BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

NZTDT 2020/24

IN THE MATTER	of the Education Act 1989
AND	
IN THE MATTER	of a charge referred by the Complaints Assessment Committee to the New Zealand Teachers Disciplinary Tribunal
BETWEEN	**COMPLAINTS ASSESSMENT COMMITTEE**
AND	**TEACHER K** **Respondent**

TRIBUNAL DECISION DATED 21 JANUARY 2021

HEARING: Held on the papers on 29 September 2020

TRIBUNAL: Theo Baker (Chair)

Puti Gardiner and Sue Ngārimu (members)

REPRESENTATION: Ms Paterson and Ms Lim for the CAC

Mr Smith for the respondent

1. In a Notice of Charge dated 23 June 2020, the Complaints Assessment Committee (**CAC**) alleged that on or about 24 July 2019, while teaching at Centre 1 (**the Centre**), Teacher K (**the respondent**), smacked her 2-year-old child, a student at the Centre, on his nappy.

2. It was alleged that the conduct amounted to serious misconduct under section 378 of the Education Act 1989 (**the Act**) and rule 9(1)(a) of the Teaching Council Rules (**the Rules**), or alternatively amounts to conduct otherwise entitling the Tribunal to exercise its powers under section 404 of the Act.

3. We must first decide if the CAC has proved the allegations in the charge. If we are satisfied on the balance of probabilities that the conduct occurred, we may then consider whether the conduct amounts to serious misconduct.

Summary of decision

4. We found that the respondent smacked her child on his nappy and, for the reasons outlined in paragraphs 27 to 32, this amounts to serious misconduct.

5. We ordered a condition on the respondent's practising certificate that she have a mentor for one year and costs of 40%.

6. We made an order for non-publication of the name of Child A and identifying details, which includes the name of the respondent and any Centre referred to in the evidence.

Evidence

7. The parties conferred and filed an agreed statement of the facts to support the charge. We were told that Teacher K is a registered teacher with a provisional practising certificate.

8. In the week of 8 July 2019, the respondent had been in New Zealand for approximately three weeks, after emigrating from South Africa on 15 June 2019. She was employed as a teacher at Centre 1, where her two-year-old son, Child A, was enrolled. The respondent was in the process of completing the Centre's 10- week induction programme, having begun it on 2 July 2019.

9. Around lunchtime on an unspecified day during the week of 8 July 2019, the respondent told the Infant Team Leader at the Centre that her son was being extremely difficult that morning, getting upset, crying and smacking her for no reason. The respondent said that she took Child A into the sleep room to "give him a hiding"

after feeling frustrated with his behaviour. She smacked Child A once on the bottom, while he was wearing a nappy. The respondent said that she then returned to the main room with Child A. Child A was still upset but was no longer hysterical.

10. Following the disclosure there was an internal investigation, during the course of which the respondent explained the difficulties she had been facing, including her mother's dementia, immigration problems, and bullying from a colleague at the Centre. She was issued with a Final Warning on 14 August 2019. On 27 September 2019, the respondent resigned from the Centre, and is now employed elsewhere.

11. In her response to the Mandatory Report to the Teaching Council (**the Council**), the respondent said that the smack was light and was to get his attention and not intended to punish him or hurt him in any way. She thought it was acceptable because Child A was her own child. The respondent described her conduct as a "horrible uneducated mistake", and that it was common practice in South Africa to be able to discipline your own child without being abusive, adding that it was something she did not really practise as a mother in South Africa. She has since completed a course on the Fundamentals of Child Protection so that she can be confident as a parent and teacher.

12. The respondent also said:

> *I most sincerely regret and apologise for the inconvenience and trouble that has been caused through this unfortunate event and mostly because I never want to harm any of my own children or children in my care.*

13. At a meeting with the Complaints Assessment Committee the respondent explained that she had said she had given her son a "hiding" because there is only one word in Afrikaans for "smack" and that she translated it directly into English.

Findings

14. We are satisfied that the respondent smacked Child A once on the bottom while he was wearing a nappy. The factual allegation in the charge is therefore proved. The CAC has not argued that there was anything more than that, and so we do not need to place any significance on the respondent's use of the word, "hiding".

Serious misconduct

15. The CAC contends first that the conduct amounts to serious misconduct under section

378 of the Act and rule 9(1)(a) of the Rules.

