

NZTDT 2020/20

BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

UNDER the Education Act 1989

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

BETWEEN **THE COMPLAINTS ASSESSMENT COMMITTEE**

Referrer

AND **TEACHER D**

Respondent

DECISION OF THE TRIBUNAL

Tribunal: Ian Murray (Deputy Chair), Megan Cassidy and Will Flavell

Hearing: Held at Wellington on 27 October 2020 (on the papers) 15

Decision: 15 December 2020

Counsel: Sean Brennan and Nasif Azam for the CAC
Dzintra King for the respondent

Charge

- 1) The Complaints Assessment Committee (**CAC**) has referred a charge to the Tribunal alleging serious misconduct and/or conduct otherwise entitling the Tribunal to exercise its powers. In a Notice of Charge dated 4 June 2020, the CAC alleged that the respondent:
 - a) grabbed a student, twice, using unjustified or unreasonable physical force; and/or
 - b) hit or slapped, with the back of his hand, a student in the face; and/or
 - c) used threatening and/or inappropriate language towards a student.
- 2) The CAC contends that this conduct amounts to serious misconduct pursuant to s 378 of the Education Act 1989 (**the Act**) and rr 9(1)(a) and/or (k) of the Education Rules 2016 (**the Rules**); or conduct that otherwise entitles the Disciplinary Tribunal to exercise its powers under s 404 of the Act.

Factual background

- 3) The hearing took place on the papers. Before the hearing, the parties conferred and submitted an Agreed Summary of Facts (**ASF**), signed by the respondent and counsel for the CAC. The ASF is set out in full:

AGREED SUMMARY OF FACTS

Background

The respondent, TEACHER D, is a fully registered teacher with the registration number [REDACTED]. His practising certificate is due to expire on [REDACTED]. He is currently teaching at the School with conditions applying.

Teacher D was a teacher during the relevant period at (the College).

The Incident

On Wednesday 18 September 2019 Teacher D had been teaching a year 10 class in the final period for the day. The class had packed up and was ready to go home in anticipation of the bell. One of the students (the student), a 14-year-old male, asked Teacher D what time it was. Teacher D told him that everyone would wait for the bell. The student replied that it was 3.15 pm. Teacher D again said that everyone would wait for the bell.

The student began to leave the room. He swore at Teacher D while doing so. As the student exited the classroom into the hallway, Teacher D reached for and grabbed the student's arm and told him to wait like the rest of the students. The student swore at Teacher D and told Teacher D to let go of him. Teacher D let the student go, Teacher D took offence at the student swearing and told him not to talk to him in that manner. The student then swore at Teacher D who threatened him with words to the effect that he would fuck him up. The student said "I'll fuckin kill you" to Teacher D.

In response, Teacher D again grabbed the student and told him that he would do the same to him and pushed the student up against a wall by his collar. As Teacher D held the student against the wall, Teacher D had his hand drawn back as if he was ready to hit the student. There was a general struggle involving mutual pushing and shoving between the two.

While Teacher D held the student against the wall, the student kicked or shinned Teacher D around his left leg or thigh area and then tried to throw a punch. Teacher D blocked the punch and then struck the student on the cheek with his hand.

The bell went and the student left. The strike to the student's face did not cause any injury or markings.

There is agreement that Teacher D swore at and threatened the student in response to the student doing the same to him. This occurred while Teacher D was holding the student and the two were engaged in mutual pushing and shoving. There is some agreement that the student told Teacher D that he would kill him and that Teacher D responded by threatening to hit or "lay out" the student.

Teacher D's response

Teacher D accepts that he grabbed the student twice.

Teacher D also accepts that he struck or hit the student in the face once. Some of the students who witnessed the incident described the strike as a "punch". In relation to striking the student, Teacher D has consistently characterised it as a "quick tap", a "flick" or a "jab" with the back of the hand.

