

BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

NZTDT 2022/10

IN THE MATTER of the Education and Training Act 2020


AND

IN THE MATTER of a charge of serious misconduct referred by the
Complaints Assessment Committee to the New
Zealand Teachers Disciplinary Tribunal

BETWEEN **COMPLAINTS ASSESSMENT COMMITTEE**

Referrer

AND


Respondent

DECISION OF THE TRIBUNAL ON CHARGES

4 November 2022

HEARING: Held in person on 28 September 2022

TRIBUNAL: Rachael Schmidt-McCleave (Deputy Chair)
Neta Sadlier and Nikki Parsons (members)

REPRESENTATION: E Mok/H Smaill, Meredith Connell for the Complaints Assessment
Committee
The respondent, self-represented with her support person

Hei timatanga kōrero – Introduction

1. Pursuant to section 497(4) of the Education and Training Act 2020 (the “Act”), the Complaints Assessment Committee (“CAC”) referred the respondent’s conduct to the Tribunal. This was on the basis that the respondent engaged in conduct that, while not amounting to serious misconduct, otherwise entitles the Tribunal to exercise its disciplinary powers under section 500 of the Act.
2. The referral from the CAC states that:
 - (a) On 10 February 2022, the CAC considered the mandatory report received by the Teaching Council and found that, with respect to the respondent’s conduct, she had left a hot drink unattended resulting in serious harm to a 15 month old child.
 - (b) The CAC sought to resolve this matter by issuing a censure, on the grounds that the respondent’s conduct amounted to misconduct.
 - (c) The CAC sought the agreement of the respondent and of the initiator of the report (the parent of the child concerned), as required by section 497(3) of the Act.
 - (d) The initiator declined to sign the agreement to censure.
 - (e) The CAC considers that the respondent’s conduct warrants a disciplinary response.
3. The CAC alleges that the conduct above amounts to conduct which otherwise entitles the Disciplinary Tribunal to exercise its powers pursuant to section 500 of the Act.
4. The matter was heard in person on 28 September 2022.

Ko te hātepe ture o tonono nei – Procedural History and Preliminary Matters

5. A pre-hearing conference (“PHC”) was held on 13 July 2022, whereby various timetabling directions were made to enable the charge to proceed to a hearing. An interim order for non-publication of the respondent’s name was made at that time. The Chair convening the PHC also noted that where, as here, the CAC and the respondent have reached agreement as to the outcome of an investigation without the need to refer to the Tribunal, and the Tribunal also agrees with the proposed outcome, it is common to grant permanent suppression of the respondent’s name, on the basis that proceedings before the CAC are

in private. The Chair noted she could not bind any Tribunal considering this matter, however, and directed that, if the respondent wanted permanent suppression, she should file an application for such by a specified date. I will return to this point later in the Tribunal's decision.

6. On 15 August 2022 a further PHC was called to clarify how the hearing was to proceed. The respondent had confirmed that she would like to be heard in person and the matter was therefore set down for an in-person hearing.

Kōrero Taunaki - Evidence

Agreed Summary of Facts

7. The ASoF is set out in full below:

“Background

1. *The respondent, [REDACTED], is a registered teacher.*
2. *At all material times, the respondent worked as a teacher at [REDACTED] (Centre). The Centre is a private early childhood centre offering early education and care for children aged between 0 and 2 years old. The respondent continues to work as a teacher as at the date of this summary of facts.¹*
3. *While working at the Centre, the respondent was involved in an incident where injuries were sustained by a 15-month-old child (Child A) who attended the Centre at the relevant time.*

Leaving uncovered hot cup of tea unattended resulting in serious injury to Child A

4. *On 9 September 2020, the respondent completed a training course for her new role as Lead Teacher at the Centre. As a result of the training course, the respondent took her lunch later than usual, at approximately 2.40 pm.*
5. *The respondent prepared her lunch in the kitchen which included a cup of black tea made from boiling water. On her way from the kitchen to the office, she placed the uncovered cup of hot tea in an open locker approximately 80 centimetres off the ground. The locker was located at the side of the dining room and was accessible to the children playing in the dining room at the time.² She continued into the [REDACTED] room' to inform her colleague ([REDACTED]) that she was taking her lunch break. As the respondent exited the [REDACTED] room and went back towards the lockers, she saw Child A with the tea cup in his hands and heard him scream.*

¹ 20 July 2022.

² The Appendix filed with the Agreed Summary of Facts contained photographs of the area, which the Tribunal has viewed.

