NZTDT 2020/34

BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

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

DECISION OF THE TRIBUNAL

Tribunal:	Nicholas Chisnall (Deputy Chair), Kiri Turketo and Simon Williams
Hearing:	28 June 2021
Decision:	Issued on 30 August 2021 and finalised on 9 September 2021 with determination on costs
Counsel:	R Scott for the referrer The respondent in person

Introduction

[1] The Complaints Assessment Committee ("the CAC") referred to the Tribunal a charge against [redacted], the respondent, alleging serious misconduct and/or conduct otherwise entitling us to exercise our powers under section 404 of the Education Act 1989. The CAC's notice of charge, which is dated 3 August 2020, alleges that:

> [redacted], registered teacher, of [redacted], in March 2018, attempted to smother her son, a [redacted] child who was in her care.

[2] We convened to hear the case on 28 June 2021. At the conclusion of the hearing, we provided the parties with a brief oral summary of our decision. We concluded that [redacted] had committed misconduct. We adopted Ms Scott's careful submissions regarding penalty, and advised [redacted] that we will censure her. Ms Scott proposed that the register be annotated to record the censure for a period of two years. We also imposed a condition on any practising certificate issued to [redacted] in future requiring her to satisfy the Teaching Council that she is fit to teach. This condition will require [redacted] to provide a medical opinion from her treating mental health clinician. We have modified what Ms Scott proposed regarding annotation in one minor respect. Rather, than expiring after two years, reference to the censure can be removed upon the respondent satisfying the Council regarding her fitness to teach.

[3] We made an order prohibiting publication of [redacted] name and details that might identify her. We did so because naming [redacted] will inevitably identify her son.

The evidence

[4] The parties provided us with an agreed summary of facts. It provided in full that:

> 1. [redacted] (registration number [redacted]) completed her Graduate Diploma in Teaching (Early Childhood Education) from the New Zealand Tertiary College in [redacted]. On [redacted] she was granted provisional registration and certification. [redacted] worked as an early learning teacher at [redacted] and then as a home-based educator with [redacted] Her practising certificate expired

on [redacted]. [redacted] has been working part-time in the [redacted] industry since [redacted].

2. In April 2018, after suffering a two month period of acute depression, [redacted] general practitioner referred her to Dr [redacted], a psychiatrist at the [redacted] Mental Health Centre.

3. [redacted] began seeing Dr [redacted] in June 2018. At the time of her referral, [redacted] disclosed to her treating team that in the preceding months she had had intermittent suicidal thoughts (but had made no attempt to end her life), and that she had had homicidal thoughts towards her then [redacted] old son.

4. [redacted] disclosed to her treating team that in or around March 2018, she placed a pillow over her son's head in an attempt to smother him while she was struggling to manage his behaviour and when she wasn't able to cope. When her son screamed, she realised the gravity of the situation and immediately removed the pillow.

5. [redacted] treating team reported this information to the New Zealand Police. The Police investigated the matter and verbally and warned [redacted] for the manual assault of a child noting that it occurred in circumstances where [redacted] was suffering from an acute episode of depression. The matter was also referred to Oranga Tamariki.

6. On 26 September 2018, following a request for a routine vet on [redacted] the police sent the Teaching Council of Aotearoa New Zealand (Teaching Council) a vetting report advising of this incident.

7. On 19 October 2018, the Teaching Council wrote to [redacted], to advise of the Police's report, to explain the Teaching Council's process, and to request a response.

8. On 3 December 2018, [redacted] sent an email to the Teaching Council, advising:

> *The incident in the police report was an isolated incident; there have been no other incidents of this nature. I was clinically depressed at the time and had very little support in dealing with my son's special needs. My present situation is different. I have made a full recovery and my depression has been in remission for the last three months. I continue to take psychiatric medication as prescribed. My family is also now receiving support services for managing our son's special needs. He is a patient of the [redacted] and is receiving treatment for ASD and ADHD. The [redacted] Community Mental Health Centre are not concerned for the safety of my son. Similarly, although we were initially referred to Oranga Tamariki, we were discharged from their service. In the past, when I have experienced relapses of depression I have resigned from my employment [redacted]. I have insight into my mental health needs and recognise when it is appropriate that I seek*

employment. I ask that you take the above into account when considering whether to allow me to return to work in the future.