Teacher D also accepts that he threatened to "fuck up" the student, in response to the student's threats to do that to him.

Teacher D accepted that what he has done was wrong and has said that he is "truly sorry and apologetic". He says he has "apologised to his friends, colleagues, [the student], his whanau and most of all to [his] wife", He apologised to the Board and all the students he had taught In his 28 year career. Teacher D felt that he had let everyone down. Teacher D said that he had never physically reached for or grabbed a student as described in this incident in his 28 years as a teacher and that it was very out of character. Despite this, Teacher D said that he did not want to use this as an excuse for what he had done.

Teacher D says his behaviour was reactive to the student showing him disrespect. He also says his reaction may be a consequence of his high blood pressure and/or testosterone.

- 4) We must be satisfied on the balance of probabilities that the CAC has proved the charge. In this case, the respondent accepts that he grabbed the student twice and struck or hit the student in the face once involving a "quick tap", a "flick" or a "jab" with the back of the hand. He also accepts that he threatened to "fuck up" the student, in response to the student's threats to do that to him. Accordingly, we find that the charge has been proved.

Serious misconduct

- 5) The respondent has acknowledged that his conduct amounts to serious misconduct but despite that acknowledgement, it is for the Tribunal to be satisfied that the established conduct amounts to serious misconduct (or conduct otherwise entitling the Tribunal to exercise its powers).
- 6) Section 378 of the Act provides:

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 Education Council's criteria for reporting serious misconduct.*

- 7) The criteria for reporting serious misconduct are found in r 9 of the Rules. The CAC relies on rr 9(1)(a) and (k).

Criteria for reporting serious misconduct

- (1) *A teacher's employer must immediately report to the Education Council in accordance with section 394 of the Act if the employer has reason to believe that the teacher has committed a serious breach of the Code of Professional Responsibility, including (but not limited to) 1 or more of the following:*
- (a) *using unjustified or unreasonable physical force on a child or young person or encouraging another person to do so):*
- ...
- (k) *an act or omission that brings, or is likely to bring, the teaching profession into disrepute.*

Our analysis

- 8) We must be satisfied that the respondent's conduct meets at least one of the definitions of serious misconduct in s 378 of the Act, and that it is of a character or severity that meets the criteria for reporting serious misconduct contained in r 9.
- 9) The Tribunal has considered the use of force by teachers on a number of occasions. The cases cited by the CAC in this case, *CAC v Teacher H*,¹ *CAC v Astwood*,² and *CAC v Taylor*³ are representative of the orthodox position we have adopted in previous cases. Ordinarily behaviour of this kind will be serious misconduct but, as with all cases, we still must make a fact specific analysis of the amount of force used and the context in which it was used.⁴
- 10) A useful starting point is s 139A of the Act which has prohibited the use of force by teachers for the purposes of correction since July 1990.
- 11) Turning to assess the behaviour in this case against the two-stage test in s 378 and rule 9.⁵ Starting first with the effect of the behaviour on students. Because the incident occurred in the school environment, involving a student in the respondent's care and was witnessed by other students, we are satisfied that the respondent's conduct was undoubtedly likely to adversely affect the wellbeing or learning of the student himself and the students who witnessed the incident.
- 12) While the incident involved a relatively brief loss of control, nonetheless the respondent used physical force against a student in front of a class full of other students. Such a response by a teacher and the obvious loss of self-control

¹ *CAC v Teacher H* NZTDT 2019/119.

² *CAC v Astwood* NZTDT 2018/6

³ *CAC v Taylor* (NZTDT 2017-41).

⁴ See for example *CAC v Teacher* NZTDT 2016-50.

⁵ *Teacher Y v Education Council of Aotearoa New Zealand* [2018] NZDC 3141 at [64].

despite the obvious provocation reflects adversely on the respondent's fitness to be a teacher. He could have should have walked away and de-escalated the situation. But he did not.