6. Another colleague (██████████), immediately came into the room from the kitchen and saw that Child A had spilled hot tea over himself. The respondent apologised and said she had spilled hot water over Child A.
7. The respondent began removing Child A's clothing and ██████████ began tipping glasses of cold water over him. Another colleague (██████████) came into the room and carried Child A to the bathroom where she placed him in a large tub and began running cold water over him.
8. The respondent called an ambulance and ██████████ called Child A's mother. Child A's father arrived at the Centre shortly followed by the ambulance, which arrived at approximately 2:55 pm.
9. Child A continued to be cooled in the bath tub before being taken to hospital at approximately 3:26 pm. Child A underwent surgery for severe burns sustained to his left arm and left side of his cheek. He remained in hospital for five days before being discharged. Child A's parents reported that Child A was traumatised by the incident and did not want to eat or be bathed afterwards.

Centre investigation

10. The Centre immediately removed all open mugs from the Centre. The day following the incident the Centre reported the incident to the Ministry of Education and WorkSafe New Zealand (both took no further action), stood down ██████████ and notified all other parents of the incident.
11. The Centre contacted the Teaching Council about mandatory reporting requirements and determined a mandatory report was not necessary. The Centre engaged Buddle Findlay to assist with its internal employment disciplinary process. Buddle Findlay found that ██████████ conduct breached her employment contract (by virtue of breaching the Centre's guidelines against using uncovered mugs for hot drinks) and amounted to serious misconduct. The Centre issued ██████████ with a formal written warning which remained on her employment file for a period of 12 months. ██████████ was first allowed to return to work in an administrative role on 22 September 2020 before resuming her role as Lead Teacher on 28 September 2020.
12. The Centre engaged Whakamana Law and Consultancy Limited to conduct an independent investigation of the incident. As a result of the incident, the Centre no longer permits open mugs on site and has provided screw top travel mugs to all staff.

Committee investigation

13. On 13 September 2020, Child A's mother made a complaint to the Teaching Council, which referred the matter to a Complaints Assessment Committee to investigate (Committee).
14. On 10 February 2022, the Committee met and determined that the respondent's conduct in leaving a hot cup of tea unattended in an area accessible to children at the Centre (and which resulted in Child A picking up the cup and experiencing serious injury) amounted to misconduct pursuant to s 497(2) of the Education and Training Act 2020 (Act). The Committee considered that a censure was the appropriate penalty. The Committee sought the agreement of the respondent and Child A's mother (as the initiator of the complaint) to impose a censure on 18 March 2021. Section 497(3) of the Act requires the teacher and the initiator's agreement before the Committee may impose penalty orders such as a censure.

15. On 18 March 2021, Child A's mother informed the Committee she would not be signing the agreement to censure.
16. On 19 April 2021, the Committee met to consider next steps. The Committee decided to refer the matter to the Teachers Disciplinary Tribunal under s 497(4) of the Act.

Teachers response

17. At a meeting with the Committee during the investigation process, and in an additional written response, the respondent accepted responsibility for her actions and expressed remorse for her conduct.
18. The respondent sent an apology card to Child A's parents and said she had not had any further contact with Child A's parents or Child A in accordance with their wishes."

Te Ture - The Law

8. The Committee submits that the respondent's conduct amounts to misconduct and warrants a disciplinary response.
9. The Act does not define "misconduct" but does define "serious misconduct". This Tribunal has, on prior occasions under the previous Act, undertaken its assessment of whether conduct is misconduct by reference to the Act's definition of "serious misconduct" (which has not changed in the new Act):³

"serious misconduct means conduct by a teacher –

(a) that -

- (i) adversely affects, or is likely to adversely affect, the well-being or learning of 1 or more students; or
- (ii) may bring the teaching profession into disrepute; and

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

10. As this Tribunal has stated on many occasions, section 10 establishes a two-step test for serious misconduct, namely first that the conduct must have one or more of the adverse professional effects or consequences described in subsections 10(a)(i)-(iii), and, second, that the conduct must meet the Teaching Council's criteria for reporting serious misconduct. These are set out in rule 9 of the Teaching Council Rules 2016 (the **Rules**).

³ See *CAC v Evans* NZTDT 2018/43; *Education Council of Aotearoa New Zealand v Teacher Y* 2016/25, 29 March 2017.

11. The Court of Appeal in *Evans v Complaints Assessment Committee of Aotearoa New Zealand* [2021] NZCA 66⁴ held that (at [6]):

“[if] one of the matters in limb (a) of the definition [of serious misconduct] is made out, the question whether limb (b) is met determined whether the conduct is “serious misconduct” or “misconduct simpliciter”.

