NZTDT 2021/22

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**
AND	Teacher X [redacted] Respondent

Decision on charge, penalty, costs and publication

Date of hearing:	29 September 2021
Members:	T J Mackenzie (Deputy-Chair), N Sadlier, S Williams
Representation:	C Patterson and P O'Boyle for the CAC The respondent in person
Date of decision:	26 October 2021

The charge

1. The Complaints Assessment Committee (CAC) has brought the following charges of serious misconduct and misconduct against the respondent:

> TAKE NOTICE that a Complaints Assessment Committee (the CAC) has determined that in accordance with section 401 of the Education Act 1989:
>
> (a) Information received from the mandatory report provided by [redacted] about the conduct of [redacted] should be considered by the New Zealand Teachers Disciplinary Tribunal (the Disciplinary Tribunal).
>
> (b) The CAC charges that the teacher has engaged in serious misconduct and/or conduct otherwise entitling the Disciplinary Tribunal to exercise its powers.
>
> **Particulars of the Charge**
> 1. The CAC charges that [redacted], registered teacher, of [redacted]:
>
> a. During sometime in 2018 used unjustified and/or unreasonable physical force on Student A by grabbing Student A by the wrist and/or pulling him to remove him from assembly.
>
> b. On or around 20 March 2019 used aggressive and / or threatening and / or inappropriate language towards Student A by saying to him:
>
> (i) "I'll come and rip the headphones off your face" and "call it an accident" and
> (ii) "shut your mouth, I'm talking at you, I'm not talking with you" and
> (iii) "little upstart" and
> (iv) "I'm about to march you out soon."
>
> c. On or around 20 March 2019 used inappropriate language by saying to Student A "Fuck off"

Issues

2. Liability for the charges is denied. The Tribunal will need to determine whether the charges are made out and if so what orders should follow.

3. The parties have provided an agreed summary of facts.

4. Depending on outcome, costs will need to be considered.

5. The respondent seeks permanent non publication orders.

Facts

6. The agreed summary of facts provides:

    1. [redacted] is a registered teacher (registration number [redacted]). Her practising certificate expired on 7 July 2019.

    2. At the relevant time, [redacted] was employed by [redacted] (School), which has been a co-educational State full primary school in [redacted]

    3. In 2018 and 2019 [redacted] taught year 7 and 8 students. A student (Student A) was in [redacted] classes in both years.

    4. The Complaints Assessment Committee (CAC) conducted an investigation and determined to refer the allegations outlined in this summary of facts to the Tribunal for its determination.

    Allegation one: assembly incident

    5. Sometime in 2018, there was a school assembly where [redacted] and Student A were present. Student A was seated on the floor and was observed talking to his friend during the assembly so [redacted] told Student A to be quiet.

    6. Student A responded by telling her to "shut up" and then to "fuck up" and then he also said he was "not fucking going anywhere". [redacted] then told him to go the Principal. Student A responded by saying words to the effect of "I'm not going with you, you fat bitch".

    7. [redacted] then pulled Student A up off the floor by his hand and walked him towards the door. He resisted, but she kept hold of him by the wrist and continued to pull him out of the assembly.

    Allegation two: used aggressive/threatening/inappropriate language towards student

    8. On 20 March 2019, Student A walked into a classroom where [redacted] was teaching. [redacted] was annoyed by Student A walking in at that moment. He was late.

    9. [redacted] became engaged in a heated verbal discussion with Student A about his absence. At one point [redacted] said to him, "Shut your mouth, I'm talking at you I'm not talking with you. And if you keep on doing that, I'll come and rip those headphones off your face". She followed up by saying, "And I'll call it an accident, you...little upstart''. She then said, "I'm about to march you out soon".

    Allegation three: inappropriately told student to "fuck off''

    10. After the verbal altercation in the classroom on 20 March 2019, [redacted] told Student A to go to the Principal's office. Student A got up and walked out of the classroom. [redacted] followed him out of the door.

    11. As [redacted] walked alongside Student A they bumped into each other and Student A said "Fuck off" to her. In response she also told him to "Fuck off".

Teacher's comments

12. [redacted] admitted each of the allegations.