- 13) The test for deciding whether a teacher's actions are likely to bring the teaching profession into disrepute is informed by the conclusions of the Court in *Collie v Nursing Council of New Zealand*.⁶ It is an objective test and requires consideration of 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 respondent's actions.
- 14) Ordinarily but not invariably the use of physical force against a student for corrective or punishment purposes will bring the teaching profession into disrepute. This was our conclusion in *Taylor*. But we must assess this case on its own facts. Here the teacher scuffled with a student, pushed him against a wall then struck him. He also threatened him. All of that in front of other students. Having considered all of these circumstances, we concluded that reasonable members of the public informed of these facts and circumstances, would reasonably conclude that the reputation and good standing of the profession was lowered by the respondent's actions.
- 15) Moving on to our analysis of Rule 9, it was not contested that this was unjustified or unreasonable physical force on a young person so that the criteria for reporting serious misconduct is made out. We are also satisfied that this was an act or omission that was likely to bring the teaching profession into disrepute.

Penalty

- 16) In *CAC v McMillan*,⁷ we summarised the role of disciplinary proceedings against teachers as:

... to maintain standards so that the public is protected from poor practice and from people unfit to teach. This is done by holding teachers to account, imposing rehabilitative penalties where appropriate, and removing them from the teaching environment when required. This process informs the public and the profession of the standards which teachers are expected to meet, and the consequences of failure to do so when the departure from expected standards is such

⁶ *Collie v Nursing Council of New Zealand* [2001] NZAR 74.

⁷ *CAC v McMillan* NZTDT 2016/52, 23 January 2017, paragraph 23.

that a finding of misconduct or serious misconduct is made. Not only do the public and profession know what is expected of teachers, but the status of the profession is preserved.

- 17) Our powers on a finding of serious misconduct (or an adverse finding) are contained in section 404 of the Act which provides:

404 Powers of Disciplinary Tribunal

- (1) *Following a hearing of a charge of serious misconduct, or a hearing into any matter referred to it by the Complaints Assessment Committee, the Disciplinary Tribunal may do 1 or more of the following:*
- (a) *any of the things that the Complaints Assessment Committee could have done under section 401(2):*
 - (b) *censure the teacher:*
 - (c) *impose conditions on the teacher's practising certificate or authority for a specified period:*
 - (d) *suspend the teacher's practising certificate or authority for a specified period, or until specified conditions are met:*
 - (e) *annotate the register or the list of authorised persons in a specified manner:*
 - (f) *impose a fine on the teacher not exceeding \$3,000:*
 - (g) *order that the teacher's registration or authority or practising certificate be cancelled:*
 - (h) *require any party to the hearing to pay costs to any other party:*
 - (i) *require any party to pay a sum to the Education Council in respect of the costs of conducting the hearing:*
 - (j) *direct the Education Council to impose conditions on any subsequent practising certificate issued to the teacher.*

CAC submissions on penalty

- 18) The CAC made the following submissions as to the seriousness of the offending and suggested penalty:
- a) The starting point of a disciplinary response or penalty for the circumstances of this case should be cancellation;
 - b) However, matters which ameliorate the seriousness of the offending and which, in the CAC's submissions, ultimately mean this case can be dealt with

by way of a disciplinary response short of cancellation;

- c) There are mitigating features including:
- i. there was a degree of provocation;
 - ii. he was assaulted by the student;
 - iii. he immediately reported the matter;
 - iv. he made full and frank admissions and apologised;
 - v. he has an exemplary and long history of teaching and contributing to the College and was well-respected amongst his colleagues and students; and
 - vi. has demonstrated remorse, insight and taken full responsibility for his actions.
- d) Censure, annotation and conditions will suffice to serve those purposes.

Respondent's submissions

- 19) The respondent's essential submission on outcome was:

6 In terms of the submissions of the CAC regarding penalty, the respondent agrees that censure, annotation of the register and the imposition of some conditions on his practising certificate are appropriate.