16. Section 378 of the Act is an interpretation section. Serious misconduct is defined 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 one or more students;

(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.

17. The criteria for reporting serious misconduct referred to in section 378 (b) are found in rule 9 of the Rules and the CAC relies on rule 9(1)(a):

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:

CAC submissions

18. The CAC submitted that this conduct meets the first two definitions in paragraph (a) in section 378:

a) Adversely affects or is likely to adversely affect the wellbeing or learning of 1 or more students:

b) May bring the teaching profession into disrepute.

19. The CAC submitted that the respondent's conduct is of a character and severity that meets the criteria for reporting serious misconduct contained in the Rules, specifically, rule 9(1)(a) (using unjustified or unreasonable physical force on a child or young person or encouraging another person to do so). Rule 9(2) of the Rules makes it clear

that physical abuse is reportable whether it occurs as a number of acts forming part of a pattern of behaviour, or a single act.

20. The CAC submitted that the respondent's actions involved a breach of standards set out in the Code of Professional Responsibility (**Code**) and therefore supports a finding that this was conduct that risks bringing the teaching profession into disrepute. Specifically, the respondent's actions were contrary to Clause 2.1 (promoting the wellbeing of learners and protecting them from harm). The CAC submitted that the guidance suggests inappropriate handling such as physically grabbing, shoving or pushing, or using physical force to manage a learner's behaviour is an example of conduct which will not comply with clause 2.1 of the Code.

21. The CAC reminded us:

a) Section 139A of the Act provides that teachers employed by registered schools are prohibited from using force "by way of correction or punishment" towards any child or young person at the school. As the Tribunal stated in *CAC v Rangihau*[1] it is incumbent on all the teaching profession to have a clear appreciation of the prohibition on the use of corrective and disciplinary force under s 139A of the Act.

b) The importance of ensuring the protection and safety of children in education settings has been reinforced by the enactment of the Children's Act 2014,[2] and the amendments to that Act in 2015. The Tribunal in *CAC v Mackey*[3] found that the Children's Act reinforced the importance of closely scrutinising the ongoing fitness to teacher of any practitioner who faces a disciplinary charge for a behaviour of a type that may pose an ongoing risk to students.

c) The Tribunal in NZTDT 2014/18[4] stated that any breaches of the Council's Code of Ethics for Certificated Teachers (which has been replaced by the Code of Professional Responsibility) will be a highly relevant consideration as to whether there has been serious misconduct. The Code of Professional Responsibility relevantly provides that teachers "will work in the best interests of learners by promoting the wellbeing of learners and protecting them from harm", and that

[1] *CAC v Rangihau* NZTDT 2016/18, at [58]
[2] Formerly the Vulnerable Children's Act 2014
[3] *CAC v Mackey* NZTDT 2016-60, 24 February 2017
[4] NZTDT 2014-18, 5 June 2016 at pages 5-6

teachers shall "manage the learning setting…to maximise learners' physical…and emotional safety".[20]

d) The Tribunal has also affirmed that the use of force for a corrective purpose, even if no aggression or anger is involved, will typically amount to serious misconduct.[5]

e) In *CAC v Whelch*, the Tribunal considered section 139A of the Act, considered that the section "makes it clear that a teacher has no unique right to use force" and that "Teachers must be careful not to abuse the position of authority that they have in a classroom".[6] In *CAC v Batang*, it was stated that "whether the use of force is for punishment or corrective purposes does not necessarily make the conduct more or less serious; rather, s 139A makes it clear that discipline is not a justification or excuse for the use of violence".[7]

22. The CAC submitted that the conduct in the present case did amount to the use of unjustified or unreasonable force and that there was no reasonable basis on which a teacher in the position of the respondent could have been justified in smacking Child A. It was force used for the purposes of correction and cannot be justified.

23. The CAC acknowledged that this case clearly falls at the lower end of the spectrum of such conduct but nevertheless meets the seriousness threshold set out in rule 9(1)(a).

Respondent submissions

24. For the respondent, Mr Smith submitted that the incident was at the lower end of the spectrum. He said that the respondent accepts that to apply force to a child in any circumstance is contrary to the laws of New Zealand, good parenting and guardianship and is not something that has ever happened to her in work or family life; the incident was completely out of character.

