

**BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL**

**DECISION NO:** NZTDT 2022/58

**UNDER THE** Education and Training Act 2020

**IN THE MATTER** of a charge laid by a **COMPLAINTS ASSESSMENT COMMITTEE** against [NAME PERMANENTLY SUPPRESSED FROM PUBLICATION] registered teacher (Registration Number [REDACTED]), of Rotorua

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**Hearing held on the papers on Wednesday, 19 April 2023**

**Tribunal:** Jo Hughson (Deputy Chairperson),  
David Spraggs, Simon Williams

Shannon Hullett (Tribunal Coordinator)

**Appearances:** J G Avia for the Complaints Assessment Committee

The respondent (Ms X)

**Decision:** 1 May 2023

## Summary

- [1] ██████████ (Ms X) is a registered teacher who is, and was at the relevant time in February 2021, the Head Teacher at ██████████ [name of Preschool suppressed] in Te Moana-a-Toi (Bay of Plenty). The Preschool is an early childhood education and care service for tamariki aged between six months and five years old. Ms X has been the Head Teacher since 2014.
- [2] The Complaints Assessment Committee (the CAC) charged that on or about 5 February 2021, while at home, Ms X smacked her daughter, Child A (aged 2 years, 5 months) with a ruler on Child A's upper thigh, leaving a red mark (the Charge)<sup>1</sup>.
- [3] This conduct was alleged to amount to serious misconduct. Alternatively, it was alleged the conduct amounted to conduct which otherwise entitled the Tribunal to exercise its powers pursuant to section 500 of the Education and Training Act 2020 (the Act).
- [4] The Charge was heard on the papers. The evidence produced by the CAC was an agreed summary of facts<sup>2</sup>.
- [5] Ms X accepted the Charge.
- [6] Written submissions were received from Counsel for the CAC addressing the issues of liability, and separately, penalty and non-publication orders. Ms X provided information that was relevant to the Tribunal's consideration of penalty including a statement of reflection<sup>3</sup>, and eight character references, all of which the Tribunal considered carefully.
- [7] The Tribunal found the Charge made out and that on the occasion when Ms X smacked her young daughter with a ruler on her upper thigh, her action amounted to serious misconduct as that term is defined in the Act.
- [8] The decision of the Tribunal is that penalties should be ordered against Ms X for her act of serious misconduct. Ms X is censured. There is to be a condition on Ms X's practising certificate which will require her to provide a copy of this decision to her

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<sup>1</sup> Notice of Charge dated 4 November 2022.

<sup>2</sup> Agreed Summary of Facts dated 19 December 2022 signed by both Counsel for the CAC and Ms X.

<sup>3</sup> Dated February 2023.

current employer, and for one year, to any prospective or future employers in the education sector. The register of teachers is to be annotated to note the censure, for one year.

[9] Ms X is also ordered to contribute towards the costs of the CAC and the Tribunal associated with these proceedings.

[10] The Tribunal also decided it is proper to make permanent orders under section 501(6)(c) of the Act prohibiting from publication the name and identifying details of the teacher (Ms X), her daughter (Child A), and the name and identifying details the Preschool. These permanent orders are being made primarily to protect the privacy and welfare interests of Ms X's child. Were Ms X to be named in connection with these proceedings there is a real risk her daughter would be identified. As such, the Tribunal considered that the relevant public interest considerations in naming Ms X are outweighed by the private interests of her child. The name of the Preschool where Ms X is the Head Teacher, is also permanently suppressed as it is an identifying feature of Ms X and her daughter.

### **Factual Findings**

[11] The Tribunal made the following findings of fact based on the evidence contained in the Agreed Summary of Facts.

[12] Ms X's daughter, Child A (aged 2 years, 5 months), attended the Preschool where Ms X was the Head Teacher.

[13] On the afternoon of 5 February 2021, a teacher at the Preschool (Ms B) noticed that Child A had two red marks on her upper thigh, when changing her nappy. These marks were from Ms X smacking Child A with a ruler while at home.<sup>4</sup>

[14] Teacher B took photographs of the marks, and she also alerted another female staff member (Ms C).<sup>5</sup>

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<sup>4</sup> ASF at [5].

<sup>5</sup> ASF at [6].

- [15] Ms C spoke with Ms X about the marks on Child A's leg. Ms X was upset, embarrassed and ashamed and told her about the stress she was under. Ms C told Ms X to discuss the matter with the Centre Manager and her husband.<sup>6</sup>
- [16] On 10 February 2021, Teacher B spoke with Ms X about the marks on Child A's leg. Ms X denied that the marks were from a ruler. However, she also made an oblique reference to a ruler visiting her home.<sup>7</sup>
- [17] On 13 February 2021, Teacher B reported the incident to the Preschool by way of an email complaint. In her email, Teacher B described the red marks as "defined welts".<sup>8</sup>
- [18] The Preschool carried out an internal investigation and gave Ms X a verbal warning on 26 February 2021.<sup>9</sup>
- [19] On 1 March 2021 an anonymous report of concern for Child A was made to Oranga Tamariki. Oranga Tamariki notified the Police, who carried out an investigation at the Preschool.<sup>10</sup>
- [20] In her discussions with Police, Ms X admitted to smacking her child once with a ruler out of frustration with her child's behaviour. <sup>11</sup>
- [21] On 10 March 2021, the Police issued Ms X with a formal warning for assault on a child. The Oranga Tamariki and Police files were then closed with no further action to be taken.<sup>12</sup>
- [22] As to Ms X's various responses:
- (a) In response to the Preschool's investigation, Ms X did not deny smacking Child A. She told the Preschool she was under stress and lost control

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<sup>6</sup> ASF at [7].

