BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

NZTDT 2019 /125

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

DECISION OF NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

HEARING:	31 March 2020
TRIBUNAL:	John Hannan (Deputy Chair), Aimee Hammond, Nikki Parsons
DECISION:	1 April 2020
COUNSEL:	A Lewis for Complaints Assessment Committee A Foster for Respondent

Introduction

1. By notice of charge dated 18 November 2019 the Complaints Assessment Committee (CAC) charges that the respondent in May 2018 hit his 12 year old son with a belt.

2. The CAC alleges that this conduct amounts to serious misconduct under section 378 of the Education Act 1989 and Rule 9(1)(a) and/or (b) and/or (o) of the Education Council Rules 2016 as they were prior to 18 May 2018 or alternatively Rule 9 (1)(a), (b) and (o) of the Rules as they stood after 18 May 2018, or alternatively is conduct otherwise entitling the Tribunal to exercise its powers under section 404 of the Education Act.

Facts

3. An agreed Summary of Facts, dated 20 December 2019 has been prepared as follows:

> ***Background***
>
> 1. Teacher U (Respondent) is a fully certified teacher. The Respondent was born on [redacted] He gained provisional registration with the Teaching Council in 2005 before moving to full registration in March 2007.
> 2. The Respondent worked at 'the School' from 2005 until 2012 before working at 'the High School' in 2013.
> 3. The Respondent has been working at 'the Intermediate School' since 2014. He was working there at the time of the incident the subject of the Notice of Charge. The Respondent continues to work at the Intermediate School.
>
> ***Police warning***
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> 4. On 30 April 2019, the Council received a Police vetting report (attached and marked "1") as part of the Respondent's application to renew his practicing certificate. The notes on the Respondent's vetting report said:
>
> > *2018: The applicant received a Verbal Warning for Assaults Child (Other Weapon)/ after the applicant admitted to hitting a child in his care (then aged 12 years) in his home environment with a belt as a form of discipline. The applicant was remorseful for his action and engaged with support services.*
>
> 5. The date of the incident was on or about 3 May 2018 and involved the Respondent's son.
> 6. On 3 July 2019 the Council received a copy of the Respondent's Case Summary Report from Police (attached and marked "2"). The report includes

a note that states:

Incident:

The following information has been copied verbatim from notifier's email regarding the incident.

The classroom teacher *- This letter confirms what I have been told by Teacher U's son.*

On Friday the 4th of May Teacher U' s son told me that he was getting a hiding at home, but not long afterwards he said he was only joking. Then after school on Tuesday the 8th of May Teacher U's son wanted to speak to me privately. He told me that he was getting a hiding from his dad with a belt and he wasn't joking around as he was crying. He also showed me a bruise on his leg.

The next day Wednesday the 9th of May I advised my leader of learning.

The senior ***teacher*** *- Teacher U's son spoke to me about being given a hiding with a belt at home by his father - Teacher U This was first brought to my attention by [classroom teacher] who expressed concerns about this.*

Teacher U's son shared with me that his father was giving him a hiding with a belt in the presence of his mum for the complaints that his dad had to deal with - coming from his classroom teachers. He did say that it was not the first time that he got the strap. I saw an obvious blue mark on his upper leg caused by the belt [according to Teacher U's son was feeling sad and hard done by.

I told Teacher U's son that he could share that info with the principal which he did.

Any other information:

It was not until Monday 14th May 2018 that Notifier was aware of the information and spoke with Teacher U's son on the 15th. Teacher U's son did not want his parents made aware by the notifier of his disclosure which notifier has kept but is contacting Oranga Tamariki as per process.

Teacher U's son did not give an indication that any other incident has taken place since the last incident. He also disclosed that he did not feel unsafe to return home.

Teacher U's son's mother is a school teacher at a primary school.

A teacher has spoken with the parents about Teacher U's son having behavioural issues which notifier believes relates to self-esteem issues. Teacher U's son is described as small built for his age and this may influence the behavioural issues the teacher behaviours are believed to be an issue due to attention seeking.