12. What this means in practice is that, if a teacher’s conduct adversely affects, or is likely to adversely affect the well-being or learning of one or more students, or reflects adversely on the teacher’s fitness to be a teacher, or may bring the teaching profession into disrepute, then the conduct will constitute misconduct. If the conduct is sufficiently serious to engage one or more the rule 9 reporting criteria, then it will constitute serious misconduct.

Ngā Kōrero a te Kōmiti – CAC and Respondent Submissions

CAC submissions

13. The CAC submitted that the respondent’s conduct meets one or more of the matters in limb (a) of the definition of serious misconduct in section 10 of the Act (and, in the CAC’s submissions meets all three), but does not meet limb (b).
14. The CAC explained its reasoning thus:
- (a) The respondent’s negligence in leaving an uncovered hot tea cup unattended in a locker that was accessible to children, and which resulted in serious harm to Child A, has serious implications for Child A’s physical and emotional wellbeing (section 10(a)(i)). Immediately after spilling the boiling water on himself, Child A began screaming and crying. He sustained serious physical injuries in the form of severe burns to his left arm and left side of his cheek, and underwent surgery. He remained in hospital for five days. His parents reported that afterwards Child A remained traumatised and did not want to eat or be bathed for many weeks.
 - (b) The respondent’s conduct on this occasion reflects adversely on her fitness to be a teacher (section 10(a)(ii)). The conduct was contrary to clause 2.1 of the Code,

⁴ Citing *Teacher Y v Education Council of Aotearoa New Zealand* [2019] NZCA 637. Note that, in addressing the question of the earlier Act, the Court of Appeal noted in *Evans* that “[the] current legislation has replicated the earlier provisions. It is to be assumed that Parliament did so in the knowledge that the approach to determining what constitutes misconduct has been settled and has not caused difficulty.”

in that, in carelessly leaving her cup of boiling water unattended and at a height easily accessible to young children and in their direct vicinity, failed to protect Child A from harm. While the conduct involved a momentary lapse of judgement on the respondent's part, the risks of her actions were foreseeable. The Nursery's health and safety policy in force at the time required all hot drinks to be in travel safe mugs.

- (c) The respondent's conduct was also contrary to the Education (Early Childhood Services) Regulations 2008, regulation 46(1)(b) of which specifically requires teachers to take all reasonable precautions to prevent accidents in order to protect the health and safety of all children.
 - (d) The respondent's conduct risked bringing the profession into disrepute, given the serious impact of her conduct on Child A (section 10(a)(iii)). Reasonable members of the public, looking at the respondent's conduct objectively, would consider that the reputation and good standing of the teaching profession was lowered, given the impact of the negligence for Child A's physical and emotional wellbeing.
15. The CAC submitted that the conduct did not meet the criteria for serious misconduct primarily because, while the respondent's actions resulted in serious harm to a child, the respondent's culpability sits at the lower end of the spectrum of seriousness given it involved a momentary instance of carelessness and a one-off lapse in judgement.

Respondent submissions

16. The respondent provided a written statement as well as various documents, including the Whakamana Law investigation report, and numerous statements from the respondent's colleagues. The Tribunal has considered all these documents carefully, particularly the positive statements about the respondent by her colleagues.
17. The respondent says, in summary:
- (a) Under the Code, she has always maintained a commitment to the teaching profession, and has respected the wishes of Child A's family and demonstrated a high standard of professional behaviour and integrity. She continually provides a commitment to all the children in her care and their families and communities.

- (b) She values the Code and her standards of teaching and continues to embed whakamana, manaakitanga, pono and whananungatanga into her daily practice. She still provides high quality teaching and leadership, despite the incident.
 - (c) She cannot express how remorseful she is. The incident has changed her a lot as a person both internally and externally. She is more aware, still, conscious, alert to her actions and surroundings, especially around young children. She has learned from her mistake and is extra vigilant when at the Centre. She has not been able to have a hot drink again.
 - (d) She thinks about, and prays for, Child A and his family every day.
18. The respondent expanded upon this written summary orally at the hearing, and the Tribunal is appreciative of her honesty and her willingness to speak to the Tribunal directly and the remorse and self-reflection she demonstrated.