<sup>7</sup> ASF at [8].

<sup>8</sup> ASF at [9].

<sup>9</sup> ASF at [10].

<sup>10</sup> ASF at [11].

<sup>11</sup> ASF at [12].

<sup>12</sup> ASF at [13].

when her children were misbehaving. She said that since the incident she had implemented strategies from the Incredible Years Programme she had completed in 2018, discussed changes to disciplining her children with her husband and put measures in place to help manage her stress.<sup>13</sup>

- (b) When she was spoken to by the Police, Ms X admitted that she slapped Child A once on the backside with a ruler. She told Police that at the time she was under extreme stress. She told Police she had never smacked Child A before.<sup>14</sup>
- (c) In her written response to the Teaching Council, Ms X said the incident was a lapse of judgement and that there was no excuse for her actions. She said that, as soon as it occurred, her husband spoke to her about her actions. She explained further that she had (after discussions with her husband) implemented strategies to remove stress, was attending regular counselling sessions and getting more administrative support at the Preschool.<sup>15</sup>

### **Legal Principles - Liability**

[23] The burden of proving the charge (on the balance of probabilities), lay with the CAC.

[24] The definition of serious misconduct in section 10 of the Education and Training Act 2020 is:

**Serious misconduct** means conduct by a teacher –

- (a) that-
  - (i) adversely affects, or is likely to adversely affect, the wellbeing or learning of 1 or more students; or
  - (ii) reflects adversely on the teacher's fitness to be a teacher; or
  - (iii) may bring the teaching profession into disrepute; and

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<sup>13</sup> ASF at [14].

<sup>14</sup> ASF at [15].

<sup>15</sup> ASF at [16].

(b) that is of a character or severity that meets the Teaching Council's criteria for reporting serious misconduct.

[25] The test is conjunctive<sup>16</sup>. That means that as well as being behaviour by a teacher that has one (or more) of the adverse professional effects or consequences described in subsection (a) (i)-(iii), the conduct must also be of a character or severity that meets the Teaching Council's criteria for reporting serious misconduct.

[26] Rule 9(1)(a), (j), and (k) in Part 3 of the Teaching Council Rules 2016 (the Rules) were relied on by the CAC:

### **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):<sup>1</sup> 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.

...

(j) an act or omission that may be the subject of a prosecution for an offence punishable by imprisonment for a term of 3 months or more.

(k) an act or omission that brings, or is likely to bring, the teaching profession into disrepute.

[27] The criteria for reporting serious misconduct in these rules are given as examples of conduct that are of the nature and severity to be a serious breach of the Code of Professional Responsibility.

[28] Rule 9(1)(k) of the Rules is a "catch all" provision<sup>17</sup>. In *Teacher Y v Education Council of Aotearoa New Zealand*, the Court of Appeal held in relation to the predecessor Rule 9(1)(o):<sup>18</sup>

... Sub-rule (o) was clearly designed to be a catch-all provision in recognition of the fact that it was impossible to categorise or capture in specific wording all forms

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<sup>16</sup> *Teacher Y v Education Council of Aotearoa New Zealand* [2018] NZDC 3141, 27 February 2018, at [64] with reference to the definition in section 378 of the Education Act 1989.

<sup>17</sup> *Teacher Y v Education Council of New Zealand* [2019] NZCA 637 at [69].

<sup>18</sup> Above fn. 17.

of serious misconduct. The sub-rule is necessarily and deliberately broader than what goes before and of course expressly includes the word “omission”.

- [29] In relation to whether an act or omission brings or is likely to bring the teaching profession into disrepute, the question to be asked by the Tribunal is whether reasonable members of the public, informed of all the facts and circumstances, could reasonably conclude that the reputation and good standing of the teaching profession would be lowered by the behaviour of the teacher concerned.<sup>19</sup>
- [30] That approach reflects the fact that whether there has been serious misconduct or misconduct simpliciter<sup>20</sup>, or not, and the severity of any such misconduct is to be assessed by objective standards.
- [31] Previous Tribunal decisions demonstrate that “fitness to be a teacher” in the definition of serious misconduct extends beyond competence issues and includes conduct that, when considered objectively, will have a negative impact on the trust and confidence which the public is entitled to have in the teacher and the teaching profession as a whole, including conduct which falls below the standards legitimately expected of a member of the profession, whether of a teaching character or not.<sup>21</sup>
- [32] Subjective matters that are personal to the respondent teacher are not to be considered in any significant way when the Tribunal objectively assesses whether there has been serious misconduct. Personal factors may fully be considered at the penalty stage if a charge is found to have been established.<sup>22</sup> The Tribunal considered Ms X’s reported stress levels at the time she smacked her daughter with a ruler, at the penalty stage.