7. Included in the Summary Report was a note dated 18 May 2018 which said

[redacted] *advises CFI [1] completed, disclosed that dad had hit him with the belt.*

OT[2] spoke to the father of the child. Child has been acting out for a couple of weeks, they have been trying to manage it first with positive parenting and then with negative actions (the hit) child has started not wanting to go to school. There is a new teacher in that class and several children have started acting up as the children all previously got on well with the old teacher and are not liking the change to the new teacher.

The father acknowledges that what he did was wrong and that they are trying to make a plan to help Teacher U's son come to terms with the change. They are putting a mentor in place to take him to school on Friday and integrate him into the new teachers class.

[redacted] *recommendation is that the father receive a warning. The family are engaging well and have put many of their own safety plans into practice and are happy to work with other agencies to assist with Teacher U's son.*

8. On 10 January 2019 the Police recorded in the Summary Report:\

Assault on a child, involving a teacher (his own child)

Alleged offender/family engaged well with service and agencies and were open and forthcoming with information on the incident.

Warning issued and NIA[3] updated.

[1] CFI means "Child Follow-up Interview"

[2] OT means Oranga Tamariki, Ministry for Children

[3] NIA mean s National Intelligence Application.

9. On 24 March 2019 the Police recorded in the Summary Report:

Matter for filing. Warning issued after consultation with OT. Appropriate in circumstances and family engaged with receiving supports. No further action required.

Teacher's Response

10. On 29 May 2019 the Respondent provided the following written response to

the Council:

> *First of all, I am not condoning my actions that afternoon in May and know* this could have been handled better at my end.
>
> *2 incidents had happened at school the first from our son being disrespectful* to his teachers. *There were emails sent between the teachers and myself and I said I would discuss this with my son at home. Both my wife and I did this with some success for a little while. The 2nd email that was received was again for being disrespectful to his class peers and his two teachers.*
>
> *That afternoon I had been filled in by the staff verbally what had happened, upon going home I hit my son with the soft end of a belt. This is the incident which occurred.*
>
> *Upon this OT (Oranga Tamariki) came into work the following week to follow up on the incident which occurred. In hindsight this should never have happened, and I knew this. OT wanted to see what measures I was going to take if this incident was to ever arise again. Outlined in the attachments supplied are an email to Te Reiha of OT and the steps I took to seek guidance around that incident. All of these steps were followed, and some are still on- going now.*
>
> - *The interaction between my nephew and son. Having another male role model in his life along with the many he already has.*
> - *Whanau support - my brother, sister, mother and in laws all know of this incident. As to not hide anything but to seek support and guidance as to not put myself in this predicament again.*
> - *Golf - My son and I both love golf and play every weekend together. Having time together between son and dad to build positive relationships.*
> - *Counselling - there is a counsellor available for access at our sons school and if he was ever to feel under threat again I know he would not hesitate in finding help from whanau or an outside agency and I am more than accepting of this.*
>
> *During this process my current place of employment was aware of what was going on and I disclosed this to our Principal back then as well as our current principal in the role now. I have also enclosed the emails from my current principal as well as the strategies taken back in May to address the issue which were forwarded onto OT. Oranga Tamariki were appreciative that I was being proactive in dealing with the issue which had arose.*

11. The Respondent provided to the Teaching Council an email he sent to Oranga Tamariki on 23 May 2018, which is attached and marked "3".

12. The Respondent also provided a copy of a letter from the Deputy Principal and current acting Principal dated 28 May 2019 (attached and marked **"4").**

Acceptance of Notice of Charge

13. The Respondent accepts that the conduct alleged in the Notice of Charge, including particulars alleged in paragraph 1, amounts to serious misconduct under section 378 of the Education Act 1989 and Rules 9(1)(a), (b), and (o) of the Teaching Council Rules 2016.

4. The respondent has also filed an application for permanent name suppression.

Consent memorandum

5. Counsel for the CAC and counsel for the respondent have jointly filed a Consent Memorandum. The memorandum points out that the respondent has accepted that his conduct amounts to serious misconduct.

