met, misconduct is made out. If misconduct is made out the Tribunal will then consider part (b) to determine if serious misconduct is made out.

[16] As noted, the criteria to consider for part (b) are the Teaching Council Rules 2016. These make the following behaviour mandatory to report:

> **9 Criteria for reporting serious misconduct**
>
> (1) A teacher's employer must immediately report to the Teaching 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:
> (c) neglecting a child or young person:
> (d) failing to protect a child or young person due to negligence or misconduct, not including accidental harm:
> (e) breaching professional boundaries in respect of a child or young person with whom the teacher is or was in contact as a result of the teacher's position as a teacher; for example,—
> (i) engaging in an inappropriate relationship with the child or young person:
> (ii) engaging in, directing, or encouraging behaviour or communication of a sexual nature with, or towards, the child or young person:
> (f) viewing, accessing, creating, sharing, or possessing pornographic material while at a school or an early childhood education service, or while engaging in business relating to a school or an early childhood education service:
> (g) acting dishonestly in relation to the teacher's professional role, or committing theft or fraud:
> (h) being impaired by alcohol, a drug, or another substance while responsible for the care or welfare of a learner or a group of learners:
> (i) permitting or acquiescing in the manufacture, cultivation, supply, offer for supply, administering, or dealing of a controlled drug or psychoactive substance by a child or young person:
> (j) an act or omission that may be the subject of a prosecution for an offence punishable by imprisonment for a term of 3 months or more:
> (k) an act or omission that brings, or is likely to bring, the teaching profession into disrepute.

[17] Here, the CAC relies on (a) and (k).

[18] The CAC has the obligation to prove the charge. The standard 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.[8]

[8] *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1 (SC).

Early Childhood Services

[19] Below we will work through and consider the particular legal framework relevant to physical contact between teachers and children in Early Childhood Services.

[20] The most precise direction is found at section 24 of the Act. This imposes a blanket prohibition on corporal punishment and seclusion in ECS. Section 24 states:

> **24 Prohibition on corporal punishment and seclusion in early childhood services**
>
> (1) A person must not—
> (a) use force, by way of correction or punishment, toward a child enrolled at or attending an early childhood service; or
> (b) seclude a child enrolled at or attending an early childhood service.
>
> (2) In this section, person means an individual who—
> (a) is employed or engaged by a service provider of an early childhood service; or
> (b) is supervising or controlling a child on behalf of a service provider of an early childhood service; or
> (c) owns, manages, or controls an early childhood service.

[21] Force, correction and punishment are not defined in the Act. However the heading of the section plainly indicates what is meant – the prohibition of what are essentially assaults to punish for or correct something.

[22] Seclusion though does receive a definition in the Act:[9]

> seclude, in relation to a student or child, means placing the student or child involuntarily alone in a room from which they cannot, or believe they cannot, freely exit.

[23] It is useful to also examine what applies in schools (i.e. primary and secondary schools). A corporal punishment prohibition in schools is found at section 98 of the Act, and is much the same as the ECS version at section 24 as noted above.

[24] A point of difference between schools and ECS is present in the Act however. The Act provides clear restraint restrictions, including a specific definition of what "restraint" means. But this applies only to schools, not ECS.

[9] At section 10.

[25] Section 99 states:

> **99 Limits on use of physical restraint at registered schools**
>
> (1) A person holding a teaching position or an authorised staff member at a registered school must not physically restrain a student unless the conditions set out in subsection (2) are met.
>
> (2) The conditions are that—
>
> (a) the physical restraint is necessary to prevent imminent harm to the student or another person; and
>
> (b) the person holding a teaching position or authorised staff member reasonably believes that there is no other option available in the circumstances to prevent the harm; and
>
> (c) the physical restraint is reasonable and proportionate in the circumstances.
>
> (3) In subsection (2), harm means harm to the health, safety, or well-being of the student or another person, including any significant emotional distress suffered by the student or the other person.
>
> (4) For the purposes of this section and sections 100 and 101,—
>
> authorised staff member means an employee of a registered school who is trained and authorised by the employer to use physical restraint in accordance with this section
>
> physically restrain, in relation to a student, means to use physical force to prevent, restrict, or subdue the movement of the student's body or part of the student's body against the student's will.
>
> (5) Nothing in this section limits or affects section 98.

[26] As can be seen, section 99 provides that a teacher at a school can use physical force to restrain (as defined) if three requirements are met: if it is necessary to prevent imminent harm, there is a reasonable belief that no other options are available, and the restraint is reasonable and proportionate.

[27] Context is important in the section 99 test. This is indicated by both (b) and (c) of the restraint test referring to the circumstances that were present at the time of the restraint.

[28] The only other statutory provision of direct relevance is found in Regulation 56 of the Education (Early Childhood Services) Regulations 2008 (the Regulations). This states:

> **56 Ill-treatment of children**
>
> (1) In order to ensure that the standards set out in this Part are complied with, the service provider of a licensed service and any educator who provides education and care for a licensed home-based education and care service must comply with subclause (2) if the service provider or educator has reasonable grounds to believe that a person employed or engaged in the service, or any other person,—
>
> (a) has physically ill-treated or abused a child or committed a crime against children; or
>
> (b) in guiding or controlling a child, has subjected the child to solitary confinement, immobilisation, or deprivation of food, drink, warmth, shelter, or protection.[10]
>
> (2) The service provider and the educator must ensure that—
>
> (a) the person is excluded from coming into contact with the children participating in the service or, as the case requires, the children being educated by the educator; and
>
> (b) if satisfied that it is necessary to do so to ensure that no child is ill-treated, ensure that the person is excluded from the service and does not enter or remain in any premises where the service is provided while it is being provided, or as the case requires, is excluded from the home and does not enter it or remain in it while the educator is providing education and care.

[29] Unfortunately neither "guiding" nor "controlling" are defined in the Regulation (or the Act). The drafting of regulation 56 however is an indication that "guiding or controlling" might be expected. If guiding or controlling was impermissible the Regulations would not be drafted in this way. This is only realistic given the age of children in ECS, which can range from near new-borns through to toddlers and young children. Some guiding and controlling must occur, for instance to keep them safe from harm, to aid in toileting, sleeping, feeding and dressing.