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<sup>19</sup> *CAC v Teacher C* NZTDT 2016/40 28 June 2018 at [203] citing *Collie v Nursing Council of New Zealand* [2001] NZAR 74 (HC) at [28]. This test was applied in *Teacher Y v Education Council of Aotearoa New Zealand*, above fn. 15 at [48].

<sup>20</sup> The District Court on appeal, has ruled that if any one of the matters under limb (a) of the definition of serious misconduct are made out, the teacher’s conduct will amount to misconduct, whereas if the conduct also meets limb (b), the conduct will meet the conjunctive test for serious misconduct; *Teacher Y v Education Council of Aotearoa New Zealand* [2018] NZDC 3141, 27 February 2018, at [64]. *Evans v Teachers Disciplinary Tribunal* [2020] NZDC 20062, 8 October 2020, at [42].

<sup>21</sup> This is the approach taken to “fitness to practise” for the purposes of the Health Practitioners Competence Assurance Act 2003, and the approach which has been taken to the test for “fitness to be a teacher”, by this Tribunal in previous decisions.

<sup>22</sup> See *Martin v Director of Proceedings* [2010] NZAR 333 and *Cole v Professional Conduct Committee of the Nursing Council of New Zealand* [2017] NZHC 1178, at [126]-[130] applied in previous decisions of this Tribunal.

## Relevant standards

[33] The Tribunal assessed Ms X's established conduct against the following standards set in the Code of Professional Responsibility and in previous, comparable, cases. The Tribunal also had regard to section 24(1)(a) of the Act.

[34] Section 24(1)(a) of the Act prohibits a teacher using force, by way of correction or punishment, towards a child enrolled at or attending an early childhood service.

### *Code of Professional Responsibility*

[35] The standards of behaviour expected of registered teachers are contained in the Teaching Council's Code of Professional Responsibility (the Code). The Code emphasises in Clauses 1 and 1.3 that teachers need to maintain the trust and confidence of the teaching profession by "demonstrating a high standard of professional behaviour and integrity"<sup>23</sup>.

[36] Clause 2.1 reads:

I will work in the best interests of learners by promoting the wellbeing of learners and protecting them from harm.

[37] The Code was issued with 'Examples in Practice' which provide examples of what the principles look like in practice and include behaviours that are unacceptable and in breach of the Code.<sup>24</sup> An example given of demonstrating a high standard of professional behaviour and integrity as required by Clause 1.3 is "behaving in ways that promote a culture of trust, respect and confidence in me as a teacher and in the profession as a whole." Conduct that damages this trust and confidence breaches Clause 1.3. Examples of promoting the wellbeing of learners and protecting them from harm, as required by Clause 2.1 are "fostering trust, respect and cooperation with and among learners". An example that is given of behaviour that does not promote learners' wellbeing and may cause harm is:

Inappropriate handling such as physically grabbing, shoving or pushing, or using physical force to manage a learner's behaviour.

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<sup>23</sup> Code of Professional Responsibility, 1.3.

<sup>24</sup> Code of Professional Responsibility, 'Examples in Practice' (Education Council, Wellington, June 2017).



- [38] In *CAC v Teacher Z*<sup>25</sup> the Tribunal explained that by acting with integrity and professionalism, teachers maintain the trust and confidence placed in them by learners, families and whānau, and the wider community “to guide their children and young people on their learning journey and to keep them safe”<sup>26</sup>. Further, that conduct in breach of Clause 1,3 “may include conduct outside of work that interferes with their performance as a teacher, that affects the trust and confidence that others have in them as a teacher, or that reflects badly on the integrity or standing of the teaching profession.”<sup>27</sup>
- [39] The Tribunal also had regard to the Children’s Act 2014 which reinforces the importance of ensuring the protection and safety of children in education settings. Changes brought in by that Act included safety checking for employees who work with children and requiring that school boards adopt child protection policies to identify and report cases of suspected child abuse or neglect.

#### *Previous comparable cases*

- [40] The Tribunal has previously affirmed that the use of force by a registered teacher for a corrective purpose, even if no aggression or anger is involved, will typically amount to serious misconduct.<sup>28</sup>
- [41] There are several cases where the Tribunal has found that minor assaults on children amount to serious misconduct, both in the home environment and in the education setting.<sup>29</sup>
- [42] In *CAC v Teacher K*<sup>30</sup> a teacher at a Play Centre smacked her two-year-old child, who attended the Centre, on his nappy. The incident occurred three weeks after the

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<sup>25</sup> *CAC v Teacher Z* NZTDT 2020/19 at [26].

<sup>26</sup> *CAC v Teacher Z* NZTDT 2020/19 at [25].

<sup>27</sup> *CAC v Teacher Z* NZTDT 2020/19 at [26].

<sup>28</sup> *CAC v Haycock* NZTDT 2016/2.