7 The respondent says that the condition proposed at [3(b)(i)] is already being addressed at the College. This was part of a measure that was agreed to enable the respondent to continue teaching while the legal matter proceeded.

8 The respondent says that any anger and conflict management courses would provide him with useful knowledge.

9 He agrees to provide his current and any prospective employer with a copy of the Tribunal's decision for a period of two years from the date of the Tribunal's decision.

Our analysis

- 20) Looking first at the ordinary approach to this type of conduct. we noted: ⁸
- We repeat as we have said in a number of cases in the past that the use of physical force – even at a lower level such as evident in this case – is unacceptable in New Zealand schools, and that any teacher who uses physical force contrary to section [139A] puts his or her status as a teacher in peril.
- 21) Ultimately, however we agree with both parties that cancellation of Teacher D's registration is not required. We agree with the CAC that, while this is relatively serious, there are powerful mitigating features. In the end the respondent's attitude and response to the offending means that a penalty short of cancellation is available and appropriate.
- 22) We consider the appropriate penalty is one that notes the seriousness of what occurred but also recognises the positives and allows Teacher D to continue with his rehabilitation from what has occurred. We consider the appropriate outcome is:
- a) Censure;
 - b) Conditions requiring the respondent to:
 - i) undergo professional mentoring and/or supervision for a period of 12 months following the Tribunal's decision and
 - ii) complete course(s) approved by the Manager Professional Responsibility of the Teaching Council in anger and conflict management and/or managing difficult students and classroom situations within the next 12 months.
 - iii) advise his current and prospective employer(s) of the Tribunal's decision, and to provide them a copy of the decision for a period of two years from the date of the Tribunal's decision; and
 - c) annotation of the censure for two years, and of the conditions until completion.

Costs

- 23) The CAC sought a contribution of 40% of its costs under s 404(1)(h).
- 24) The Tribunal has previously indicated that such a level of costs will ordinarily be appropriate in cases determined on the papers. We see no reason to depart from

⁸ *CAC v Teacher NZTDT* 2014-49, 20 May 2014.

our usual approach.

- 25) Therefore, the Tribunal orders the respondent to pay 40% of the CAC's actual and reasonable costs under s 404(1)(h) and the Tribunal's costs under s 404(1)(i).
- 26) The Tribunal delegates to the Deputy Chair authority to determine the quantum of those costs and issues the following directions:
- (a) Within 10 working days of the date of this decision the CAC is to file and serve on the respondent a schedule of its costs; and
 - (b) Within a further 10 working days the respondent is to file with the Tribunal and serve on the CAC any submissions she wishes to make in relation to the costs of the Tribunal or CAC.
- 27) The Deputy Chair will then determine the total costs to be paid.

Non-publication

- 28) We make an order prohibiting publication of the name of the student involved in the incident in accordance with the protections afforded to young persons in Rules 34 of the Teaching Council Rules 2016.
- 29) As far as the Tribunal is aware, presently there are no interim orders prohibiting publication of particulars identifying the respondent or the name of the School. However, the respondent seeks an order for permanent non-publication of those details. The respondent's grounds for non-publication are set out succinctly in his submissions:
- 23. The public and private interests must be weighed by the Tribunal. The possibility of damage to the wellbeing of the respondent in a small community and to standing of the school within the community must be strong factors in making an assessment that the respondent should have name suppression.
- 30) A secondary ground on which suppression of those details is sought is protection of the student. The basis for that argument is expressed in this way:
- 14. The respondent is concerned that publishing his name may lead to the identification of the student.
 - 15. The Town is a small community. It would be embarrassing for the student to be identified as recipient of the respondent's inappropriate actions.