6. The consent memorandum says that the reasons for the acceptance by the respondent that this is serious misconduct are that he accepts that teachers face complex ethical dilemmas and professional tensions every day, he understands the overarching expectation that every teacher will apply high professional standards and sound ethical decision-making both within the school environment but also in their private lives, he understands that teachers should act in a way that upholds the reputation of the teaching profession and the trust and confidence of learners, their whānau and the public, and he accepts that his actions did not meet these expectations.

7. The respondent also accepts that his actions breached the Code of Professional Responsibility for Teachers, and that they impact on his fitness to teach and bring the profession into disrepute.

8. The consent memorandum proposes a penalty outcome of censure, conditions requiring the respondent to notify his current employer of the Tribunal decision, and for 2 years to notify all future employers, annotation of the register for period of 2 years, and a contribution of 50% towards the CAC's and the Tribunal's costs.

9. The memorandum specifically says that the CAC has agreed with the proposed penalty on the basis that while assaulting a child is serious, the steps the respondent has taken since the conduct are worthy of recognition. The respondent has acknowledged and admitted that what he did was wrong. The respondent has put

safety plans for the victim in place and is happy to work with other agencies. The respondent cooperated with and engaged well with Police and other agencies. Police considered that a warning was appropriate and a prosecution was not required. There is a reference from the acting principal of the respondent's employing school. The proposed penalty is consistent with cases referred to in a schedule of cases attached to the consent memorandum.

10. Finally, the consent memorandum notes that if the Tribunal is not prepared to deal with the matter in the manner agreed to by the parties, the parties wish to file submissions.

Decision

11. Section 378 of the Education Act 1989 defines "serious misconduct" as behaviour by a teacher that has one or more of the following outcomes, in that it:

    (a) adversely affects, or is likely to adversely affect, the well-being or learning of one or more students; or

    (b) reflects adversely on the teacher's fitness to be a teacher; or

    (c) may bring the Teaching profession into disrepute.

12. As well as having one or more of these effects, the conduct must also be of a character and severity that meets the Teaching Council's criteria for reporting serious misconduct, as found in the Teaching Council Rules 2016. In the present case the most relevant rules are those in the post 18 May 2018 amendments, Rule 9 (1) (a), using unjustified or unreasonable physical force on a child; (b) emotional abuse that causes harm or is likely to cause harm to a child; (k) an act that is likely to bring the teaching profession into disrepute. At least (a) and (k) seem to be clearly engaged at the required level of severity.

13. In terms of the definition of serious misconduct in section 378 of the Education Act 1989, this conduct reflects adversely on the respondent's fitness to practice and is capable of bringing the teaching profession into disrepute. The respondent's use of force to discipline a child is of a character and severity that meets the reporting criteria under Rule 9.

14. The Tribunal finds serious misconduct established. In the circumstances the misconduct is clearly over the line of serious misconduct. The respondent very

deliberately used physical force for the purposes of disciplining his child. This is unlawful. The respondent as a teacher would have known that very well.

15. This is not a case where there has been a sudden and impulsive striking of a child as a result of annoying or provocative behaviour or in a moment of high stress.

16. Neither is this a case where the force used can be regarded as minimal, as there was evidently bruising from the use of the belt. The Tribunal has no evidence of how many blows were struck and so makes no finding on that point. We note however that the child complained of being given a "hiding" with the belt, and effectively the respondent admits that. Clearly distress was produced in the child given the child's complaint.

17. That said, once the matter was raised the respondent immediately acknowledged his conduct was inappropriate and took steps to amend the situation. He has cooperated fully with both Police and the CAC investigations. The Police reports indicate Police are satisfied he has a proper recognition of the situation and has taken steps to avoid a repetition. The Police report notes that "*Alleged offender/family engaged well with service and agencies and were open and forthcoming with information on the incident*". The various steps the respondent has taken and the acknowledgements and admissions he has made indicate a reasonable, dignified and appropriate response. His child was not concerned about returning to the home. This was so far as the Tribunal is aware a one-off incident. So, while this is clearly over the line of serious misconduct, it is not a situation at the more serious end.

Outcome and penalty

18. The primary purposes of professional disciplinary proceedings are the protection of the public and the maintenance of professional standards. In discharging its responsibilities to the public and profession, the Tribunal is required to arrive at an outcome that is fair, reasonable and proportionate in the circumstances. It also must seek to apply the least punitive sanction which is appropriate in the circumstances. If rehabilitation appears a reasonable possibility that will be a highly relevant consideration.