[30] Nor is "confinement" or "immobilisation" defined in the Regulations. Taken literally, any holding of a child could be seen as "immobilisation" and therefore ill-treatment. "Immobilisation" however must be defined by the company it keeps. It is surrounded by terms such as "solitary confinement", "depravation" (of food, drink, warmth, shelter, protection), and generally "ill-treatment" (which is also the heading to regulation 56). We consider that "immobilisation" must require similar conduct both

[10] Our emphasis.

in its intention and the actual act.

[31] Although the Regulations give an indication that guiding and controlling will occur in an ECS, we do not take them as suggesting that ECS teachers have immunity to engage physically with children as long as they keep it short of the prohibited conduct in the Regulation. We will consider this point again later in this decision.

[32] The CAC also raise the 2017 Ministry of Education *Guidelines for Registered Schools in New Zealand on the Use of Physical Restraint (August 2017)* (the Guidelines). The Guidelines list various physical restraints that should not be used, such as using force to take/drag a student who is resisting, restraints when moving a student, and restraint as a response to a refusal to comply.

[33] The CAC notes that the Guidelines apply to schools, not ECS, but suggest that they remain a useful reference for determining what might be permissible.

[34] The CAC noted that the Guidelines appear to only have been mentioned in one previous ECS case, being *CAC v Teacher Z*.[11] In that case, the teacher accepted serious misconduct. It appears that one basis for this acceptance was that her conduct was a breach of the Guidelines. It does not seem however that there was any consideration given by the parties or Tribunal to whether the Guidelines, developed for schools, should be considered in an ECS setting.

[35] We note at the outset that the 2017 Guidelines may no longer have statutory force. They are produced via s 139 AE of the Education Act 1989. That is now repealed. The 2020 Act provides for new Guidelines to be produced (s 101). That has not yet occurred. The transitional provisions of the 2020 Act do not appear to carry over s 139 AE of the 1989 Act into the 2020 Act.[12] It appears then that there are no Guidelines in force.

[36] In any event even if the Guidelines are still in force for schools (or even if a similar or identical set were in force under the 2020 Act) we do not consider that they add anything more when considering the legal framework applicable to conduct in an ECS. This is for two reasons.

[37] First, whilst there is some brief reference to younger students, the overall theme of the Guidelines appears to have been designed at dealing with and/or avoiding physical contact with older and larger children. That is a quite different context to an ECS setting. For instance the Guidelines variously state:

> They provide school staff with advice about safe ways to manage potentially dangerous situations when a student may need to be physically restrained.

[11] *CAC v Teacher Z* NZTDT 2020/14.

[12] Schedule 1, section 7, savings provision.

> Teachers and authorised staff members will need to use their professional judgement to decide what constitutes "a serious and imminent risk to safety". These situations are examples.
>
> A student is moving in with a weapon, or something that could be used as a weapon, and is clearly intent on using violence towards another person.
>
> A student is physically attacking another person, or is about to.
>
> A student is throwing furniture, computers, or breaking glass close to others who would be injured if hit.
>
> A student is putting themselves in danger, for example running onto a road or trying to harm themselves.

[38] Second, both Acts (1989 and 2020) have chosen to create Guidelines for schools, not ECS. This is an indication to us that consideration of physical contact/restraints in an ECS setting requires the application of a different lens than in schools (although even within schools it remains a challenging issue). Consistent with the Guidelines applying to schools only, we also note that the advisory group that contributed to the Guidelines did not appear to have an ECS related contributor.

[39] Overall then the framework for physical contact in an ECS setting is somewhat undefined for conduct falling below obvious assaults/corporal punishment:

- There is the complete prohibition on corporal punishment.[13]
- Schools have express limits on the use of physical restraints,[14] but ECS do not.
- Both Acts have required the creation of restraint guidelines for schools, but not for ECS.[15]
- The Guidelines (whether in force or not) do not fit well into an ECS context.
- Regulation 56 indicates that "guiding" and "controlling" occurs, but short of ill-treatment.

[40] Essentially we have a clear prohibition on assaults at one end. And at the other, an indication that some guiding and controlling is part of a teachers role in ECS. Somewhere between those two is where we must determine whether proven conduct meets the serious misconduct test or not. The Tribunal is intentionally composed of two experienced teachers for such a task.

[41] In considering the test, we do however consider that the scheme of the restraint provisions in section 99 provides a useful guide to the issue, despite not applying to ECS. That is, if any restraining occurs, in considering whether it breached section 10 of the Act we would look to see if it was to prevent harm, with no other options

[13] Section 24, 2020 Act.
[14] Section 99, 2020 Act.
[15] Section 139 AE 1989 Act, section 101 2020 Act.

reasonably present, and using the least force possible in all of the circumstances. An overlaying factor will be the context of an ECS setting, given the necessary requirement in the role to guide and control ECS children through their day (which reality exists in a practical sense, as well as being suggested by the Regulations). That different context means we must be careful to recognise that not all physical contact where a child is held, halted or redirected (as examples) will fit easily into what was being aimed at in section 99.

[42] We also note other ECS decisions which the CAC has referred to in submissions, suggesting they are a guide to determining what is and is not permissible. *CAC v Teacher C* saw a less challenging child, running along a couch.[16] The conduct from the teacher appeared out of frustration with the child and a lack of patience. In *CAC v Williams* the teacher grabbed a boy by the arm who wouldn't come to the mat and pulled him into her kicking and screaming, then holding him.[17] This lasted for five minutes. On another occasion the child was throwing blocks at another child when the teacher took him by the arm and "dragged" him to a room to tell him off. The Tribunal concluded that misconduct had been made out due to some of the behaviour having an adverse effect on the child.

[43] Those cases all present quite different circumstances and are difficult to compare to the present facts. Broadly however they do suggest an approach to us that is consistent with the application of the general theme of the restraint restrictions in section 99, but considered within the different context of ECS. Firm and unnecessary conduct occurred in those cases, and it came out of frustration, impatience and punishment. If the conduct had been gentler guiding and controlling, out of care and concern for safety and with no other choice seeming available, the charges may well not have been made out.

[44] Whilst we have attempted to distil some guidance and principles above, ultimately we fall back to the test before us: we must determine what is and is not serious misconduct within the circumstances and context of the case before us. We will now turn to consider the charge.

Is the charge proven?

[45] In determining whether the charges are proven we will be considering the facts of each particular incident. We will also include the background and context to the specific facts. Whilst context is always relevant, when considering restraint issues in an ECS setting it is important to appreciate the entire circumstances that were present.