<sup>29</sup> For example, *CAC v Teacher K* NZTDT 2020/24, *CAC v Rowlingson* NZTDT 2015/54, *CAC v Haycock* NZTDT 2016/2 (the Tribunal considered that although serious misconduct was established, no disciplinary penalty was required – the smacking was considered to be at the lower end of the scale of force and there was no anger or aggression on the part of the teacher) and *CAC v Maeva* 2016/37.

<sup>30</sup> *CAC v Teacher K* NZTDT 2020/24.

teacher had emigrated from South Africa and she was still in her induction programme. The Tribunal stated:<sup>31</sup>

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.

[43] The Tribunal imposed conditions on Teacher K's practising certificate.

[44] In *CAC v Teacher A*<sup>32</sup> the teacher worked at an early learning centre and had two young children who attended the centre. The teacher smacked the first child hard on the bottom three times. The teacher hit the second child on the back at a force level of a two or three out of 10. The Tribunal found this conduct was serious misconduct and ordered suspension of Teacher A's practising certificate noting:

[76] On the parenting issue, it could be said to have an even greater adverse effect to be hit by your own parent. This is because, assuming the teacher does not hit any other child..., then the child of the teacher feels particularly singled out and seemingly not as protected from violence in schools as other children. For that reason, we do not consider that the presence of a parental relationship with the child that has been assaulted should be relevant to liability for the charge in this case.

[77] Further, assaults by teachers on children will near always reflect adversely on their fitness to practice and will also bring the profession into disrepute. We find in this case that both of these limbs are easily met.

[45] In *CAC v W*<sup>33</sup> the Tribunal found that the teacher's assault on her 17-year-old daughter by hitting her with the back of her hand, reflected adversely on the teacher's fitness to be a teacher and may bring the teaching profession into disrepute. The daughter was not a student of the teacher, and the conduct did not take place at the teacher's workplace. The Tribunal referred to *CAC v Risuleo*<sup>34</sup> where the Tribunal described legislative amendments that have the result of prohibiting the use of force in early childhood services and registered schools, and the use of force by parents. In that case the Tribunal stated that the repeal of the parental defence to the use of

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<sup>31</sup> *CAC v Teacher K* at [31].

<sup>32</sup> *CAC v Teacher A* NZTDT 2019/130.

<sup>33</sup> *CAC v W* NZTDT 2018/105.

<sup>34</sup> *CAC v Risuleo* NZDT 2018/8.

force on children formerly contained in section 59 of the Crimes Act 1961 “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”.<sup>35</sup> The Tribunal in *CAC v W* also accepted that the conduct fell within the contemplation of Rule 9(1) because it was conduct that could be the subject of prosecution for an offence punishable by a term of imprisonment of three months or more<sup>36</sup>.

[46] In *CAC v Dinsdale*<sup>37</sup> the teacher smacked a two-year-old Child (O) on two occasions at a Play Centre in 2018. After Child O hit another child, the teacher smacked Child O on the hand. Some months later, Child O grabbed another child’s face and the teacher smacked Child O on the hand twice. The Tribunal found this conduct was serious misconduct and imposed a penalty of censure, annotation, and conditions.

[47] In *CAC v Teacher V*<sup>38</sup> the teacher hit her granddaughter a number of times with a salu (broom) and the handle of a shopping trolley, causing bruises. This conduct occurred in the home environment. The Tribunal found the conduct was serious misconduct and censured the teacher, imposed conditions on her practising certificate, and ordered the register of teachers to be annotated, noting<sup>39</sup>:

...the respondent’s use of violence adversely reflects on her fitness to teach, notwithstanding that it happened in a personal rather than professional setting. As we have said on many previous occasions, practitioners have an obligation to their students to both teach and model lawful behaviour. The respondent’s reversion to violence, employed against a young person, sends a very poor signal about the propriety of the use of force to resolve conflicts to the children whose behaviour she is responsible for supervising and moderating.

[48] In *CAC v Teacher Z*<sup>40</sup> the Tribunal found that the teacher had committed misconduct that was sufficiently serious to warrant discipline, when she had slapped and/or hit

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<sup>35</sup> *CAC v Risuleo* NZDT 2018/8 at [25].

<sup>36</sup> *CAC v WNZTDT* 2018/105 at [25].

<sup>37</sup> *CAC v Dinsdale* NZTDT 2019/42.

<sup>38</sup> *CAC v Teacher V* NZTDT 2020/02.

<sup>39</sup> At [6].

<sup>40</sup> *CAC v Teacher Z* NZTDT 2020/19 at [2]-[4].

her two daughter's palms with a ruler on several occasions, up to three times on each occasion, and that on one occasion she slapped her daughter on the cheek.<sup>41</sup> The conduct occurred purely in the private sphere in the context of parenting (her own children), rather than teaching. The Tribunal noted that "*registered teachers are expected to role model positive behaviour in their daily lives, including to the students they teach, and to children in general. The Respondent's conduct, on the limited occasions the Tribunal has found it occurred, called into question her parenting skills, demonstrated a lack of judgement and on the one occasion when she slapped her daughter on the cheek, a lack of self-control in front of and towards her own child/children*".<sup>42</sup>

### **Discussion and Findings on the Charge**

[49] The Tribunal was satisfied the evidence established the matter alleged in the Charge; that on or around 5 February 2021, while at home, Ms X smacked her daughter, Child A (who was aged 2 years, 5 months) with a ruler on Child A's upper thigh, leaving a red mark.