9. [redacted] email attached a medical report written by Dr Whiting, which confirmed:

a. That [redacted] had been referred to him in April 2018 as a result of a two-month period of depression and that she had been in his care since June 2018;

b. [redacted] disclosures about having suicidal and homicidal thoughts in February/March 2018, and about placing a pillow over her son's head in an attempt to smother him, and stopping when he screamed and she realised what was happening and the gravity of the situation;

c. Her insight into her mental health problems, awareness of potential triggers, and willingness to take medication as prescribed;

d. That [redacted] son has now been diagnosed with Autism Spectrum Disorder and Attention Deficit Hyperactivity Disorder and is receiving care and support from the [redacted] and [redacted]; and

e. that [redacted] and her husband are also receiving support, including the offer of respite care.

10. On 10 December 2018, [redacted] advised the Teaching Council that she was not teaching so that she could focus on her son's special needs.

11. On 17 January 2019 the CAC sent [redacted] a copy of the Complaints Assessment Committee's (CAC) investigation report and invited her to meet with the CAC on 21 March 2019.

12. On 25 February 2019, [redacted] provided a response to the CAC in which she explained that, at the time of the incident, she was completely isolated and was clinically depressed with little support in dealing with her son's special needs. She felt overwhelmed and was struggling to manage his behaviour. She did not seek to excuse the behaviour and took full responsibility for what had happened and was horrified at what she had done. She advised there had been no incidents of this nature beforehand, and none since. [redacted] outlined that she had taken steps to address the challenges that were facing her to ensure that nothing of this nature would ever happen again, and that she had done all the right things following the incident, including disclosing the incident to her psychiatrist, engaging in treatment and seeking additional support for her and her family. She confirmed that she was managing her depression with professional help, was receiving treatment from the Community Mental Health team, was taking antidepressant medication, engaging in counselling and was fully committed to the treatment to assist in her recovery.

13. [redacted] attended the CAC's meeting on 21 March 2019.

14. In April 2019, the CAC referred the matter to the Teaching Council's Impairment Committee to consider whether [redacted] was suffering from any impairment that might affect her ability to perform her functions as a teacher. The CAC resolved to suspend its consideration of the case until the Impairment Committee had undertaken its own assessment.

15. Over the following months, [redacted] failed to engage at all in the impairment process, so the matter was referred back to the CAC.

16. The CAC met again in July 2020, as a result of which it charged [redacted] with engaging in serious misconduct and/or conduct otherwise entitling the Disciplinary Tribunal to exercise its powers on the basis that she attempted to smother her son, a nine-year old child, who was in her care.

17. [redacted] accepts that she attempted to smother her nine-year old son with a pillow. Her explanation for her conduct is that, at the time, she was suffering from acute depression, was overwhelmed and struggling to manage her son's very challenging behaviour and was lacking adequate support.

18. On 3 August 2020 [redacted] was advised of the CAC's decision to refer the matter to the New Zealand Teachers Disciplinary Tribunal and of its desire to provide [redacted] a further opportunity to engage in the impairment process while the matter proceeded to the Disciplinary Tribunal.

19. Ultimately the impairment process had to be abandoned for a second time because, by November 2019, [redacted] had failed to engage at all with the Impairment Committee.

Our findings

[5] The burden rested on the CAC to prove the charge. While the standard to which it must be proved is the balance of probabilities, we must keep in mind the consequences for the respondent that will result from a finding of serious professional misconduct.[1]

[6] [redacted] did not dispute what was alleged in the CAC's notice of charge. We are satisfied that it is more probable than not that the respondent attempted to smother her son.

[7] Ms Scott, in her helpful submissions, focused on whether [redacted] conduct reaches the threshold to constitute "serious misconduct" under the Education Act 1989. Ms Scott provided us with several recent decisions in

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

which the Tribunal dealt with teachers who assaulted their own children, where we held that there was no nexus between the behaviour concerned and the practitioner's professional obligations because it happened in the private sphere.[2] In each case, the Tribunal found that the teacher committed misconduct simpliciter. Ms Scott observed that the approach taken by the Tribunal in each of the cases she cited in reaching a finding of misconduct rather than serious misconduct differed to that recently described by the Court of Appeal in *Evans v Complaints Assessment Committee of the Teaching Council of New Zealand*.[3] *Evans* is a case in which we found that the practitioner had committed misconduct.

[8] We will briefly describe the relevant test. Section 378 of the Education Act defines "serious misconduct" as behaviour by a teacher that has one or more of three outcomes; namely that which:

(a) Adversely affects, or is likely to adversely affect, the wellbeing or learning of one or more children: s 378(1)(a)(i); and/or

(b) Reflects adversely on the teacher's fitness to be a teacher: s 378(1)(a)(ii); and/or

(c) May bring the teaching profession into disrepute: s 378(1)(a)(iii).