19. On balance we conclude that the outcomes proposed jointly by the respondent and CAC are appropriate; censure, annotation and the imposition of appropriate conditions for a period.

20. The Tribunal orders as follows:

(a) The respondent is censured;

(b) The register is to be annotated for a period of 2 years from the date of this decision;

(c) It will be a condition of the respondent's practising certificate for a period of 2 years from the date of this decision that he provides a copy of this decision to any future employer, and that he asks that they confirm they have been advised of the decision by notifying the Teaching Council within 7 days of the respondent starting a new position;

(d) The respondent is to immediately provide a copy of this decision to his current employer.

Application for Non-Publication order

21. The respondent has applied for an order permanently suppressing the publication of his name and any details capable of identifying him.

22. The grounds for the application were;

- to protect the identity of the victim, being the respondent's child;
- to protect the identity of the respondent's other schoolchildren;
- to protect the identity of the respondent's wife who is a schoolteacher;
- to protect the identity of another family member of the respondent

23. In support of his application he has filed an affidavit making the following points;

- the respondent's child who was the victim has the respondent's surname;
- he has another child who attends the school in which he teaches and has a further child who will likely be attending that school later. He says he is concerned that publication of his name could lead to identification of his children and might "exacerbate issues as may affect them and impede their progress";
- he refers to material in the police case, a summary report about his child's behaviour in class; apparently his child was upset and not wanting to go to school, in relation to there having been a change of teacher;

- his wife is a teacher at a different school. He anticipates she will shortly have a position of responsibility in that school;

- his brother is a relatively newly elected councillor of the relevant District Council, is actively involved in the relevant community and has been appointed to a Board of Trustees. He says that he does not wish his past conduct to impede or prejudice his brother's public positions;

- he says that while his health is relatively good he had some time off from school due to stress-related issues in 2019 and 2018.

24. The consent memorandum records that the parties agree that the name and identifying features of the school and the victim are to be permanently suppressed. The victim is under the age of 16 and therefore entitled to automatic name suppression under Rule 34 of the Teaching Council Rules 2016. Publishing the name of the school risks identifying the victim.

25. The CAC neither consents to nor opposes the respondent's application for permanent name suppression.

Applicable principles relating to non-publication orders

26. Section 405 (3) of the Education Act 1989 provides that hearings of the Tribunal are in public. This is consistent with the principle of open justice.

27. The provision is subject to subsections (4) and (5) which allow for the whole or part of the hearing to be in private. Subsection (6) provides that if the Tribunal is of the opinion that it is proper to do so, having regard to the interest of any person including the privacy of the complainant, and to the public interest, it may make an order prohibiting the publication of the name, or any particulars of the affairs, of the person charged or any other person.

28. The default position is therefore that Tribunal hearings are to be conducted in public and that the names of teachers who are the subject of disciplinary proceedings are to be published. This reflects the principle of open justice which applies to the Tribunal's proceedings.

29. In deciding if it is proper to make an order prohibiting publication the Tribunal must consider the interests of the respondent, but the Tribunal must also consider the public interest. If the Tribunal thinks it is proper it may make such an order.

30. Many cases discuss the principle of open justice in courts and Tribunals. The principle has been described as a fundamental principle of common law, manifested in three ways.

31. First, proceedings are normally expected to be conducted in "open court". Second, information and evidence presented in court is communicated publicly to those present in the court. Third, nothing is to be done to discourage the making of fair and accurate reports of judicial proceedings conducted in open court, including by the media. This includes reporting the names of the parties as well as the evidence given during the proceedings.