[46] Contextual facts that are particularly relevant are:

- Mrs Stairmand had only been at the centre for a few weeks.

[16] *CAC v Teacher C* NZTDT 2020-32.
[17] *CAC v Williams* NZTDT 2019-24.

- Child X was 3½ years' old, autistic, non-verbal, and posed significant and frequent behaviour management challenges.
- Mrs Stairmand explained that her practice of restraining and moving students (by standing behind them holding their arms and moving them forward with her feet) was a widely used practice called the 'crane technique' which she had been taught by a special education teacher. Mrs Stairmand clarified that the 'crane technique' was taught to her early on in her ECE career while she was working with children with special needs at Whitireia ECE. At that time, she was working alongside specialist teachers from the Ministry of Education.
- Mrs Stairmand said that neither she nor the other teachers had been shown how to manage Child X's particular needs by her employer at the Centre, and considered that her approach to moving him (and other children) about the Centre was appropriate, and safer than the techniques employed by her colleagues.
- Mrs Stairmand stressed that Child X posed some specific challenges; he would regularly climb on furniture and on several occasions had been found chewing or sucking on hammers and nails, and on one occasion had been found after drinking a full bottle of red food colouring at the Centre.

Particular 1(a): That after witnessing Child X (aged 3 years 6 months) with a pair of scissors in his mouth, removed the scissors and held him with his legs in front of her legs, incapacitating him.

[47] The agreed facts for this aspect state:

> At the end of her morning tea break after 11:00am, (Mrs Stairmand cannot recall the exact date but the incident was between 18 October 2020 and 1 November 2020), Mrs Stairmand noticed Child X sitting down playing by the only exit door, a blind spot, inside the upstairs junior room of the Centre. Child X was holding scissors in his mouth. Mrs Stairmand responded by approaching him in order to remove the scissors. Child X stood up, took the scissors out of his mouth and dropped them on the floor. Mrs Stairmand attempted to encourage Child X to come with her. When he refused to hold her hand, Mrs Stairmand stepped behind Child X, placed her arms over the child's arms and placed his legs in front of her legs, so that Child X was prevented from moving - she held Child X in that position. She then walked Child X to the mat area, with Child X's feet on top of her feet, moving him along with her feet, while maintaining Child X's balance by holding onto his arms or hands further inside the Centre. Child X reacted by crying out (but not getting teary-eyed) and yelling.

[48] Mrs Stairmand found Child X alone in a blind spot with scissors in his mouth. And this was not just any child but a child with the suite of challenges set out above. Mrs Stairmand quite rightly wanted him to return to a supervised and safe area. She did not panic or act out. She initially tried to encourage him by holding his hand. He refused to hold her hand or go with her.

[49] Although the scissors had been dropped, we do not accept that this changed the situation in any real sense. We consider it is unrealistic in these circumstances to expect Mrs Stairmand to leave Child X simply because he has dropped the scissors or that they could be removed from his immediate reach.

[50] Mrs Stairmand then placed her arms over his arms and her legs behind his – in other words, stood behind him and held him. She then walked him to the mat area with his feet on top of her feet. This appears best described as "shuffling" him. She then did this, to a safe area. She maintained his balance whilst doing so.

[51] There is no evidence of what alternative action was available. There is no evidence that there was an existing and better procedure in place for dealing with Child X, or that there was a level of staff resource available that could have assisted to ensure Child X was not left unsupervised, was not in danger, or would have cooperated with the need to move him to a safer area. Indeed the evidence before us suggests that in the circumstances of this short lived event there were no other options.

[52] We consider that the description of "incapacitating" in the charge particulars is not apt for what occurred. Likewise whilst this technique may have been known as "the crane technique", such a name risks being distracted by dramatic sounding labels instead of focusing on the actual facts and entire circumstances.

[53] We have already noted the challenges presented by Child X. And we have noted that Mrs Stairmand had been trained in this way (which has been included in the agreed evidence). And she had not been trained in or shown any other way by her employer for dealing with Child X despite the challenges that he brought.

[54] Overall in the context of the circumstances and evidence before us including the challenges presented by Child X, Mrs Stairmand's training, and lack of any particular instruction from her new employer, we find that Mrs Stairmand was reasonable in her actions of moving Child X out of the blind spot in the way that she did. We cannot describe this as "incapacitating" nor a "restraint" in the true meaning of the terms. We consider that Mrs Stairmand reasonably considered there was no other option, that moving him was for his safety, and that she used a minimal amount of force when she shuffled him away.

[55] The CAC submits that there was adverse effect. The CAC submits that *"…the routine recourse to the crane technique risked causing Child X, in particular (due to his sensitivities surrounding his autism) to fear physical contact with teachers, with flow on consequences for his development."*. We have no evidence before us that it caused such a fear or had "developmental consequences". This is not an available or reasonable inference.

[56] We cannot be satisfied that being moved in this way adversely effected Child X. Whilst he cried out, given his situation we cannot be satisfied that he would not have cried out regardless of what occurred. Child X becoming upset at what we have found to have been reasonable conduct does not then make it into conduct that adversely affects him. The test is not whether a child simply became upset.

[57] For the reasons already given we do not consider that all of these facts taken

together adversely reflect on Mrs Stairmand's fitness to be a teacher. Likewise we do not consider that a reasonable member of the public would consider that what occurred, knowing all of the facts and circumstances, brought the teaching profession into disrepute. Indeed we consider that many of those hypothetical bystanders might well approve of Mrs Stairmand taking the steps she did if they knew all of the circumstances.

[58] We will consider the next two particulars together:

Particular 1(b): Carried Child X to mat time with his feet on her feet and head below her chin and physically restrained him during mat time by putting her arms around his torso.

Particular 1(c): Carried Child X to kai time and then sat on a chair with arms wrapped around his stomach, pinning his arms.