[50] As to liability, the Tribunal accepted the following submissions that were made for the CAC and was satisfied Ms X's conduct was serious misconduct:

- (a) Limb (a)(ii) of the definition in section 10, is met. Ms X's use of force for corrective purposes showed a serious lapse of judgement and reflects adversely on her fitness to be a teacher. Despite that Ms X smacked Child A in the home environment, her conduct calls into question her capacity for self-control and self-regulation. Smacking any child is not the conduct of a competent, fit teacher. The fact that Ms X used a ruler as her method of exerting force against Child A is a further reason why Ms X's conduct reflects adversely on her fitness to be a teacher.
- (b) Limb (a)(iii) is also met. Ms X's smacking of Child A with a ruler was conduct which is likely to bring the teaching profession into disrepute. Reasonable members of the public would very likely conclude that the reputation and good standing of the profession is lowered when a teacher, particularly one in a position which Ms X held as Head Teacher of a

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<sup>41</sup> CAC v Teacher ZNZTDT 2020/19 at [35].

<sup>42</sup> CAC v Teacher ZNZTDT 2020/19 at [37].

Preschool, used force to discipline her young daughter, aggravated by the use of a ruler.

- (c) As to the second limb, rule 9(1)(a) is engaged because there was no reasonable basis on which a teacher in Ms X's position could have been justified in smacking Child A with a ruler. Ms X's conduct was for corrective purposes prohibited by section 24 of the A and cannot be justified.
- (d) Rule 9(1)(j) is also engaged as smacking is a form of discipline and this is prohibited by section 59 of the Crimes Act 1961. Ms X was given a formal warning by Police for her assault on a child under section 194 of the Crimes Act 1961 which carries a maximum penalty of two years' imprisonment.
- (e) Rule 9(1)(k) is engaged for the same reasons limb (a)(iii) is engaged. Reasonable members of the public, informed that a Preschool Head Teacher disciplined her own young child by smacking her with a ruler, would likely think less of a profession which tolerates that conduct, particularly where young learners are involved.
- (f) The conduct was therefore of a character and severity that meets the Teaching Council's criteria for reporting serious misconduct.

[51] A finding of serious misconduct is consistent with the majority of the Tribunal's previous, comparable, decisions which reiterate that the use of physical force against children is unacceptable and amounts to a disciplinary offence, even when the conduct occurs solely in the private sphere. In this case there is a closer nexus between the teacher's conduct and her professional role as Ms X was a teacher at the Preschool that her child attended. Ms X and her daughter were members of the same preschool community.

[52] The Tribunal considered that Ms X's conduct was more serious than Teacher K's conduct which involved a single smack against a young learner, because of Ms X's use of a ruler (which caused a red mark to be left on her daughter's thigh).

[53] It was for those reasons that the Tribunal's opinion was that considered objectively, Ms X's assault on her young daughter amounted to serious misconduct in terms of the applicable definition. Accordingly, the Charge is established. Ms X is guilty of serious misconduct.

## Penalty

[54] Having made an adverse finding of serious misconduct, the Tribunal was entitled to exercise its powers under section 500 of the Act. The Tribunal could do one or more of the things set out in section 500(1).

[55] It is well established that the primary purposes of the imposition of disciplinary penalties against teachers who have been found guilty of a disciplinary offence are to maintain professional standards (through general and/or specific deterrence, so that the public is protected from poor practice and from people unfit to teach), to maintain the public's confidence in the teaching profession, and to protect the public through the provision of a safe learning environment for students<sup>43</sup>.

[56] In previous decisions the Tribunal has accepted as the appropriate sentencing principles those identified by Collins J in *Roberts v Professional Conduct Committee of the Nursing Council*<sup>44</sup>. His Honour identified eight factors as relevant whenever an appropriate penalty is being determined in proceedings of this nature. Those factors are:

- (a) What penalty most appropriately protects the public.
- (b) The Tribunal must be mindful of the fact that it plays an important role in setting professional standards.
- (c) Penalties imposed may have a punitive function.
- (d) Where it is appropriate, the Tribunal must consider rehabilitating the professional.<sup>45</sup>
- (e) The Tribunal should strive to ensure that any penalty imposed is comparable to penalties imposed in similar circumstances.
- (f) It is important for the Tribunal to assess the practitioner's behaviour against the spectrum of sentencing options that are available. In doing so, the Tribunal must try to ensure that the maximum penalties are reserved for the worst offenders.

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<sup>43</sup> As discussed in *CAC v McMillan* NZTDT 2016/52 at [23].

<sup>44</sup> [2012] NZHC 3354 at [44]-[51].

<sup>45</sup> *CAC v Teacher* NZTDT 2016/55 at [30].

- (g) The Tribunal should endeavour to impose a penalty that is the least restrictive that can reasonably be imposed in the circumstances.
- (h) It is important for the Tribunal to assess whether the penalty it is to impose is fair, reasonable, and proportionate in the circumstances presented to the Tribunal, or not.