[9] It is settled that the test under s 378 is conjunctive.[4] Therefore, as well as having one or more of the three adverse professional effects or consequences described in s 378(1)(a), the act or omission concerned must also be of a character and severity that meets the Teaching Council's criteria for reporting serious misconduct. The Teaching Council Rules 2016 describe the types of acts or omissions that are of a prima facie character and severity to constitute serious misconduct.[5]

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[2] *CAC v Teacher Z* NZTDT 202/19, 17 September 2020, *CAC v Teacher Z* NZTDT 2020/7, 23 September 2020, *CAC v Teacher X* NZTDT 2020/9, 20 August 2020.
[3] The Court of Appeal, in *Evans v Complaints Assessment Committee of the Teaching Council of New Zealand* [2021] NZCA 66, recently described the two-step approach we have used as "settled".
[4] *Teacher Y v Education Council of Aotearoa New Zealand* [2018] NZCA 637.
[5] Which came into force on 1 July 2016 as the "Education Council Rules 2016", with the change in name happening in September 2018. The Rules were amended in May 2018, so it is the original iteration that applies to the respondent's behaviour.

[10] The CAC contended that several of the Rules were engaged. First, it said that [redacted] use of force use against her son constituted "physical abuse", in contravention of r 9(1)(a). Second, it comprised "ill-treatment" of a child in the respondent's care in breach of r 9(1)(f). Third, it was an assault that "could" have been prosecuted. As such, the CAC submitted that the behaviour falls within r 9(1)(n), which describes "any other act or omission that could be the subject of a prosecution for an offence punishable by imprisonment for a term of 3 months or more".

[11] For clarity's sake, we record that we placed no weight on the fact that [redacted] was issued a warning by police. The High Court, on judicial review, recently held that such "formal warnings" are unlawful.[6] However, nothing turns on that in the instant case, given that [redacted] accepted the behaviour described in the CAC's notice of charge.

[12] In *Evans*, the Court of Appeal was asked to grant the teacher leave to bring a second appeal. It declined to do so on the basis that the approach the Tribunal has taken when distinguishing between serious misconduct and misconduct simpliciter "appears to have been settled and not to have caused any difficulty to date".[7] The Court described the approach taken by the Tribunal at first instance, and applied again on appeal in the District Court, in the following way:[8]

> Although the charge against Mr Evans was one of misconduct, the Tribunal undertook its inquiry by reference to the definition of "serious misconduct". The District Court Judge did likewise, accepting the argument made on behalf of the Tribunal that if one of the matters in limb (a) of the definition is made out, the question whether limb (b) is met determines whether the conduct is "serious misconduct" or "misconduct simpliciter". In accepting this argument the Judge considered that it was consistent with the scheme of the Education Act (though did not elaborate on that aspect). He cited the decision of *Teacher Y v Education Council of Aotearoa New Zealand*, in which the same approach had been taken.

[13] We will approach our assessment in [redacted] case in the same way we did in *Evans*.

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[6] *S v Commissioner of Police* [2021] NZHC 743, Davison J.
[7] At [9].
[8] At [6]. Footnotes omitted.

[14] Starting with the first limb of the definition of serious misconduct, we accept that the respondent's behaviour satisfies two of the three factors in s 378(1)(a) of the Education Act.

[15] Starting with s 378(1)(a)(ii), we acknowledge that [redacted] behaviour happened in the private sphere, and has no direct bearing on the responsibilities owed to the teaching professional, and to the public in general. That is not the end of the matter, however. We have said on many occasions that a practitioner's violence, regardless of whether it happened in a personal or professional setting, can adversely reflect on his or her fitness to teach. This is for the simple reason that reversion to violence undermines the high standard of professional behaviour and integrity the public expects of those in the teaching profession.[9] This is not to say that s 378(1)(a)(ii) will be met in every case where a teacher uses violence in a private setting. It is a context-specific enquiry.

[16] In [redacted] case, there is a not a stark demarcation between her private and professional lives. It was clear to us that [redacted] acute depression bore on why she assaulted her son. While the assault happened in a private setting, [redacted] severe depression, if it persists, may impact on the way in which she conducts herself when performing her duties as a teacher.