General Principles on Non-Publication

- 31) Section 405(3) provides that hearings of this Tribunal are public. This is consistent with the principle of open justice. The provision is subject to subsections (4) and (5) which allow for whole or part of the hearing to be in private and for deliberations to be in private. Subsection (6) provides:
- (6) *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.*
- 32) In deciding if it is proper to make an order prohibiting publication, we must consider relevant individual interests as well as the public interest. If we decide that it is proper, then we may make such an order.
- 33) As we noted in *CAC v Finch*,⁹ we apply a two-stage approach. The first stage involves an assessment of whether the particular consequence is "likely" to follow. This simply means an "appreciable" or "real" risk. If we are so satisfied, our discretion to forbid publication is engaged and we must determine whether it is proper for the presumption in favour of open justice to yield. There is no onus on the applicant and that the question is simply whether the circumstances justify an exception to the fundamental principle.¹⁰
- 34) The correct approach is to strike a balance between open justice considerations and the interests of the party who seeks suppression.¹¹
- 35) Starting with the first ground on which suppression is sought, which is the impact on the respondent. We simply have insufficient information to justify suppression. We would have expected considerably more information before the principle of

⁹ *CAC v Finch* NZTDT 2016/11

¹⁰ *ASB Bank Ltd v AB* [2010] 3 NZLR 427(HC) at [14].

¹¹ *Hart v Standards Committee* (No 1) of the New Zealand Law Society [2012] NZSC4 at [3].

open justice could yield to the interests of the respondent.

- 36) Turning to the effect on the school, we have recently comprehensively reviewed the principles for suppression of schools.¹² We made the following observations:

29. Where the request for a non-publication order is made by a school or other person involved in the disciplinary proceedings, the threshold can possibly be somewhat relaxed, as the public interest in publication of the name of a teacher who has engaged in professional misconduct, and the protective effects which publication can produce, are not involved. But nevertheless, the underlying and fundamental principle is that of open justice, and the presumption of open justice must be displaced by more than mere assertion.

30. In order to justify a conclusion that it is proper to order name suppression for a school there must be some evidence of a real risk that publication will cause real adverse effects which are at least more than speculative. It must be clear that such potential effects are likely to go beyond the normal embarrassment or disruption a school might suffer where one of its teachers is found to have engaged in professional misconduct. A bare assertion by a school, without evidence, that it will suffer beyond the norm will not usually be enough, although that possibility cannot be excluded.

- 37) We consider the effect on the School is largely speculative and we concluded that any consequences are unlikely “to go beyond the normal embarrassment or disruption a school might suffer where one of its teachers is found to have engaged in professional misconduct”. So, we have concluded that this ground does not justify suppression.

- 38) Regarding the likelihood of identification of the student, we were more troubled by this ground and gave this issue careful consideration. We were also assisted by the responsible position the CAC took in their submissions:

The primary concern for the Committee is the protection of the student from further harm. If the Tribunal accepts that publication of the respondent's name is likely to lead to the identification of the student and result in harm to them, then the Committee does not oppose name suppression for the respondent. However, no

¹² CAC v Taylor (NZTDT 2019/ 92).

evidence has been produced of the likelihood of those consequences and the Committee submits that the balancing of open justice and risk in this case is addressed by ordering non-publication of the student's name alone.

- 39) Like the CAC, our primary concern is protection of the student. The information provided in support of this ground was very sparse and it did not assist us in any material way in making this decision. An issue of this importance deserved far more than the two paragraphs it was given in the respondent's submissions. However, after careful consideration, we could not shake the genuinely held concern that identification of the teacher, the school or even the location of the school could identify the student.
- 40) The Town is a small town of around 5000 people with only a handful of schools. We held real concerns that because of the role the student played in the incident there was a risk of bullying and further victimisation if it became known that he was the student involved. As a result, despite the unfortunate lack of information provided in support of the application, we have decided to grant the application.
- 41) On balance, we have decided that it is proper to make an order under s 405(6) for non-publication of the student's name, the respondent's name, the geographical location of the school and the name of the school.



Ian Murray

Deputy Chair

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

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