13. In respect of allegations two and three, [redacted] has specifically offered her regret and has admitted her conduct was wrong. In respect of all of the allegations, she said she was "not proud" of her admitted behaviour.

Charge – discussion

7. Even based just on the incident of pulling the child off the floor out of assembly, we would have no difficulty in finding that serious misconduct has been made out.

8. Many similar cases of use of force have come before the Tribunal. Physical force used against children in a teaching setting will often result in the test for serious misconduct being met.

9. Here, we consider that all or any of the three tests at s 378(1)(a) are met by the conduct. That is, the conduct was likely to adversely affect a student. It reflected adversely on the respondent's fitness to be a teacher. And, it may bring the profession into disrepute.

10. We note there has been no argument from the respondent against such a finding although we make it independently of that absence.

11. Likewise the conduct meets the reporting criteria. The physical act of pulling the child by the arm triggers reporting rule 9(1)(a) and 9(1)(k), and the balance of the conduct rule 9(1)(k).

12. Although charged as two charges (one of serious misconduct and one of misconduct) we do not see a need to make two findings, although if required to it would follow that both charges are proven. We prefer to deal with all of the admitted conduct cumulatively during penalty considerations however on one charge of serious misconduct.

Penalty

13. We agree with the CAC that on the basis of relatively similar conduct examples[1] that an appropriate penalty is:

    a) a censure under s 404(1)(b) of the Act.

    b) That the Teaching Council be directed to place the following conditions on any future practising certificate obtained by the respondent (s 404(1)(c)):

[1] *CAC v Teacher Q* NZTDT 2020-23, 26 November 2020; *CAC v Risuleo* NZTDT 2018-8, 17 September 2018.

(i) That the respondent complete a rehabilitative programme, approved in advance by the Teaching Council, directed at managing disruptive (student) behaviour, and managing emotional and behavioural responses to such behaviour (or similar).

(ii) That the respondent disclose the Tribunal's decision to prospective employers (in the education sector) and provide them with a copy, for a period of two years.

c) Annotation on the register for three years (s 404(1)(e)).

14. In coming to that decision we have taken into account the evidence from the respondent regarding her family situation and the support she is receiving. We have also taken into account the stress, anxiety and depression she was dealing with at the time of the incidents. We have no reason not to consider that this was a one off series of incidents for the respondent.

Costs

15. The respondent accepts that costs are payable. We consider that the costs sought of $2721.80 (being 40% of costs incurred) are reasonable.

16. Tribunal costs of $458.00 are also ordered.

Publication orders

Positions

17. The respondent seeks permanent non publication orders.

18. The CAC opposes this, noting that the mental health issues raised are fairly generalised and that concern for family is common.

Legal principles

19. The default position under s 405 of the Act is that Tribunal hearings are to be conducted in public. Consequently the names of teachers who are the subject of these proceedings are to be published. The Tribunal can only make one or more of the orders for non-publication specified in the section 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.

20. The purposes underlying the principle of open justice are well settled. As the Tribunal said in *CAC v McMillan*, the presumption of open reporting "exists regardless of any need to protect the public".[2] Nonetheless, that is an important purpose behind open publication in disciplinary proceedings in

[2] *CAC v McMillan* NZTDT 2016/52.

respect to practitioners whose profession brings them into close contact with the public. In *NZTDT v Teacher* the Tribunal described the fact that the transparent administration of the law also serves the important purpose of maintaining the public's confidence in the profession.[3]

21. In *CAC v Finch* the Tribunal noted that the "exceptional" threshold that must be met in the criminal jurisdiction for suppression of a defendant's name is set at a higher level to that applying in the disciplinary context. As such, the Tribunal confirmed that while a teacher faces a high threshold to displace the presumption of open publication in order to obtain permanent name suppression, it is wrong to place a gloss on the term "proper" that imports the standard that must be met in the criminal context.[4]