Kupu Whakatau – Decision

19. The Tribunal finds all the particulars set out in the notice of charge are established to the requisite standard. The Tribunal considers that the respondent's conduct is misconduct entitling the Tribunal to exercise its powers, but is not serious misconduct. The Tribunal accepts the CAC's submissions on this point in full.
20. The Tribunal's finding in this regard is analogous with other cases where misconduct, but not serious misconduct, has been found.
21. For example, in *CAC v Billingsley* [2021] NZTDT 21, the respondent was found guilty of misconduct in respect of using force on four separate occasions involving three children (picking a child up by his upper arms, pulling on a child's sweatshirt while the child was running, causing the child to fall, pushing a child off his lap and pushing another child off a seat). The Tribunal listened to the teacher's explanation and found that the conduct could not fairly or accurately be described as involving an unreasonable or unjustified use of force, such that the test of serious misconduct could be said to be met. However, the Tribunal found that the incidents when considered together were misconduct, given the respondent's repeated use of low-level force to manage children's behaviour.

22. Similarly, in *CAC v Teacher S NZTDT 2018-5*, the Tribunal found misconduct in respect of a teacher who made physical contact with a six-year-old child when she placed her hands on the child's shoulders and pushed him to his table, causing him to cry. Teacher S explained that she was guiding the child but acknowledged that a physical response was not the best course of action, and expressed regret for her actions.
23. Like in this case, the initiator did not agree to the CAC's proposed penalty orders so the CAC referred the matter to the Tribunal to consider. The Tribunal agreed with the CAC's proposed penalty orders, and declined to make a costs order given that the case would not have to have been considered by the Tribunal had the initiator agreed to the CAC's proposed outcome. I shall return to this point later in this decision.
24. The Tribunal considers that the respondent's conduct here was ill-considered and thoughtless. It was clearly foreseeable that placing a boiling hot cup of water at a height accessible to a curious young child of Child A's age was likely to result in harm. From the photographs seen by the Tribunal, the area where the hot drink was placed was an open locker and easily accessible by a young child. The Tribunal was also particularly disturbed by the photographs of the burns to Child A's face and arm. It was certainly harm that could have been avoided.
25. The Tribunal notes that in some early childhood centres, even travel mugs are prudently not permitted in areas where young children are, and all hot drinks must be consumed in separate areas away from children.
26. However, the Tribunal is satisfied that the respondent acted with a momentary and out of character lapse of judgement and has suffered remorse as a result of the incident. She clearly has engaged in a great deal of learning and self-reflection since the incident. The Tribunal is satisfied that the respondent has learned a great deal from the incident, and continues to do so. The Tribunal is also appreciative of the steps the respondent took to meet with the Panel personally to express her remorse.

Whiu - Penalty

27. Having determined that this case is one in which we consider misconduct to be established, the Tribunal must now turn to consider what is an appropriate penalty in the circumstances:

500 Powers of Disciplinary Tribunal

- (1) *Following a hearing of a charge of serious misconduct, or a hearing into any matter referred to it by the Complaints Assessment Committee, the Disciplinary Tribunal may do 1 or more of the following:*
- (a) *any of the things that the Complaints Assessment Committee could have done under section 401(2):*
 - (b) *censure the teacher:*
 - (c) *impose conditions on the teacher's practising certificate or authority for a specified period:*
 - (d) *suspend the teacher's practising certificate or authority for a specified period, or until specified conditions are met:*
 - (e) *annotate the register or the list of authorised persons in a specified manner:*
 - (f) *impose a fine on the teacher not exceeding \$3,000:*
 - (g) *order that the teacher's registration or authority or practising certificate be cancelled:*
 - (h) *require any party to the hearing to pay costs to any other party:*
 - (i) *require any party to pay a sum to the Education Council in respect of the costs of conducting the hearing:*
 - (j) *direct the Education Council to impose conditions on any subsequent practising certificate issued to the teacher.*
- (2) *Despite subsection (1), following a hearing that arises out of a report under 493 of the conviction of a teacher, the Disciplinary Tribunal may not do any of the things specified in subsection (1)(f), (h), or (i).*
- (3) *A fine imposed on a teacher under subsection (1)(f), and a sum ordered to be paid to the Teaching Council under subsection*

(1)(i), are recoverable as debts due to the Teaching Council.