32. A passage from a judgement of Fisher J is often quoted:

> *In general, the healthy winds of publicity should blow through the workings of the courts. The public should know what is going on in their public institutions. It is important that justice should be seen to be done. That approach will be reinforced if the absence of publicity might cause suspicion to fall on other members of the community, if publicity might lead to the discovery of additional evidence or offences, or if the absence of publicity might present the defendant with an opportunity to reoffend.*[1]

33. The Court of Appeal has stated:

> *…the starting point must always be the importance in a democracy of freedom of speech, open judicial proceedings, and the right of the media to report the latter fairly and accurately as "surrogates of the public"… The basic value of freedom to receive and impart information has been re-emphasised by section 14 of the New Zealand Bill of Rights Act 1990.*[2]

34. The principle of open justice exists regardless of any need to protect the public. The starting point has been said to be one of openness and transparency,

35. Several decisions discuss what differences, if any, there are between the courts and professional disciplinary tribunals in relation to non-publication orders. In *Director of Proceedings v I* [3] Frater J found that any differences in approach between the courts and medical disciplinary processes under the Medical Practitioners Act 1995 were differences of emphasis and degree. The most significant difference was the

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[1] *M v Police* (1991) 8 CRNZ 14, at 15
[2] *R v Liddell* [1995] 1 NZLR 538 at 546
[3] [2004] NZAR 635

threshold to be reached before the balance is tipped in favour of name suppression. Unlike the courts, where "exceptional" circumstances are commonly required, the criterion for cases before the Medical Practitioners Disciplinary Tribunal was whether suppression is desirable.

36. In this jurisdiction the threshold is whether it is "proper". This is the same as under the Lawyers and Conveyancers Act 2006. That Tribunal has suggested that "proper" arguably sits between "exceptional" and "desirable", but in any event the threshold is somewhat lower than that imposed in the courts.[4]

37. In NZTDT 2016/69 this Tribunal discussed the differences between name suppression applications in the ordinary courts (for example in criminal prosecutions) and in professional disciplinary tribunals. It too noted that the most significant difference is that the criterion in some disciplinary tribunals is whether suppression is "desirable" (medical) or "proper" (law practitioners, and this Tribunal), whereas in the courts "exceptional" circumstances are commonly required.

38. In *CAC v Finch* NZTDT 2016/11 the Tribunal discussed the High Court decision of *ABC v Complaints Assessment Committee* [2012] NZHC 1901. In that case Chisholm J said that the test used in disciplinary proceedings involves a threshold that is "significantly lower" than that used by courts in the criminal jurisdiction (at [44]).

39. So, the threshold is whether it is "proper" to order non-publication. If the evidence gets across that threshold the Tribunal may exercise its discretion whether to order non-publication. The threshold is somewhat lower than that applying in the courts. It was said in *Finch* at [18] that while a teacher faces a "high" threshold to displace the presumption of open publication to obtain permanent name suppression, it is wrong to place a gloss on the word "proper" that imports the standard that must be met in the criminal context.

40. In order to justify a conclusion that it is proper to order name suppression there must be a real risk that publication will have or will be likely to have significant and serious adverse effects on the teacher (or in appropriate cases their family). It must be clear that such potential effects are likely to go beyond the normal embarrassment, distress, anxiety and shame which will afflict any teacher who is the subject of a published disciplinary decision. One example of circumstances which may, if they are at the required level, potentially justify a non-publication order is if it is established

[4] *Canterbury Westland Standards Committee No2 v Eichelbaum* [2014] NZLCTD 23

that a teacher's rehabilitation and recovery from (for example) a mental illness or an adverse psychological condition are likely to be significantly harmed or impaired by publication, in a way which could cause appreciable harm to the teacher. If self-harm is a real possibility that will be a major consideration. In this type of circumstance appropriate specialist medical or psychological evidence would usually be required. The evidence must provide sufficiently detailed information about the condition or circumstances of the teacher relating to which publication might cause such harmful effects. A bare assertion by a teacher that a condition exists or that they will suffer beyond the norm will usually not be enough, although that possibility cannot be excluded.

41. The categories of circumstance which could justify a non-publication order are not closed, and the examples given above are by no means exhaustive.

42. It may in addition be appropriate to order suppression of a respondent's name where publication of that name would be likely to lead to identification of the students involved in a sensitive and difficult situation.