#### *Submissions for the CAC*

[57] It was submitted for the CAC that the appropriate disciplinary response to Ms X's established conduct was censure, annotation of the register of teachers for two years, and the imposition of conditions on her current and any future practising certificate, including requiring Ms X to attend a professional development course in the area of behaviour management, attend a course designed to assist stress management, and disclose this decision to her employer and any prospective employer for two years (from the date of the decision). It was submitted these conditions were necessary to prevent a repetition of the conduct and enable any future employer to put in place mechanisms to support Ms X's teaching and/or support any students who may be in a similar situation to Child A.

[58] The Tribunal accepted the following submissions that were made for the CAC:

- (a) This case was more serious than other cases that have come before the Tribunal<sup>46</sup> because an instrument was used to inflict the force on the child and Ms X did not inform any of her staff about the conduct. Rather, Ms X's conduct was discovered by another staff member as she was changing Child A's nappy (that is, before Ms X disclosed what had happened).
- (b) Ms X smacked Child A in the home environment and used a ruler to inflict the force, which brought it into line with, for example, the *Teacher V* case. In cases which involved conduct of a similar nature, the respondent teachers were censured, had conditions imposed, and the register was annotated.<sup>47</sup> Professional development courses in the area

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<sup>46</sup> For example, *CAC v Haycock* NZTDT2016/2.

<sup>47</sup> In *CAC v Teacher U* NZTDT 2019/25 and *CAC v Dinsdale* NZTDT 2019/42 the register was annotated for two years. In *CAC v Teacher A* NZTDT 2019/130 and *CAC v Teacher V* NZTDT 2020/02 the register was annotated for 18 months.

of behaviour management were considered appropriate in some of those cases.<sup>48</sup>

#### *Evidence for Ms X*

[59] Ms X made a reflective statement<sup>49</sup> which contained statements relevant to penalty<sup>50</sup>. This was considered carefully. In her reflective statement Ms X made the following points (summarised):

- (a) She is still very remorseful and ashamed of the actions she took at home, towards her daughter on the day of the incident (in February 2021).
- (b) She has reflected on the stresses that she had at the time and she and her husband have been able to remove these and put in place strategies to deal with any stress that she had and may face in the future. She has been assisted by counselling sessions through this process.
- (c) Her action was a one-off. She is proud to say this conduct has never happened since and will never occur again as she had never wants to see the pain she caused her daughter, again.
- (d) Her employer has been “so supportive” of her since the incident.

[60] Ms X provided eight character references.

[61] There was a joint reference from five of Ms X’s staff at the Preschool. Staff attested to Ms X’s patience, flexibility, and dedication as a leader and who they say has been fair and supportive to them as staff members. They wrote of Ms X’s loyalty to the Preschool and to friends and described her as “both positive and forgiving, and always helps others where she can”. Further they wrote of her caring nature, her understanding of issues and that Ms X shows compassion “while speaking the truth”. With her own children who attend the Preschool, staff stated that “[Ms X] always shows love, care and affection but is also impartial and practises appropriate discipline and behaviour guidance. Her professionalism is always to the fore”. Significantly, staff wrote “finally, we would like to observe that [Ms X’s] children are

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<sup>48</sup> For example, *CAC v Dinsdale* (above) and *CAC v Teacher A* (above).

<sup>49</sup> Reflective statement signed by Ms X and dated February 2023.



a testament to her and her husband[’s] quality parenting. They have been brought up to be kind-hearted, helpful, and supportive of their friends. They are healthy, well-dressed, and provided with healthy food choices in their lunchboxes. We have no hesitation in endorsing [Ms X] as an excellent teacher, friend, and colleague.”

[62] In a separate reference written by one of those staff members, that staff member stated that Ms X’s children are “happy and well-adjusted children”, and Ms X develops positive relationships with tamariki in the centre and with their whānau. The staff member wrote of Ms X’s resilience and referred to the fact that with staff shortages and other pressures, Ms X has ‘stayed on deck’ and guided her team to the best outcomes possible. Ms X is described as an “asset to our community. She is open, caring, and generous”.

[63] A relief teacher at the Preschool who has known Ms X for five years, described Ms X as a person of integrity, honesty, and good character. Of Ms X’s children, the teacher stated that they adore their mother who is loving and kind and always wants the best for them; that the children are a product of their environment and are happy, joyful, confident, and well-rounded. Ms X is described as a “role model for other mums”.

[64] Another colleague, in her reference, stated that in the 12 years she has known Ms X (through work and outside the workplace, including as a counsellor on two occasions) she has observed Ms X as a “devoted mother of good character and strong principles”. She stated that Ms X’s children are well-mannered and respectful to their parents and “[Ms X] is a trustworthy, hard working, and dedicated family loving woman, with a high moral standard. [Ms X] will always go above and beyond what’s required and she carries the respect of the staff she works with”.

[65] Ms X’s Manager for the past three years stated in his reference that his observations are of Ms X being a person of “exemplary character”, and he admires her as a person and as an employee. He stated that he has seen Ms X under pressure in the workplace and she “responds consistently with love and with real compassion for those around her”.