28. We note that, in determining penalty, the Tribunal must ensure that the three overlapping principles are met, that is, the protection of the public through the provision of a safe learning environment for students and the maintenance of both the professional standards and the public's confidence in the profession.⁵ We refer to the decisions of the superior Courts which have emphasised the fact that the purpose of professional disciplinary proceedings for various occupations is actually not to punish the practitioner for misbehaviour, although it may have that effect.⁶
29. In *Mackay* we looked at the principles the Tribunal must turn its mind to when considering penalty following a finding entitling it to exercise its powers⁷:
- (a) Protecting the public;
 - (b) Setting the standards for the profession;
 - (c) Punishment;
 - (d) Rehabilitation;
 - (e) Consistency;
 - (f) The range of sentencing options;
 - (g) Least restrictive;
 - (h) Fair, reasonable and proportionate.
30. The Tribunal does not intend to repeat what we said in that decision, other than to note that we have turned our mind to these principles in reaching our decision on penalty.
31. In its submissions on penalty, the CAC submitted that penalty orders such as suspension or cancellation should typically be reserved for cases involving serious misconduct. The CAC submitted that censure is the appropriate penalty here, given the conduct was isolated to one incident involving a momentary lapse of judgment but nonetheless was

⁵ *CAC v McMillan*, NZTDT 2016/52.

⁶ *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [97]; *In re A Medical Practitioner* [1959] NZLR 784 at p 800 (CA).

⁷ Above n 16 at [40] – [62]

concerning negligence in light of the specific policy in place at the time. Child A was young and particularly vulnerable being a toddler and reliant on the respondent to provide a safe environment. He suffered serious physical and emotional harm to Child A.

32. The respondent's conduct was, however, less serious than in *Billingsley*. There are no aggravating factors relevant to the issue of penalty and, in mitigation, the CAC acknowledges that the respondent has no previous disciplinary, has accepted the conduct occurred and has shown remorse and insight.
33. As stated already, the respondent has accepted her conduct and expressed admirable remorse and insight.
34. The Tribunal has taken into account both sets of submissions carefully and considered the cases referred to by both parties.
35. Bearing in mind the above, as well as the obligation upon us to impose the least restrictive penalty in the circumstances, pursuant to section 404(1) of the Act, we therefore order as follows:
 - (a) A censure under section 500(1)(b) of the Act.

Utu Whakaea – Costs

36. Consistently with the *Teacher S* decision, the Tribunal is not prepared to make a costs order here because was it not for the refusal by the initiator to accept the proposed penalty which the respondent had accepted, there would have been no need for this matter to come before the Tribunal.

He Rāhui tuku panui – Non-publication

37. For the same reason as to why the Tribunal has not ordered costs, the Tribunal grants an order for permanent suppression over the name and identifying details of the respondent, Child A and his parents, the teachers and the Centre involved..
38. The application of the principle of open justice to proceedings before the Tribunal is contained in section 405(3) of the Act. The primary purpose behind open justice in a

disciplinary context is the maintenance of public confidence in the profession concerned through the transparent administration of the law.⁸

39. The Tribunal's powers to prohibit publication is found in section 405(6) of the Act. It can only make one of the non-publication orders in (a) to (c) of section 405(6) if it is of the opinion that it is "proper" to do so having regard to the interests of any person, including but not limited to, the privacy of the complainant and to the public interest.
40. The Tribunal has adopted a two-step approach to applications for non-publication orders. First, it considers whether it is proper to make a non-publication order having regard to the various interests identified in section 405(6); and, secondly, it decides whether to exercise its discretion to make the orders sought.⁹ Bare assertions will not suffice for displacing the principle of open justice and nor will the "ordinary" hardships or expected consequences of a proceeding involving allegations of serious professional misconduct.¹⁰
41. Here, the Tribunal does consider there to be a basis to displace the presumption of open justice by suppressing the respondent's identity.



Rachael Schmidt-McCleave
Deputy Chair

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

⁸ *CAC v Teacher NZTDT 2016/27* at [66] citing *X v Standards Committee (No 1) of the New Zealand Law Society* [2011] NZCA 676 at [18].

⁹ *Ibid* at [61].

¹⁰ *Y v Attorney-General* [2016] NZCA 474 citing *Hart v Standards Committee (No 1) of the New Zealand Law Society* [2011] NZCA 676 approved by the Supreme Court declining leave to appeal in *Hart v Standards Committee (No 1) of the New Zealand Law Society* [2012] NZSC 4.

1. This decision may be appealed by the teacher who is the subject of a decision by the Disciplinary Tribunal or by the Complaints Assessment Committee.
2. An appeal must be made within 28 days after receipt of written notice of the decision, or any longer period that the court allows.
3. Section 356(3) to (6) applies to every appeal under this section as if it were an appeal under section 356(1).