[17] We said in *CAC v Rachelle*[10] that the way in which a practitioner engages with his or her professional body may be a relevant consideration when assessing both fitness to teach and penalty. As such, it is not simply the behaviour behind the charge that concerns the Tribunal, but also a teacher's degree of responsiveness during the proceedings. We consider that it reflects positively on [redacted] that she sought help from mental health professionals, and that she candidly disclosed to her treating clinician her

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[9] As we said in *CAC v Fuli-Makaua* NZTDT 2017/40, teachers are role models for learners and have considerable influence in and beyond the learning environment. Under the now-replaced Code of Ethics for Registered Teachers, practitioners made a commitment to the community to "teach and model those positive values that are widely accepted in society and encourage learners to apply them and critically appreciate their significance". Under the current Code of Professional Responsibility, teachers are obliged to "maintain public trust and confidence in the teaching profession by demonstrating a high standard of professional behaviour and integrity".

[10] *CAC v Rachelle* NZTDT 2019/8 at [50].

assault on her son. There is, however, a countervailing factor. As the summary of facts describes, [redacted] was referred to the Council's Impairment Committee, which was tasked with assessing whether she was suffering an impairment that "might affect her ability to perform her functions as a teacher". The respondent's lack of engagement with the Impairment Committee, in our view, must have a direct bearing on our assessment of her fitness to be a teacher. Adding to our difficulties, we did not receive an up-to-date medical opinion about [redacted] current status. We were not aware whether [redacted] depression is a recurring issue. We had no choice but to conclude that the respondent's use of force towards her son adversely reflects on her fitness to teach.

[18] Fortuitously, [redacted] attended the hearing and we commend her for answering our questions. While her participation did not enable us to step back from our finding under s 378(1)(a)(ii) of the Education Act, the way in which [redacted] engaged abated many of our concerns. [redacted] told us that she remains under the care of a mental health specialist. Importantly, [redacted] conveyed to us her desire to return to the profession when her responsibilities towards her son, which are her dominant concern, allow. [redacted] readily understood, and accepted, why we were required to impose the condition requiring her to satisfy the Council she is fit to teach before she may return to the classroom.

[19] In terms of s 378(1)(a)(iii) of the Education Act, we accept that the respondent's conduct is of a nature that brings the teaching profession into disrepute. There is an objective standard for deciding whether certain behaviour brings discredit to the profession.[11] The question we must address is whether reasonable members of the public, informed of the facts, could reasonably conclude that the reputation and good standing of the profession is lowered by [redacted] conduct. We consider that there is an element of risk to the profession's standing in the eyes of the public given the way that the respondent treated her son. However, we acknowledge that the reasonable bystander would pay heed to the extenuating circumstances:

[11] *Collie v Nursing Council of New Zealand* [2001] NZAR 74, at [28].

the acute pressure that the respondent was under, and her vulnerable mental state at the time.

[20] We turn to the second stage of the test for serious misconduct. We accept that [redacted] assault on her son meets the definition of "physical abuse" in the iteration of r 9(1)(a) of the Rules that applied at the time.[12] Second, it was "ill-treatment" of a child in the respondent's care, which breaches r 9(1)(f). We accept, however, that there was a clear nexus between [redacted] acute depression and her assault on her son. This moderates [redacted] moral culpability. We are satisfied that [redacted] condition impaired her ability to make calm and rational choices, and to think clearly.[13] Therefore, we have reached the position that [redacted] behaviour was not of a character and severity that reaches the threshold to constitute serious misconduct.

[21] For these reasons, we found [redacted] guilty of misconduct. This was not a conclusion resisted by the CAC.

Penalty

[22] There are three overlapping purposes that must be kept in mind when determining the commensurate penalty in terms of the options provided in s 404 of the Education Act. These are to protect the public through the provision of a safe learning environment for students, and to maintain both professional standards and the public's confidence in the profession.[14] We are required to arrive at an outcome that is reasonable and proportionate in the circumstances in discharging our responsibilities to the public and profession.[15]

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[12] We outlined the context-specific enquiry required to determine whether behaviour constitutes physical abuse in *CAC v Teacher* NZTDT 2016/50, *CAC v Mackey* NZTDT 2016/60 and *CAC v Whelch* NZTDT 2018/4.
[13] In the criminal context, the Court of Appeal described the ways in which a mental illness or disorder that falls short of exculpating insanity can moderate culpability in *E (CA689/2010) v R* [2010] NZCA 13, (2011) 25 CRNZ 411 at [68]. See, too, *Shailer v R* [2017] NZCA 38, [2017] 2 NZLR 629. We see no reason why, in principle, a similar approach cannot be adopted to the assessment of culpability in this jurisdiction.
[14] The primary considerations regarding penalty were discussed in *CAC v McMillan* NZTDT 2016/52.
[15] See *Roberts v Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354 at [51].