25. It was accepted that the conduct met the first part of the test for serious misconduct, but that the matter is finely balanced on the second part. It was submitted that there is an obvious tension between whether the respondent was acting as a parent or as a teacher at the time of the incident. There was no evidence of ongoing harm and no involvement of any agency in the assessment of ongoing harm to Child A. We were

[5] *CAC v Haycock* NZTDT 2016-2, 22 July 2016
[6] *CAC v Whelch* NZTDT 2018-4 at [16]
[7] *CAC v Batang* NZTDT 2018-47 at [10]

asked to consider the nature and circumstances and proportionality in the gravity of a finding of serious misconduct when all facts are considered.

Discussion

26. There is no dispute that the first part of the test for serious misconduct is met. We are satisfied that the conduct was likely to adversely affect Child A's wellbeing. We also find that it reflects adversely on the respondent's fitness to be a teacher; smacking any child is not the conduct of a competent, fit teacher. We also find that it "may" bring the reputation of the teaching profession into disrepute. Unlike rule 9(1)(k), the first part of the serious misconduct definition under paragraph (a) in section 378[8] does not require us to find it is "likely" to do so. In summary, all three definitions of serious misconduct in paragraph (a) are met.

27. We agree with the parties that this is not at the most serious end of the spectrum and have considered whether it is of a character or severity to meet the second part of the definition in paragraph (b).

28. Since 19 May 2018,[9] a serious breach of the Code is a basis for a mandatory referral by an employer to the Council. Such a breach includes, but is not limited to, any of the grounds listed in paragraphs (a) to (k) of the Rules. In its earlier form, Rule 9 made no reference to the Code or its predecessor, the Code of Ethics for Certified Teachers. It was in that context that comments were made in the decision 2018/14 that a breach of the Code of Ethics is a highly relevant consideration. Now that the Rule has been replaced, that statement has less relevance.

29. The Notice of Charge has appropriately referred to rule 9(1)(a). It is implicit that using unjustified or unreasonable physical force on a child is a serious breach of the Code. This is in contrast to the previous rule 9(1)(a) which referred to physical abuse of a child. The new wording is consistent with the numerous cases in which we have found that unjustified or unreasonable physical force amounts to serious misconduct.[10]

30. In *CAC v Risuleo*[11] we made some observations about the changes in society's tolerance corporal punishment and the use of force with children. They are relevant to

[8] Set out above in paragraph 16
[9] Rule 9 was replaced on 19 May 2018, by rule 6 of the Education Council Amendment Rules 2018
[10] See, for example, *CAC v Rowlingson*, NZTDT2015/54, 9 May 2016; *CAC v Haycock* NZTDT 2016/2, 22 July 2016 CAC v *CAC v Maeva* 2016/37, 24 May 2017
[11] *CAC v Risuleo* NZTDT 2018-8, 17 September 2018

the present case:

> [26] Society's view of adults' use of physical force on children, whether in places of learning or in the home has undergone a major refocus over recent decades. This is reflected in our legislation. The use of the cane, strap or ruler for punishment or classroom management was commonplace in schools 50 years ago. Treatment of children that would not be tolerated if perpetrated by a stranger was permitted and endorsed where the child had a relationship with the adult either in a family or school context. Perversely, it seems, the greater the degree of the child's trust generated by the nature of the relationship, the more likely society condoned the adult's assault on the child.
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> [27] Twenty-seven years ago s 139A was inserted into the Act.[12] This prohibits the use of "force, by way of correction or punishment" by any employee or manager in "early childhood services or registered schools."[13] Until it was removed by the Crimes (Substituted Section 59) Amendment Act 2007, parents and guardians were exempted under s 139A. In other words, a teacher could hit their own child for the purposes of correction or punishment, but not other students. This was consistent with s 59 of the Crimes Act 1961 which at that time justified parental "force by way of correction towards [a] child, if the force used is reasonable in the circumstances." That justification was explicitly reversed with the 2007 amendment. This marks society's increasing aversion to the use of force by adults on children, no matter what the relationship, and bringing it in line with the long-held intolerance of assaults on adults.