22. In *Finch,* the Tribunal described a two-step approach to name suppression that mirrors that used in other disciplinary contexts. The first step, which is a threshold question, requires deliberative judgment on the part of the Tribunal whether it is satisfied that the consequence(s) relied upon would be "likely" to follow if no order was made. In the context of s 405(6), this simply means that there must be an "appreciable" or "real" risk.[5] In deciding whether there is a real risk, the Tribunal must come to a judicial decision on the evidence before it. This does not impose a persuasive burden on the party seeking suppression. If so satisfied, the Tribunal must determine whether it is proper for the presumption to be displaced. This requires the Tribunal to consider, "the more general need to strike a balance between open justice considerations and the interests of the party who seeks suppression".[6]

23. In NZTDT 2016/27, we acknowledged what the Court of Appeal said in *Y v Attorney-General*.[7] While a balance must be struck between open justice considerations and the interests of a party who seeks suppression, "[A] professional person facing a disciplinary charge is likely to find it difficult to advance anything that displaces the presumption in favour of disclosure".[8]

24. The Court of Appeal in *Y* referred to its decision *X v Standards Committee (No 1) of the New Zealand Law Society*, where the Court had stated:[9]

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

[3] *NZTDT v Teacher* 2016/27,26.
[4] *CAC v Finch* NZTDT 2016/11, at [14] to [18].
[5] Consistent with the approach we took in *CAC v Teacher* NZTDT 2016/68, at [46], we have adopted the meaning of "likely" described by the Court of Appeal in *R v W* [1998] 1 NZLR 35 (CA). It 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.
[6] *Hart v Standards Committee (No 1) of the New Zealand Law Society* [2012] NZSC 4, at [3].
[7] *Y v Attorney-General* [2016] NZCA 474, [2016] NZFLR 911, [2016] NZAR 1512, (2016) 23 PRNZ 452.
[8] At [32].
[9] *X v Standards Committee (No 1) of the New Zealand Law Society* [2011] NZCA 676 at [18].

and has been recently confirmed in *Rowley*.

25. Gwynn J in the High Court recently considered the applicable principles for suppression in professional disciplinary litigation, in a Chartered Accountant's disciplinary decision.[10] Although the specific statutory wording in that legislation used the term "appropriate" (instead of "proper"), we consider little turns on such semantics and the observations of the Court are of application here. Gwynn J stated:

> [85] Publication decisions in disciplinary cases are inevitably fact-specific, requiring the weighing of the public interest with the particular interests of any person in the context of the facts of the case under review. There is not a single universally applicable threshold. The degree of impact on the interests of any person required to make non-publication appropriate will lessen as does the degree of public interest militating in favour of publication (for instance, where a practitioner is unlikely to repeat an isolated error). Nonetheless, because of the public interest factors underpinning publication of professional disciplinary decisions, that standard will generally be high.
>
> [86] I do not consider the use of the word "appropriate" in r 13.62 adds content to the test usually applied in the civil jurisdiction or sets a threshold lower than that applying in the civil jurisdiction. The rule is broad and sets out neither a specific threshold nor mandatory specific considerations. The question will simply be, having regard to the public interest and the interests of the affected parties, what is appropriate in the particular circumstances.
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> (citations omitted).

Discussion

26. On its own, the mental health information would not reach the threshold for permanent non publication orders.

27. Subsequently however the Tribunal has received further information from the respondent, particularly regarding her family situation. The respondent is the full time carer for her two mokopuna. They are school aged and attend the same school at which this incident occurred. The respondent advises that they have been bullied at school.

28. Life hasn't been easy for these children. There has been the involvement of Oranga Tamariki and a criminal prosecution concerning their mothers care. This is a summary of the information we have received, which doesn't need to be rehearsed in detail.

29. The short point is that these children are in a delicate situation. We are concerned that publication of the respondents name could, particularly in a smaller school such as this, easily link them to the respondent and cause a significant setback for these mokopuna who plainly don't need any further obstacles in their path.

[10] *J v New Zealand Institute of Chartered Accountants Appeals Council* [2020] NZHC 1566.

30. We consider that this outweighs the public interest in open justice in this case and that is it proper to order non publication. We therefore make a permanent order prohibiting the respondent's name from publication, the school and area where the incident occurred, and the names of any other persons who would lead to identification of the respondent.

T J Mackenzie

Deputy-Chair