[23] Having heard from [redacted], we are satisfied that she appreciates what led to her assaulting her son in 2018. She remains under the care of a mental health clinician to ensure that there is no repetition. We accept that [redacted], while currently committed to her son's welfare, wishes to return to the profession in future. We accept that this is a case in which the purposes of rehabilitation and reintegration are engaged, and the penalty we impose should reflect that. We wish to provide [redacted] with the opportunity to return to teaching, but must also protect the public.

[24] Ms Scott proposed two alternative conditions. These were that [redacted] "either engage with the Impairment Committee or, alternatively, to provide a medical report to the satisfaction of the Manager – Professional Responsibility at the Teaching Council that confirms that the respondent is fit to teach". We decided not to adopt the first option. It seems to us that the Council, in its discretion, may refer [redacted] to the Impairment Committee if the information that she provides requires that step.

[25] [redacted] does not currently hold a practising certificate. As such, we direct the Council to impose the condition we described at the beginning of this decision on any subsequent practising certificate issued to her.[16] This will require [redacted] to provide the Council with the information that we lacked.

Non-publication order

[26] While [redacted] did not apply for suppression of her name, we nevertheless made a non-publication order under s 405(6) of the Education Act to that effect. We will briefly explain why.

[27] We can only make one or more of the orders for non-publication specified in s 405, and depart from the presumption of open reporting, 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.

[28] Section 405 must be read in conjunction with r 34(4) of the Teaching Council Rules 2016, which obliges the Tribunal to consider making a

[16] Education Act 1989, s 404(1)(j).

suppression order whenever it receives evidence that "includes details relating to a person" deemed to be vulnerable. Rule 34(1)(a) applies to [redacted] son, as he is a child. Ordinarily, we make an order under s 405(6) of the Education Act whenever r 34 is engaged and we are satisfied that it is proper to suppress [redacted] son's name.

[29] We are satisfied that naming [redacted] will inevitably identify her son.[17] This will undermine the efficacy of our order suppressing [redacted] son's name and details. For that reason, we decided that it is proper for the presumption in favour of open justice to yield and for [redacted] name to be suppressed.

Costs

[30] The CAC telegraphed that it seeks a contribution from the respondent towards the actual and reasonable costs it incurred undertaking its investigative and prosecutorial functions. Ms Scott invited us to order a smaller contribution – 40 per cent instead of the usual 50 per cent – to reflect that there was some delay on the part of the Council bringing the matter to hearing. Also, we consider it reasonable to reduce the respondent's contribution from 50 to 40 per cent to reflect that [redacted] signed an agreed summary of facts. That abbreviated the length of the hearing.

[31] We enquired of [redacted] at the hearing whether she has the means to meet a costs order, and she confirmed that she does. However, we did not have a costs schedule from the CAC. Nor were we provided with a schedule of the Tribunal's expenses, which is the third category of costs described in our 2010 Practice Note. We directed that [redacted] be provided with the necessary schedules and deferred making orders.

[32] Schedules were subsequently provided. The CAC's total costs are in the amount of $12,823.76, exclusive of GST. The Tribunal's costs come to $6,131.50.

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[17] See *CAC v Teacher* NZTDT 2016/68 at [46], where we said that "real", "appreciable", "substantial" and "serious" are qualifying adjectives for "likely" and bring out that the risk or possibility is one that must not be fanciful and cannot be discounted.

[33] [redacted] was provided with time to decide whether she disputed the reasonableness of what is sought. She does not.

[34] We therefore order [redacted] to make a 40 per cent contribution in respect to each category of costs, and to pay the amounts stated under "Orders".

Orders

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

(a) Pursuant to s 404(1)(b), the respondent is censured for her misconduct.

(b) Pursuant to s 404(1)(j), we direct that the following condition be imposed on any practising certificate issued to the respondent. The respondent must satisfy the Teaching Council that she is fit to teach. This condition will require [redacted] to provide a medical opinion from her treating mental health clinician.

(c) The matters referred to in (a) and (b) will be annotated on the register until the condition referred to in (b) is fulfilled, at which point the censure will expire.

(d) The respondent is ordered to pay $5,129.50 to the CAC pursuant to s 404(1)(h) of the Education Act.

(e) The respondent is ordered to pay $2,452.50 to the Teaching Council pursuant to s 404(1)(i) of the Education Act.

(f) Pursuant to s 405(6)(c) and r 34 of the Teaching Council Rules 2016, there are orders permanently suppressing the names and identifying particulars of [redacted] and her son.

Nicholas Chisnall
Deputy Chair

NOTICE

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 Section 356(3) to (6) apply to every appeal as if it were an appeal under section 356(1).