31. The respondent's actions in the present case constitute a minor assault.[14] There are various cases where we have found that minor assaults on children amount to serious misconduct.[15] We accept the CAC submission that this smack was for punishment or corrective purposes and therefore contravened section 139A. Smacking a child is simply unacceptable in today's places of learning and will not be tolerated. It is difficult to imagine a case where smacking a baby will not amount to serious misconduct and we make that finding in this case.

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[12] Amended by s 28 of the Education Amendment Act 1990
[13] The word "services" was substituted for "centre" by the Education Amendment Act 2006
[14] Assault is defined in section 2 of the Crimes Act 1961 as intentionally applying or attempting to apply force to the person of another
[15] See note 10 above.

Penalty

32. Section 404 of the Act provides:

> ***404 Powers of Disciplinary Tribunal***
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> *(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 Teaching Council in respect of the costs of conducting the hearing:*
> *(j) direct the Teaching Council to impose conditions on any subsequent practising certificate issued to the teacher*

CAC submissions

33. The CAC set out the penalty principles and sought a censure and a condition on the respondent's practising certificate that she have a mentor for one year. The respondent accepted that this was an appropriate penalty.

34. The CAC referred to the following comparable cases:

a) In *CAC v Haycock*[16] we found serious misconduct where a teacher had lightly smacked a boy on the bottom and asked him to sit down. The rest of the class

[16] *CAC v Haycock* NZTDT 2016/2, 22 July 2016

laughed. We agreed that the smacking was very much at the lower end of the scale of force and accepted the teacher's explanation that the incident did not arise out of a loss of temper, anger or aggression. The incident adversely affected the student, embarrassing him in front of his peers and causing him to cry. We considered that the circumstances were "one of those rare situations in which, although the complainant has managed to establish serious misconduct, the case is not serious enough to justify the imposition of a disciplinary penalty". The Tribunal noted that as soon as the teacher realised his conduct had an adverse impact on the student, he did everything he could to retrieve the situation by telling the class that what he had done was wrong, apologising to the student, and informing a staff member of the incident and asking her to put in place support for the student.

b) In *CAC v Dinsdale*,[17] a teacher smacked a two-year-old child, "Child O", on the hand after Child O hit another child and on another occasion, she struck Child O's hand twice, while saying in a stern tone "kati, kati". We imposed a penalty of censure, annotation of the register for a period of two years, and imposed conditions on the teacher's practising certificate requiring her to provide the Tribunal's decision to any current or prospective education sector employer for a period of two years, and to undertake a course in behavioural management.

c) In *CAC v Carmen*[18] a teacher grabbed a two-year-old child by the back of her sweatshirt and letting her go, causing the child to drop to the floor. The teacher was feeling frustrated with the child for not getting out of bed. We found that the incident was isolated, and accepted that the teacher was not well at the time, which affected her resilience and tolerance levels, and therefore her judgement and reactions. We imposed a penalty of censure, annotation of the register for one year, and conditions on the teacher's practising certificate requiring her to show any employer a copy of the decision for a period of one year and requiring her to undergo mentoring.

35. It was also acknowledged in mitigation that the respondent:

[17] *CAC v Dinsdale* NZTDT 2109/42, 28 January 2020
[18] *CAC v Carmen* NZTDT 2018.21, 5 February 2019

a) has no previous disciplinary history;

b) has expressed remorse and insight into her conduct, and has fully cooperated with the disciplinary process;

c) The respondent told another staff member about the incident on the same day, and when the staff member advised her that she should not have smacked her child, immediately took responsibility for her conduct;

d) has since completed a course on the Fundamentals of Child Protection to ensure that she fully understands and can comply with her obligations going forward.

36. The CAC submitted that the conduct in the present case was less serious than *Dinsdale* and similar to *Carmen* and *Haycock*.

37. Mr Smith emphasised that the respondent:

a) is only facing this charge by virtue of her honesty;

b) through further education, has taken steps to ensure that she never finds herself in this position again;

c) moved to a new pre-school shortly after this incident and the Chairman of that employer has written a favourable reference which confirms that the respondent fully disclosed this issue before she was employed.

38. Mr Smith advised that the respondent accepts that what she did was wrong and she offers her apology to the teaching profession and to Child A. A letter of apology was included in the documents before us. It concluded:

I most sincerely regret and apologise for the inconvenience and trouble that has been caused through this unfortunate event and mostly because I never ever want to harm any of my own children or children under my care.