[59] The facts:

> 18. Following on from the incident with the scissors referred to above, upon arriving at the mat area for mat time, Mrs Stairmand sat on a small chair and sat Child X on her lap. Then, she placed her arms around the child's torso to prevent him from moving away as there would be no other teacher to supervise him. Mrs Stairmand then moved the small chair to the lunch tables, a few steps away, while holding Child X. Then, she wrapped her arms around the child's torso to prevent him from leaving.
>
> 19. Child X continued to cry out and struggle as Mrs Stairmand moved him using her feet, with his feet placed on top of her feet, to mat time and then held him on her lap,
>
> 20. Less than a minute after the mat time incident, Mrs Stairmand moved the chair she was sitting on from the mat time area to the nearby dining tables for kai time, holding Child X on her lap as she did so. She maintained contact with Child X by wrapping her arms around the child's torso to hold Child X at the kai table. She called out to nearby staff words to the effect of "I'm restraining [Child X) for his safety".
>
> 21. Child X responded by crying out and twisting his body in an attempt to get away. Once the child had settled and was quiet, which took approximately 10 seconds, Mrs Stairmand released him and sat him down on another chair next to her and he began to eat his lunch.

[60] We do not have evidence of how long this carried on for. However it seems to be a continuation of the scissors incident and likely to have occurred over a similarly short instance.

[61] It is artificial to consider each event in isolation. Child X has just been found alone with scissors in his mouth and refused to return to the mat, leading to Mrs Stairmand physically shuffling him there when he refused to hold her hand and go with her. He was crying out and yelling. The evidence shows there was no other teacher

available to follow or supervise him if he left the mat area. It would have been known to Mrs Stairmand that he could head straight back into an unsafe situation again given his history. She has then held him and shuffled him again.

[62] We see the facts of particulars 1(b) and 1(c) as a continuation of what was occurring in particular 1(a). For the same reasons as in particular 1(a) we do not consider that misconduct has occurred. The holding of Child X was for the same safety reasons, there appears to have still been no other option, and it appears to have been for as shorter time as was required. There is no evidence that it went on for several minutes for instance. There is likewise no evidence that anything more than a minimal, reasonable and proportionate amount of force was used.

Particular 2a: Stood behind Child X while he was holding a paintbrush then directed him, by using her hands to hold his arms and her legs to move his body, to the craft area to return the paintbrush.

[63] The next incident occurred several days later. We pause to note however that the agreed facts for the above incident included Mrs Stairmand calling out to nearby staff that she was "restraining" Child X. There is no evidence that they took objection to this or raised it with the employer as an issue, nor that the employer if aware took any steps. We do not take this as evidence of encouragement (by silence) by the employer. But the fact that she had called out to other staff, and nothing changed, indicates to us that there was often little assistance or choice for Mrs Stairmand.

[64] The agreed facts for 2(a) are:

> On 2 November 2020, Mrs Stairmand was returning from non-contact just after 11.00am and *moved* to the outdoor area, she was rostered as an outdoor supervisor. She noticed Child X attempting to climb a fence in the sandpit while he was holding a paintbrush, Mrs Stairmand ran to Child X and placed her arms around his torso then placed him on the ground and redirected Child X to another activity in the outdoor area. Child X ran back to the sandpit and again attempted to climb the fence. While Mrs Stairmand was listening to a small group of children outside, she noticed Child X climbing up on a small windowsill frame in the sandpit, giving him more height to get to the top of the fence. In response, she quickly moved to Child X again, and held him by the torso to lower him from the fence. Then, she directed him to the door leading to the inside area. However, he did not want to go inside. She stood behind the child, held his arms gently and placed his feet on her feet in front of the doorway and walked him towards the craft area by moving her feet with his feet on top, so that she could encourage him to return the paintbrush he was holding to the Centre's craft table.
>
> Child X made distressed sounds, grimaced and attempted to pull away from Mrs Stairmand. When she released him, 10-12 seconds later (nearly reaching the craft area}, Child X ran away from her. He still had the paintbrush in his hand.

[65] We also have the additional explanation from Mrs Stairmand:

> In relation to the incident with the paintbrush, Mrs Stairmand advised that the antecedent to her using the crane technique on that occasion was that Child X had attempted to climb a fence in the outdoor area of the Centre. When she was unable to redirect the child away from continuing to climb on the fence, it was necessary to bring him indoors, where other teachers could supervise him, as there is a three-storey drop on the other side of the fence.

[66] Child X has tried to climb a fence three times, with a large drop on the other side. Mrs Stairmand stopped him doing so each time. Notably she again appears alone in trying to do this. And again if she hadn't done it, it appears that the dangerous situation would continue. She has then directed him inside to the craft area by again shuffling him with her feet and by "gently" holding his arms.

[67] Again, we have the same context of the ongoing challenging behaviour presented by Child X, his behaviour on this occasion, the prior training of Mrs Stairmand in this technique, and the lack of any direction or training from her employer.

[68] We again consider that in the context of the entire circumstances that Mrs Stairmand's actions were reasonable. Her actions were designed to protect Child X, there seemed no other option, and the force used was minimal.

[69] We do not think her actions were misconduct in terms of any of the limbs of section 10. We again note that Child X becoming upset (here said to make distressed sounds, grimace and pull away) is not something that automatically equates to an adverse effect. We do not think that this incident questions Mrs Stairmand's fitness nor casts any disrepute on the profession in the eyes of fully informed reasonable bystanders.

Particular 2b: Directed Child Y (aged 4 years 11 months) to kai time by holding his forearms and moving his body with her legs

[70] This particular involves a different child. There is no evidence of challenging behaviour such as with Child X.

[71] The relevant facts for this particular are:

> 22. Child Y was another of the learners who attended the Centre in November 2020. At that time, he was 4 years and 11 months old.
>
> 23. About an hour later on the same day as the incident involving Child X, Mrs Stairmand and Child Y were both in the outdoor area at the Centre. When the teachers at the Centre started getting the learners ready for lunchtime and mat time, Mrs Stairmand directed Child Y to go inside to the mat time area. He did not want to do so. Mrs Stairmand then stood behind Child Y, in front of the doorway, gently placed her hands on his arms and moved

him inside by moving her feet with his feet on top of hers forwards into the mat time area just inside the doorway.

24. Child Y struggled and attempted to pull away from Mrs Stairmand in the doorway, but was unable to do so, the incident lasting about 5 seconds.

[72] Other wider circumstances also apply, including Mrs Stairmand's training and that her use of this technique had now occurred several times without any intervention or advice.

[73] On the facts this appears to be a very low level incident. In essence a child would not go inside and Mrs Stairmand gave the child a gentle shuffle in. It is not clear how far that was for but it appears very short – we are told "just inside the doorway". That could well have been one or two steps. We know it lasted "about 5 seconds".