43. We have carefully considered the material put forward by the respondent. On balance, we conclude that the respondent has not provided sufficient evidence to demonstrate that the impact upon him will be sufficiently beyond the normal distress, anxiety and humiliation which any teacher found to have engaged in professional misconduct must face, as to make it proper to order name suppression for him. The evidence does not establish that he suffers from any ongoing condition of enough seriousness as to render him particularly vulnerable in the ways that in other cases have justified orders for name suppression.

44. We agree that, given the respondent’s close family ties in the relevant community in the circumstances explained in his affidavit, that it would be proper to order that there is to be no publication of the name of the child involved, or the names of any of his family members mentioned in the agreed summary of facts or elsewhere in this decision. or any details capable of identifying them. To give better effect to that we also consider it would be proper to order that there is to be no publication of the locality in which the respondent teaches or in which the school is located. Our focus is on protecting the child involved from adverse effects and we consider that in order to do that prohibiting publication of the names of other family members, or the location of the persons involved or the school involved, will be an appropriate and proper order. However we also consider that with names of others prohibited from

being published, and locations prohibited from being published, it is not necessary to prohibit publication of the respondent's name to protect the child.

45. In these circumstances the Tribunal considers that it would not be proper to order that there is to be no publication of the name of the respondent.

46. The Tribunal orders that;

(a) There is to be no publication of the name of the child involved or any details capable of identifying the child;

(b) There is to be no publication of the names of any of the respondent's family members mentioned in this decision or any details capable of identifying them;

(c) There is to be no publication of the name of the school in which the respondent is currently employed, or was employed at the time of the incident giving rise to this disciplinary proceeding, or any details capable of identifying the school, including the locality in which the respondent resides or in which the school is located;

(d) This decision is to be appropriately redacted to reflect the above orders.

Costs

47. It is appropriate that in a professional disciplinary system the costs of carrying out appropriate professional disciplinary procedures be borne at least to a significant extent by teachers who are found to have engaged in professional misconduct, to avoid an inappropriate burden being placed upon the balance of the teaching profession. The Tribunal normally requires teachers found to have engaged in serious misconduct to pay 50% of the costs of both the CAC, and of the Tribunal itself. In situations where the teacher has cooperated with the process and has avoided the need for an in-person hearing by agreeing a summary of facts, the Tribunal will reduce the costs to 40%, and sometimes to a lesser percentage in cases involving proven hardship or other particular circumstances.

48. The consent memorandum states costs should be fixed at 50%. No reason is given for that figure. The Tribunal considers that it should follow its normal practice and fix costs at 40% in a situation where the teacher has cooperated with the process and

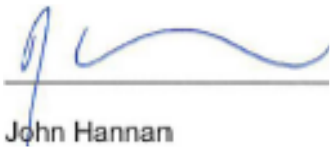
has avoided the need for an in-person hearing by agreeing a summary of facts. There is ample evidence of cooperation by the respondent which supports a discount for such cooperation.

49. If either of the parties wishes to make submissions that costs should in fact be fixed at 50%, they are at liberty to do so. The Tribunal delegates to the Deputy Chair the task of adjusting this costs order in the event that a party makes such submissions.

50. The Tribunal orders that the respondent pay 40% of the CAC's actual and reasonable costs. No costs schedule has yet been received from the CAC. The CAC is to send a copy of its costs schedule to the respondent. The respondent is ordered to pay 40% of the costs shown in the CAC schedule unless the respondent files and serves submissions as to costs within 14 days of the CAC emailing the costs schedule to him. If submissions as to costs are received from the respondent, the Tribunal delegates to the Deputy Chair the task of fixing the amount of the CAC's costs.

51. The respondent is also ordered to pay 40% of the Tribunal's costs. A schedule has been provided showing those costs as $1145. 40% of $1145 is $458 and the respondent is ordered to pay that sum.

Date: 1 April 2020



John Hannan
Deputy Chairperson

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

1. A person who is dissatisfied with all or any part of a decision of the Disciplinary Tribunal under sections 402(2) or 404 of the Education Act 1989 may appeal to a District Court.

2. An appeal must be made within 28 days of receipt of written notice of the decision, or within such further time as the District Court allows.

3. Subsections (3) – (6) of section 356 apply to every appeal as if it were an appeal under subsection (1) of section 356.