39. We also received a number of references and letters in support of the respondent from the Chairman and Centre Manager of the respondent's current employer, the Principals of some former employers in South Africa, and several former teaching colleagues. They all speak very highly of her passion for teaching and commitment to children. In particular, her current Centre Manager says that the respondent has been "eager to equip and develop herself as an educator in the New Zealand context and make the necessary cultural adjustments to effectively maximize her impact on the

learning and achievement of all the tamariki in [the] centre...She is intentionally focussed on the learning, safety and wellbeing of each child in her care."

Discussion

40. In considering the appropriate penalty to impose in the present case, we have been guided by the principles traversed in *Roberts v Professional Conduct Committee of the Nursing Council of New Zealand*[19] and further considered in the context of the Teachers Disciplinary Tribunal *CAC v Cook* NZTDT 2018-50.[20]

41. We must consider the range of options under section 404 and impose the least restrictive penalty that is fair, reasonable and proportionate, and is consistent with other similar cases.

42. We accept that the respondent has learned since this incident and there is a very low likelihood of any repetition of such conduct. The investigation and disciplinary processes run by her employer and the Council will have been a salutary lesson for her and served the purposes of protecting the public and rehabilitation.

43. The respondent's one smack is comparable to that in *Haycock.* On the one hand the fact that the teacher in *Haycock* was not angry might have made it less serious but the child in this case is unlikely to have suffered the embarrassment that the boy in *Haycock* did. The significance of the lack of anger or frustration is the reduction of risk of unintended harm.

44. We accept that if the respondent had not told her colleague what she had just done, then it is unlikely anyone would have known about the smack, but that is not the same as a teacher who immediately reports their own behaviour, knowing they have erred and there will be consequences; the respondent was not aware she had done wrong.

45. That said, we have taken into account the fact that the respondent had not long been in the country and was able to take up a teaching role without being fully informed of the differences in the law between the two countries, and we have decided not to impose a censure on this occasion. Her lack of knowledge does not excuse her conduct but in the circumstances of this case, it is a relevant to our decision on

[19] *Roberts v Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354 at [51]
[20] *CAC v Cook* NZTDT 2018-50, 11 April 2019

penalty.

46. We acknowledge the steps the respondent has taken to adapt to a new culture, but agree with the CAC that she would benefit from further mentoring, probably from someone outside the Centre. We will leave approval of the mentor to the Council. We therefore impose the following penalty:

Under section 404(1)(c) we impose a condition on the respondent's practising certificate for a period of 1 year from the date of this decision the respondent must appoint a mentor (to be approved by the Teaching Council) for a period of one year. The mentor will support the respondent in her ongoing professional development in understanding the cultural and legal expectations in Aotearoa New Zealand

Non-publication

47. The respondent applied for name suppression in order to protect the interests of Child A and her other children. Mr Smith referred to rule 34 of the Teaching Council Rules 2016 which requires the Tribunal to consider whether it is proper to make a non-publication order under the Act of the name of any child or young person who gives evidence or where evidence includes details of a child or young person.

48. The CAC does not oppose an order for non-publication of the respondent's name on the ground that publication would risk identification of the child.

49. We agree that the child's name should not be published and therefore neither should the respondent's. We think it is proper to make an order under section 405(6)[21] prohibiting publication of the name of Child A and any identifying details, which includes the name of the respondent, and any employer referred to in the evidence before us. We have not considered the interests of the respondent's other children in reaching this decision, but the effect of it will be that their names are also not to be published.

Costs

50. The parties agreed that a contribution of 40% of the CAC and Tribunal costs is appropriate. This is consistent with other cases where the parties have agreed the facts and there has been co-operation by the respondent. We therefore order that the respondent contribute 40% of the CAC costs under section 404(1)(h) and 40% of the

[21] Since 1 August 2020, section 501(6) of the Education and Training Act 2020 Rule 34(4)

Tribunal costs under section 404(1)(i). We also direct:

a) The CAC and the Tribunal secretary are each to file a schedule of costs by **25 January 2021**.

b) If the respondent wishes to respond to any matter, she should do so by The respondent is to reply by **5 February 2021**. That may include an affidavit of financial means.

51. The Tribunal delegates to the Chairperson the authority to fix the final quantum of costs.

Theo Baker
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).