[74] This conduct could be described as guiding or controlling the child, and well short of any ill-treatment. The particular itself described it as "directing" which could be much the same as guiding or controlling. If the Regulations suggest that guiding or controlling occurs, it could be said that there is some conflict with guiding or controlling then being misconduct. But everything will depend on the specific facts. A rough and impatient guiding, controlling or directing may well fall foul of the misconduct test despite what could be taken from the Regulations. As noted earlier, the Regulations do not create an immunity.

[75] With or without the presence of the Regulations, we do not consider that this conduct adversely affected child Y or was likely to. Indeed all we know is that he attempted to pull away.

[76] Given the gentle and short nature of the incident, we do not consider that in all of the facts of this matter that it adversely affects fitness. For the same reasons we also do not consider that a reasonable person would consider that the profession is brought into disrepute.

Conclusion on charges

[77] As we have not found the section 10(a) test made out on any of the particulars above, we have not moved to consider whether any of the reporting rules are met (for part (b) of the test).

[78] We therefore find that the charge has not been proven.

[79] We wish to stress that our findings in this case are highly dependent on their facts and circumstances. This decision should not be read as a suggestion that there is free reign to apply physical restraints in ECS. Nor it is a generalised endorsement of "the crane technique" or physical shuffling of children in ECS.

Non-publication

[80] We consider it proper to make permanent orders for non-publication of the name and any identifying particulars of Child X and Child Y. For the avoidance of doubt this does not include the challenges faced or presented by Child X, as this decision would lose significant meaning in their absence.

[81] We also make a permanent non-publication order of the name of the Early Childhood Centre, and the town that it is located in. This is to ensure that the children are not able to be identified.

[82] At present there is an interim order preventing publication of Mrs Stairmand's name. Mrs Stairmand's counsel's submissions stated that a permanent order should be made if the charge was not proven. Dismissal of the charge is not the test however.

[83] Given the lack of any submissions on this issue from Mrs Stairmand, rather than potentially surprise her with removal of the interim non-publication order, we now direct that Mrs Stairmand can (if she wishes to) file submissions and any evidence directed towards a permanent non-publication order. It would be helpful if Mrs Stairmand could within five working days indicate whether she wishes to do this or not, and if she does wish to, to have filed her material within 10 working days. The CAC can file any submissions in response within ten working days if they wish to.

Costs

[84] If either party seeks to recover costs they should file submissions within 10 working days. There may be several costs issues for the Tribunal to consider. There is of course the ordinary costs around the charge itself and this decision, which might see a costs claim from one or both parties in theory.

[85] There is also however a significant set of processes that occurred prior to this decision which may attract a costs liability. Indeed the Tribunal's decision of 23 December 2022 is longer than this present decision on the charge. It appears that the initial approach of Mrs Stairmand to the agreed facts, and then the recusal application, may have caused an increase in costs which there may be responsibility for.

[86] We would ask that costs applications/submissions by either party are filed within 10 working days. If either party wishes to respond to the others application, they may do so within a further 5 working days.

[87] We also note that Mrs Stairmand has previously mentioned financial issues. If costs are sought against Mrs Stairmand and she wishes the Tribunal to consider her ability to pay, detailed financial information would usually be required.

[88] If Mrs Stairmand is unclear about any of the above directions, a conference can be convened to discuss.

T J Mackenzie

Deputy Chair

BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

NZTDT 2022-37

COMPLAINTS ASSESSMENT COMMITTEE
Prosecutor

V

CAROLINE STAIRMAND
Respondent

Date of hearing:	On the papers
Representatives:	L van der Lem and A Mitra for CAC
	J Goddard for the respondent
Tribunal:	T Mackenzie, L Arndt, M Johnson
Date of decision	21 July 2023

DECISION OF THE TRIBUNAL ON NON-PUBLICATION AND COSTS

Introduction

[1] Following the dismissal of a serious misconduct charge Mrs Stairmand has made an application for permanent non-publication of her name, and costs.

Non-Publication

[2] Section 501(6) of the Education and Training Act 2020 provides as follows:

> If the Disciplinary Tribunal 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, it may make any 1 or more of the following orders:
>
> (a) an order prohibiting the publication of any report or account of any part of any proceedings before it, whether held in public or in private:
>
> (b) an order prohibiting the publication of the whole or any part of any books, papers, or documents produced at any hearing:
>
> (c) an order prohibiting the publication of the name, or any particulars of the affairs, of the person charged or any other person.

[3] The default position is that Tribunal hearings are to be conducted in public. Consequently the names of teachers who are the subject of these proceedings are to be published. The Tribunal can only make one or more of the orders for non-publication if we are 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.

[4] The purposes underlying the principle of open justice are well settled. In *CAC v McMillan*, the Tribunal said that the presumption of open reporting "exists regardless of any need to protect the public".[1] Nonetheless, that is an important purpose behind open publication in disciplinary proceedings in respect to practitioners whose profession brings them into close contact with the public.

[5] In *NZTDT v Teacher* the Tribunal noted that the transparent administration of the law also serves the important purpose of maintaining the public's confidence in the profession.[2]

[6] In *CAC v Finch* the Tribunal described a two-step approach to non-publication that mirrors that used in other disciplinary contexts.[3] The first step, which is a threshold question, requires deliberative judgment on the part of the Tribunal as to whether it is satisfied that the consequence(s) relied upon would be "likely" to follow if no order was made.

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[1] *CAC v McMillan* NZTDT 2016/52.
[2] *NZTDT v Teacher* 2016/27,26.
[3] *CAC v Finch* NZTDT 2016/11.

[7] In the context of the statutory test, "likely" simply means that there must be an "appreciable" or "real" risk. Consistent with the approach taken in *CAC v Teacher*,[4] we have adopted the meaning of "likely" described by the Court of Appeal in *R v W*.[5] The Court said there that "real", "appreciable", "substantial" and "serious" are all qualifying adjectives for "likely". They bring out that the risk or possibility is one that must not be fanciful and cannot be discounted.

[8] In deciding whether there is a likely risk, the Tribunal must come to a judicial decision on the evidence before it. This does not impose a persuasive burden on the party seeking non-publication.