[66] The Company Manager of the company which owns the Preschool stated that “[Ms X] shows empathy, support, professionalism, both in whanau and her work life”. He stated that Ms X is respected by her peers and her strong Christian values mean she puts people at the centre of her day. The Company Administrator, in a separate

reference wrote of Ms X being supportive of her team, and of her understanding and strong yet compassionate leadership, “which sets her apart”.

[67] The Head Teacher of another preschool owned by the same company wrote of Ms X’s high degree of professionalism and respect in her work and professional interactions, her strong sense of integrity and desire to strive for the best outcomes for her staff and children under her leadership (which she stated shows through in Ms X seeking guidance and further ideas/knowledge around curriculum planning, children’s outcomes and staff appraisal to ensure she keeps up to date with current expectations). This Head teacher also wrote of Ms X’s openness and honesty in her discussions, while sharing her humour and genuine desire to always do her best.

#### *Findings on Penalty*

[68] The Tribunal considered the relevant penalty principles including the previous cases, as well as the submissions that were made for the CAC, Ms X’s reflective statement and her character references.

[69] The Tribunal considered the aggravating features that have been discussed.

[70] The Tribunal was of the opinion that there are also some mitigating factors to be considered namely:

- (a) Ms X has admitted her conduct and thereby demonstrated insight.
- (b) There is no evidence that the incident was anything other than a ‘one-off’.
- (c) The events occurred two years ago and there is no evidence that there has been repeat behaviour. Ms X has stated there has not been any repeat behaviour.
- (d) Ms X has expressed genuine remorse through her statement of reflection.
- (e) There is evidence of Ms X having reflected on the inappropriateness of her behaviour, and the pain she caused her daughter. There is evidence that she has attended some counselling sessions since the incident.
- (f) Ms X’s current employer is supportive of her. Ms X’s staff respect her and there is evidence that Ms X is of good character. The references the Tribunal received were all very positive. There is no reason for the

Tribunal to be concerned that Ms X poses any risk to tamariki at the Preschool, or any ongoing risk of repeat of the behaviour it has reviewed.

- [71] Another feature is that Ms X's practice as a teacher was not in question. The information the Tribunal received about Ms X's practise as an early childhood educator (from the references) is that Ms X practises to a high standard in her role as Head Teacher.
- [72] Taking all relevant matters into account, the Tribunal was satisfied that it was appropriate and necessary to impose a formal penalty. The Tribunal formed the view that Ms X's assault on her young daughter was of sufficient severity as to warrant the imposition of disciplinary penalties to maintain professional standards and protect the public. There is a need also to send a message to members of the teaching profession that misconduct of the nature the Tribunal has found here is not a trivial matter and will likely justify the imposition of a penalty.
- [73] The Tribunal considered that the least restrictive penalty which meets the seriousness of the case and discharges the Tribunal's obligation to the public and the teaching profession is a censure of Ms X to express the Tribunal's disapproval of her conduct, and the imposition of a condition on Ms X's practising certificate requiring her to disclose a copy of this decision to her current employer, and for one year, to any prospective and future employers. In addition, the Tribunal considers that the register of teachers should be annotated to note the censure, also for a period of one year.
- [74] The Tribunal accepted the submission that was made for the CAC that a censure is required to mark the seriousness of the conduct and send a message to the profession that conduct of this nature is not acceptable, regardless of whether the conduct occurs in the education environment or the home environment.
- [75] Given the Tribunal was satisfied the conduct was an isolated incident resulting from a lapse of judgement, and there is no evidence of current stress in the workplace or conditions which may risk repetition of the conduct, the Tribunal did not consider it necessary to impose any further conditions, for example, conditions requiring Ms X to undertake professional development courses. However, Ms X may wish to consider voluntarily undertaking the Prevent, Teach, Reinforce for Young Children - The Early Childhood Model of Individualised Positive Behaviour Support programme

or similar programme if she wishes to take further steps to ensure there is no repeat of the behaviour that has led to her being disciplined.

[76] Accordingly, there is an order of censure, and the register is to be annotated to note the censure, for one year. The following condition is imposed on Ms X's practising certificate:

- a. Ms X must provide a copy of this decision to her current employer, and for one year, to any prospective and/or future employers in the education sector.

[77] It is noted that the Tribunal considered the individual components of the penalty it is imposing, together, to ensure that the overall penalty was assessed against the *Roberts* factors and was a fair and reasonable penalty in all the circumstances.

#### *Costs*

[78] It is usual for an award of costs to be made against a teacher once a charge is established. A teacher who comes before the Tribunal should expect to make a proper contribution towards the reasonable costs that have been incurred.

[79] The matter has been able to be heard on the papers which typically attracts a costs order of 40% of the costs and expenses incurred by the CAC and the Tribunal<sup>51</sup>.

[80] The Tribunal considered that an order of 40% contribution to the CAC's costs as claimed, would be reasonable and appropriate in this case. This order takes into account that Ms X accepted liability and agreed to proceed with a hearing on the papers with the benefit of an agreed summary of facts.

[81] Accordingly, the Tribunal is making an order pursuant to section 500(1)(h) that Ms X is to pay the sum of \$3,330.00 to the CAC which is 40% of the total CAC costs (\$8,324.94 excluding GST) as at the hearing date (including the investigation and external legal costs for these proceedings)<sup>52</sup>. The Tribunal agreed with the CAC that this sum is reasonable in the circumstances of this case, and it is in line with the Tribunal's latest guidance on costs, Practice Note 1: Costs, 1 April 2022 at [8].

[82] As to the costs of conducting the hearing, the Tribunal is making an order that Ms X make a 40% contribution towards those costs (estimated to be \$1,455.00), being

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<sup>51</sup> Costs Schedule filed by Counsel for the CAC on 14 April 2023.

<sup>52</sup> Costs Schedule of the Tribunal

payment of the sum of \$582.00 to the Teaching Council. This order is made under section 500(1)(i).

### **Non-publication orders**

- [83] The Tribunal's jurisdiction to make non-publication orders is found in section 501(6) of the Act. An order can only be made under section 501 (6) (a)-(c) if the Tribunal is of the opinion that it is proper to do so, having regard to the interests of any person (including, without limitation, the privacy of the complainant, if any) and the public interest.
- [84] The default position is the principle of open justice. The Tribunal needs to consider whether consequences relied on by the applicant would be "likely" to follow if no order was made. In the context of section 501(6) this means there must be an appreciable or real risk, to be assessed on the evidence before the Tribunal. When considering whether it is proper for the open justice principle to yield, the Tribunal needs to strike a balance between the public interest factors and the private interests advanced by the applicant.
- [85] Ms X sought a permanent non-publication order in respect of her name and identifying details and those of her daughter (Child A) and the Preschool.
- [86] The CAC sought an order permanently suppressing the name and identifying Ms X's daughter, in accordance with both section 501(6) of the Act and Rule 34(4) of the Teaching Council Rules. It was submitted that it is proper to suppress Child A's name, having regard to the child's privacy interests, her wellbeing and learning interests, and because there is no public interest in Child A being named.
- [87] The CAC did not oppose Ms X's application for name suppression for her and for the Preschool. Ultimately it was accepted that publication of Ms X's name, and the name of the Preschool, would risk the identification of Child A. Ms X is Child A's mother and they share the same surname. Ms X remains employed at the Preschool and Child A is a learner at the Preschool. As the CAC noted, in *CAC v Teacher*<sup>53</sup> the Tribunal ordered suppression of the teacher's name stating "the relationship of mother and daughter is an intrinsic part of the charge and the evidence, and so it is difficult to protect her [the child's] privacy interests if the respondent is named."

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<sup>53</sup> *CAC v Teacher* NZTDT 2016/67 at [21]

[88] The Tribunal balanced the public interest factors which favour open justice and Ms X being named, against the competing private interests of her young daughter. The Tribunal had no difficulty reaching the view that the privacy and welfare interests of Child A are paramount and override the public interest in Ms X being named. There is no public interest in Child A being named or identified and therefore in the Tribunal's opinion, it is entirely proper that the names and identifying particulars of Child A, and Ms X are permanently suppressed from publication.

[89] There will also be a permanent order suppressing the name of the Preschool where Ms X works. The name of the Preschool is an identifying feature of both Ms X and Child A and so suppression would be proper.

[90] Non-publication orders are made accordingly.

### **Conclusion**

[91] The Charge is established. Ms X is guilty of serious misconduct.

[92] The Tribunal's formal orders under the Education and Training Act 2020 are:

- (a) Ms X is censured, pursuant to section 500(1)(b).
- (b) The following condition is imposed on Ms X's practising certificate, pursuant to section 500 (1)(c):
  - a. Ms X must provide a copy of this decision to her current employer, and for one year, to any prospective and/or future employers in the education sector.
- (c) The register of teachers is to be annotated to note the censure, for one year, pursuant to section 500(1)(e).
- (d) Ms X is to pay \$3,330.00 to the CAC as a contribution to its costs, pursuant to section 500(1)(h),
- (e) Ms X is to pay \$582.00 to Teaching Council in respect of the costs of conducting the hearing, pursuant to section 500(1)(i).
- (f) There are orders under section 501(6)(c) permanently suppressing from publication the names and identifying particulars of:
  - a. Child A (██████████);
  - b. Ms X (██████████); and

c. The Preschool ( [REDACTED] )

Dated at Wellington this 1st day of  
May 2023



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**Jo Hughson**  
Deputy Chairperson

## NOTICE

- 1 A teacher who is the subject of a decision by the Disciplinary Tribunal made under section 500 of the Education and Training Act 2020 may appeal against that decision to the District Court (section 504(1)).
- 2 The CAC may, with the leave of the Teaching Council, appeal to the District Court against a decision of the Disciplinary Tribunal made under section 500 (section 504(2)).
- 3 An appeal must be made within 28 days of receipt of written notice of the decision, or any longer period that the District Court allows.
- 4 Clause 5(2) to (6) of Schedule 3 to the Education and Training Act 2020 applies to every appeal under section 504 as if it were an appeal under clause 5(1) of Schedule 3.