[9] If so satisfied, the Tribunal must then determine whether it is proper for the presumption to be displaced. This requires the Tribunal to consider, "the more general need to strike a balance between open justice considerations and the interests of the party who seeks suppression".[6]

[10] In *Y v Attorney-General* the Court of Appeal noted that while a balance must be struck between open justice considerations and the interests of a party who seeks suppression, "[A] professional person facing a disciplinary charge is likely to find it difficult to advance anything that displaces the presumption in favour of disclosure".[7]

[11] The Court of Appeal in *Y* also referred to its decision in *X v Standards Committee (No 1) of the New Zealand Law Society*, where the Court had stated:[8]

> The public interest and open justice principles generally favour the publication of the names of practitioners facing disciplinary charges so that existing and prospective clients of the practitioner may make informed choices about who is to represent them. That principle is well established in the disciplinary context and has been recently confirmed in *Rowley*.

[12] In *J v New Zealand Institute of Chartered Accountants Appeals Council* Gwynn J considered the applicable principles for suppression in professional disciplinary matters.[9] That case concerned a Chartered Accountant's disciplinary decision. Although the specific statutory wording in that legislation used the term "appropriate" (instead of "proper"), we consider the observations of the Court are of application here. Gwynn J stated:

> [85] Publication decisions in disciplinary cases are inevitably fact-specific, requiring the weighing of the public interest with the particular interests of any person in the context of the facts of the case under review. There is not a single universally applicable threshold. The degree of impact on the interests of any person required to make non-publication appropriate will lessen as does the

[4] *CAC v Teacher* NZTDT 2016/68, at [46].
[5] *R v W* [1998] 1 NZLR 35 (CA)
[6] *Hart v Standards Committee (No 1) of the New Zealand Law Society* [2012] NZSC 4, at [3].
[7] *Y v Attorney-General* [2016] NZCA 474, [2016] NZFLR 911, [2016] NZAR 1512, (2016) 23 PRNZ 452 (at [32]).
[8] *X v Standards Committee (No 1) of the New Zealand Law Society* [2011] NZCA 676 at [18].
[9] *J v New Zealand Institute of Chartered Accountants Appeals Council* [2020] NZHC 1566.

> degree of public interest militating in favour of publication (for instance, where a practitioner is unlikely to repeat an isolated error). Nonetheless, because of the public interest factors underpinning publication of professional disciplinary decisions, that standard will generally be high.
>
> [86] I do not consider the use of the word "appropriate" in r 13.62 adds content to the test usually applied in the civil jurisdiction or sets a threshold lower than that applying in the civil jurisdiction. The rule is broad and sets out neither a specific threshold nor mandatory specific considerations. The question will simply be, having regard to the public interest and the interests of the affected parties, what is appropriate in the particular circumstances.
>
> (citations omitted).

[13] Finally and of relevance here, there is no presumption of non-publication that arises simply due to a charge not being proven. The result however may form part of the relevant context to take into account in considering the test though.

[14] Having set out the general principles above, we will turn now to consider the various publication issues that arise here.

Discussion

[15] There appear to be several grounds advanced in seeking a permanent order.

[16] The first is centred on health concerns for Mrs Stairmand. A letter from a Nurse Practitioner[10] sets out that Mrs Stairmand has had a basal cell carcinoma removed, suffers from diabetes and has depression. Overall it is said that a combination of the medical issues and this proceeding has led to significant stress, and that any publicity may impede recovery.

[17] We note that a lot of Mrs Stairmand's concerns appear to be premised on some level of shame or acknowledgement of wrongdoing on Mrs Stairmand's part. In Mrs Stairmand's statement she has said:

> 87. I am deeply regretful for my actions and understand my liability for them. I was unable to locate the teaching method I was shown by the Crisis Intervention Unit for preventing young children from harming themselves and others dating back to the late 1990's. Unfortunately, I discovered that there are no archives that go back that far.
>
> 88. I am aware of the current ECE regulations. I will continue to ensure ECE teachers I may bump into in the future are aware of inappropriate practices and share my newfound knowledge of appropriate teaching practices and processes to follow in reporting concerning incidents.
>
> 92. But the hardest thing to deal with is that I cannot hold my head up high when I reflect on my life as an ECE teacher and how it has ended in the way it has, causing me to suffer deep pain and to feel

[10] Mr Goddard incorrectly refers to the letter as being from her "GP".

embarrassed about my actions.

[18] It is notable that it is the conduct case itself which appears to be a bigger concern to Mrs Stairmand than the health issues, and that such concern appeared to be premised on an adverse finding potentially being made.

[19] It is significant then to the Tribunal in considering Mrs Stairmand's concerns to now note that an adverse finding has not been made against Mrs Stairmand. That must alleviate much of the concern that Mrs Stairmand held. As a result we do not consider it likely that publication will exacerbate the concerns found in the statement.

[20] That leaves the medical issues above. We do not wish to minimise those, but we consider that they are not sufficient to displace the principle of open justice. It is well known that localised skin cancers in New Zealand are relatively common. And in this Tribunal, when respondents are facing conduct charges, stress and depression are also fairly commonly seen.

[21] There is insufficient evidence to find that Mrs Stairmand's conditions will be significantly worsened by publication of this case, and if so to what degree. In publication terms, there is no real and appreciable risk that Mrs Stairmand will suffer any effects from publication that are such as to properly displace the presumption.

[22] The second aspect of the application raises a number of issues with the charge and case itself. Mr Goddard submits at some length that there have been "significant process failures". We will discuss these arguments below.

[23] The CAC is said to have made an "investigative failure" for proceeding with the charges. Charges however typically come after an investigation. There is no suggestion here that there was an important piece of evidence that the CAC unreasonably failed to investigate during the investigation phase, prior to the charge. We do not consider that there was an "investigation failure". Moreover we do not see this as relevant to non-publication.

[24] The wording of the particulars is also said to have been a process failure by the CAC. This is said to be a breach of prosecutorial discretion and therefore a "prosecution failure". We are unsure what particular home such a submission has in a publication argument. In any event prosecutorial discretion is normally a concept drawn from the criminal law, imposing obligations on public criminal prosecutions.[11] This same submission appears to be raised again in the costs application and will be discussed further later in this decision.

[25] The next submission is that "There was also a failure by the Tribunal to adhere to its hearing date of 12 December". That submission appears to be an attempt to relitigate the Tribunal's determination to adjourn the hearing. As already determined

[11] See the *Solicitor-General's Prosecution Guidelines*, Crown Law Office, 1 July 2013.

by the Tribunal, the reason the hearing date was adjourned was because Mrs Stairmand filed a lengthy statement (with a number of documentary attachments) shortly before the hearing, which was at odds factually with the previously agreed summary of facts. That type of statement and material had not been foreshadowed. The Tribunal adjourned the hearing date whilst the matter was resolved. There is nothing novel or contentious in an adjournment occurring when new evidence is filed on the eve of a hearing. Indeed such events often result in wasted costs applications in both the civil and criminal courts. The fact that the Tribunal drove the adjournment simply reflects that the Tribunal was expected to conduct a hearing on the papers and the position before it was unsatisfactory for such a task.

[26] The submissions also suggest that the Tribunal acted "oddly" in referencing s 24 of the Sentencing Act as a guide when discussing the resolution of disputed facts. Quite how that is odd is not explained further in the submissions. Section 24 of the Sentencing Act sets out a fairly common sense approach to disputed facts – is there a dispute, does it matter, and if so how it should be determined. It is quite common for this Tribunal to refer to various other legislation in making its way through the myriad of issues that can arise before it (for instance the Evidence Act 2006, Criminal Procedure Act 2011 and the High Court Rules 2016 are all commonly referred to by the Tribunal and similar processes as found in those statutes are often replicated).

[27] The submission then continues, and blames the Tribunal's adjournment of the hearing for Mrs Stairmand not having representation thereafter. This is stated as follows:

> The Tribunal's failure to do so forced Mrs Stairmand to represent herself due to her lack of financial resources and her concerns about being unable to pay her legal costs. This compromised her ability to engage meaningfully with the Tribunal between January and March 2023.

[28] It is not clear why an adjourned papers hearing date in and of itself was causative of the severance of the legal relationship. Further, it is not clear what this has to do with non-publication. In any event, given Mrs Stairmand was acquitted of the charge whilst un-represented, and that submissions had already been filed, it appears that Mrs Stairmand did not suffer through the lack of representation whilst the papers hearing was conducted.

[29] The criticisms of the Tribunal process do not stop there though. The next submission is that "the Tribunal should have identified at an early stage that the notice of charge was incorrectly drafted for early childhood teachers".

[30] The first difficulty with this submission is that the charge as drafted was a factual allegation with factual particulars. The various regulatory framework issues, discussed in our decision, came later in submissions. It is not clear what is said to have been incorrect in the drafting of the charge.

[31] Moreover, this submission appears to suggest that the Tribunal should have initiated of its own motion some form of charge review, amendment or strike out when the charge was filed, by forecasting that the evidence and submissions (to come on a future date) might not make out the charge.

[32] Overall we consider this submission to be gratuitous and heavily infected by hindsight following the dismissal of the charge.

[33] A further ground is that the charge was dismissed. We have addressed that above. It does not create a presumption of non-publication.

[34] It is said the decision is novel and there may be more media interest in it. This is speculative in a case such as this, and not a real and appreciable risk. It would be a very difficult task for this Tribunal to try and foresee what level of publicity might occur (if any) and to then equate that to whether it is a proper reason to displace the presumption.

[35] It is said that former colleagues and students will think less of Mrs Stairmand. This is again speculative. They could equally feel sympathetic to her plight.

[36] It is said that publicity could reduce the likelihood of future employment in early childhood mentoring roles. This is again speculative. We also note that Mrs Stairmand has said in her statement that she is not returning to ECE teaching.

[37] We do not consider that any of the grounds above demonstrate a likely consequence. And if any were likely to occur, we do not consider any of them together or in isolation to be proper grounds to displace the presumption of open reporting.

[38] It is also argued by Mr Goddard that "no basis for publishing her name has been advanced by the CAC". This submission misses the fundamental legal principle applicable across near all judicial bodies in New Zealand (and probably most common law jurisdictions). It is not for the CAC to advance a basis for publication. Publication is already the presumption, and remains so until displaced.

[39] Finally it is said that it would be unfair for Mrs Stairmand to not receive this order when the relevant Early Childhood Centre in this case has received a final non publication order. This again misses the point. Non-publication orders are not parity contests. The reason for that order was not due to any concerns for the Centre itself. It was because the names of the children are suppressed, and naming the Centre could undermine such an order.

[40] We therefore find that the presumption of open reporting has not been displaced.

[41] We now revoke the interim non-publication order of the name of Mrs Stairmand. Other non-publication orders from our decision remain.

Costs

[42] Mrs Stairmand seeks indemnity costs from the CAC of $20,621.45 (incl GST).

[43] Costs considerations in professional conduct jurisdictions are a more nuanced exercise than in traditional civil courts (or even criminal courts). We distil the following principles from the authorities:

a) Unlike traditional civil courts, costs do not follow the event.[12]

b) Professional conduct bodies carry out an important public function, being the maintenance of public confidence in the particular profession through enforcement of professional standards of conduct.[13] Or in other words, whereas civil litigation will often only serve the interests of the private parties engaged in it, professional conduct litigation will serve the wider public interest.

c) A strict 'costs will follow the event' rule risks undermining that function.[14]

d) That said, the public interest function is not determinative and something "extraordinary" is not required as a precondition to establishing a right to costs.[15]

e) There should be no distinction in principle in the respective approach to the costs discretion across different professions.[16]

f) There is a wide discretion available to a professional conduct tribunal in considering costs, including the power to award costs against a respondent despite the charges not being proven.[17]

g) Ultimately an evaluative exercise of the discretion is required.[18]

[44] To those we would also add that part of the evaluative exercise will also include considering whether the respondent, despite the charge being dismissed, acted in a way to bring the charge on their own head or otherwise should carry some responsibility. With those principles in mind we now turn to the grounds advanced.

[45] The submissions begin with an explanation as to legal aid coming and going. That is not relevant to the Tribunal. Mrs Stairmand was not funded by the Legal Services Agency. That is a matter for her. She has incurred costs and that is all that matters at this juncture.

[46] The first submission appears to focus on the dismissal. It is argued that there

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[12] *Lagolago v Wellington Standards Committee 2* (2017) 24 PRNZ 753 (HC).
[13] *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2014] NZCA 141, (2014) 21 PRNZ 753.
[14] *Lagolago v Wellington Standards Committee 2* [2018] NZCA 406(2018) 24 PRNZ 76.
[15] *Laglago* (HC).
[16] *Roberts.*
[17] *Lagolago* (CA), citing *Daniels v Complaints Committee 2 of the Wellington District Law Society* [2011] 3 NZLR 850. (HC); and *Simes v Canterbury-Westland Standards Committee 2 of the New Zealand Law Society* [2013] NZHC 1501.
[18] *Lagolago* (HC).

was an “evidential failure”. It is noted in the submission that the Tribunal described the particulars of “restraint” and “incapacitated” as not being apt for what was contained in the agreed facts.

[47] That ignores however that such terms are not the charge itself. The charge was one of serious misconduct, based on the agreed facts. Whilst those particulars were not accepted as part of finding the charge not proven, the reason for the charge not being proven was not because of a failure of the facts to make up those two particular words. Rather, the Tribunal considered that the accepted conduct did not make out the tests for serious misconduct (or misconduct). It is by the by really that terms such as “restraint” and “incapacitated” were used.

[48] The overall argument made through the costs submission on this point is really that the charge was evidentially doomed from the outset. We do not accept that. As noted in our decision, use of force in an ECE setting is a difficult area to navigate – both for teachers and this Tribunal. Our decision was extensive and required some consideration. There were admissions, via agreed facts, of several bouts of use of force. Indeed Mr Goddard’s own submissions conceded that the conduct might be, at most, misconduct. We do not consider that there was an evidential failure in the CAC case at the outset.

[49] The next submission is that “the process could be described as a shambles.” Mr Goddard continues: “Neither the CAC nor the Tribunal identified the flaws with the Notice of Charge before the hearing…”

[50] We have already considered this same submission in relation to publication, and can only make the same points again. The submission that the Tribunal was “a shambles” is an unfortunate one though.

[51] A number of other grounds are raised. Many fall into the general submission of insufficiency on the merits of the case, already addressed above. We will mention the remaining ones below.

[52] A further ground for costs is said to be that the hearing was delayed and that Mrs Stairmand objected to this occurring. This again ignores the fact that Mrs Stairmand’s new evidence caused the adjournment, which we have already discussed in the publication aspect of this decision.

[53] The recusal application made by Mrs Stairmand is also raised as a ground for costs. Mr Goddard states that “Ms O’Sullivan did step aside as Chair and was replaced by Mr Mackenzie”. This appears to be a suggestion that the recusal application, whilst dismissed by the Tribunal, was actually then honoured by the Tribunal.

[54] That suggestion by Mr Goddard is incorrect. Ms O’Sullivan was on parental leave for several months over the period that this case was set down to be heard. The file

was simply allocated to another Member of the Tribunal.

[55] The recusal process is also mentioned for the length of the recusal decision (said to be longer than the Tribunal's determination on the charges) and that it is said to contain unjustified criticisms of Mr Goddard. This appears to be posited as another reason for a costs award.

[56] The recusal decision, contained within a Minute covering other several other issues, is eight pages long. The Tribunal's decision on the charge was 22 pages long.

[57] In any event, the recusal application was dismissed. An application for costs is not an opportunity to relitigate it. The submissions made seemingly would seek to have the Tribunal now determine that the recusal application had merit and should count towards costs.

[58] The only relevance now of the recusal application is that it might result in an award of costs against Mrs Stairmand. The application was without merit. It failed to grasp the fundamental principles of judicial recusal in New Zealand law. It appears to have been brought out of dissatisfaction with the justified criticism of the new and conflicting evidence filed by Mrs Stairmand with her submissions, which led to the adjournment. It was an unfortunate application piled on top of an unfortunate derailment of the hearing.

[59] Mr Goddard then suggests that indemnity costs should be awarded. This submissions fails to appreciate the test for indemnity costs. We borrow here from the civil common law. Indemnity costs are only awarded in rare cases, commonly involving breaches of confidence or flagrant misconduct.[19] Courts generally award indemnity costs when a party has behaved extremely badly.[20] The Court of Appeal has outlined situations that could meet the very high threshold, including allegations of fraud despite knowing the claim is false, particular misconduct that causes loss of time to the court and to other parties and making allegations which ought never to have been made (i.e., a "hopeless case").[21] The onus is on the party seeking indemnity or increased costs to prove they should be awarded.[22]

[60] There is plainly no basis for indemnity costs in this case.

[61] Much is made in the costs application of the inapplicability of the restraint guidelines. We make the same point as earlier however – this was a charge of serious misconduct, not a charge of a breach of any guidelines. The guidelines were offered as just that, and came in submissions. The charge did not rise or fall on the standing of the

[19] *Prebble v Awatere Huata (No 2)* [2005] NZSC 18, [2005] 2 NZLR 467 at [6].
[20] *Bradbury v Westpac Banking Corp* [2009] NZCA 234, [2009] 3 NZLR 400 at [29].
[21] *Bradbury* (at [29]).
[22] *Prasad v Prasad* [2016] NZHC 474 at [36]; citing *Strachan v Denbigh Property Ltd* HC Palmerston North CIV-2010-454-232, 3 June 2011 at [27].

guidelines.

[62] Overall, we do not consider there have been any unreasonable steps taken by the CAC or obvious evidential insufficiencies such that the charge should never have occurred. The CAC is required to refer any matter "that might possibly constitute serious misconduct" to the Tribunal. In this case the CAC discharged its statutory function. Its approach through the proceedings was reasonable, responsible and fair to Mrs Stairmand. As noted in our charge decision and again in this decision, use of force in ECE settings is a difficult area to regulate. And again, even Mrs Stairmand has previously suggested (via Mr Goddard's submissions) that a misconduct charge might be made out. If we had acceded to Mr Goddard's submissions, it would be likely that a costs award against Mrs Stairmand would have been made.

[63] Balancing all of the above factors, in our evaluation we do not consider that this is a case where costs should be awarded against the CAC.

[64] Even if we had considered that costs might be due, there may then have been a significant offset for the wasted costs caused by Mrs Stairmand (through the hearing being adjourned and the recusal application).

[65] We would also have been required to determine the reasonableness of the costs incurred and claimed. Particularly, we would have been curious as to how another $7,038 (including GST) was spent from receipt of our charge decision to the filing of this costs and non-publication application. This level of costs would have required some exploration, both as to reasonableness and how it is to be reconciled with the claim of impecuniosity from Mrs Stairmand.

[66] There is no order as to costs.

[67] This decision will not be released beyond the parties for ten working days, to allow Mrs Stairmand to inform any persons before the decisions of the Tribunal become public.

T J Mackenzie

Deputy Chair