

BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

NZTDT 2022-07

IN THE MATTER of the Education Act 1989

AND

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

BETWEEN **COMPLAINTS ASSESSMENT COMMITTEE**

AND

Respondent

TRIBUNAL DECISION

15 September 2022

HEARING: Held on 13 September 2022 (by Microsoft Teams)

TRIBUNAL: Ian Murray (Deputy Chair), Neta Sadlier and Simon Williams

REPRESENTATION: Adelaide McCluskey for the CAC
Janette Brown for the Respondent

Charge

1. The Complaints Assessment Committee (**CAC**) has referred to the Tribunal a charge of serious misconduct and/or conduct otherwise entitling the Tribunal to exercise its powers. In a Notice of Charge dated 11 April 2022 the CAC alleged that Mr [REDACTED]:
 - (a) Used unjustified and/or unreasonable physical force to remove a Year 7 student (“Child K”) from the classroom.
2. The CAC contends that this conduct amounts to serious misconduct pursuant to section 10 of the Education and Training Act 2020 (**the Act**) and rules 9(1)(a), and/or (k) of the Education Rules 2016 (**the Rules**); or conduct that otherwise entitles the Disciplinary Tribunal to exercise its powers under s 500 of the Act.

Evidence

3. We note the student involved in this case is referred to as “Child K” in the charge but is referred to as “Student A” in the agreed summary of facts. For clarity purposes, we will refer to him as “Child K” throughout the decision.
4. Before the hearing the parties conferred and submitted an Agreed Summary of Facts (**ASF**), signed counsel for the CAC and for Mr [REDACTED]. The ASF is set out in full:
 1. The respondent, [REDACTED], is a provisionally registered teacher. His current practising certificate is due to expire on [REDACTED] 2024.
 2. At the time of the incident on 9 June 2021, Mr [REDACTED] was employed at [REDACTED], [REDACTED] (**the school**) in a fixed-term position teaching a class of year 6, 7 and 8 students. Mr [REDACTED] had started at the school on 31 May 2021.
 3. Prior to being offered the fixed-term position, and as part of the job application process, Mr [REDACTED] had done one day of relieving

in the class. This was done because the school considered that the class was a challenging one, with some of the students having additional behavioural and learning needs. The school considered that Mr [REDACTED] had performed well during his day relieving in the class, and that he had managed the challenging students well.

4. Following the incident, Mr [REDACTED] resigned from the school on 11 June 2021.

The incident

5. On 9 June 2021, Mr [REDACTED] was teaching a year seven and eight class of about 15 students in a small classroom.
6. A Teacher Aide, who worked with one of the students in the class (but not the student involved in the incident), was also present in the classroom. The Teacher Aide had started at the school the previous day.
7. One of the students in Mr [REDACTED] class was Child K. In June 2021, Child K was 11 years old. Child K has ADHD and other learning disorders. He is described as having outbursts, behaving in an inappropriate manner when spoken to by teachers and storming out of classrooms.
8. The day prior to the incident, on 8 June 2021, Mr [REDACTED] and the Principal of the School met to discuss Child K's learning and behaviour issues. The principal told Mr [REDACTED]: "if you are struggling [with Child K], come and get me". The school was also in the process of putting together a behaviour plan for Child K, but this had not yet

been completed.

9. At the time of the incident on 9 June 2021, Child K was displaying oppositional behaviour. Mr [REDACTED] asked him to leave the class. Child K left the classroom. He then returned and sat at his desk. He began throwing items, such as a pencil case, around the room.
10. Mr [REDACTED] placed one hand on each of Child K's shoulders while standing in front of him and pulled Child K from his chair and through the gap between tables. Mr [REDACTED] then proceeded to drag Child K outside the classroom. Child K's foot became caught in the bars of the table legs, and this caused Child K to stumble as Mr [REDACTED] removed him from the classroom. Mr [REDACTED] was visibly upset and yelling at Child K.
11. Child K was found crying and holding his leg by the principal and an office manager immediately after the incident outside the classroom. As a result of the incident, Child K was worried and scared. His leg was also bruised from when it was caught in the table legs.

Teacher's response

12. Mr [REDACTED] outlined that he had previously had difficulty managing Child K's behaviour but felt that his concerns had been brushed off by the school. Mr [REDACTED] said that he had not been given any plans as to how best to manage Child K's behaviour. Mr [REDACTED] was only beginning as a teacher, having only worked in fixed-term roles covering parental leave previous to being employed at the school.

13. When the incident occurred, Mr [REDACTED] said that:

"I was helping another student at the time so decided to let him settle, and then go over to him. However as soon as he sat down, he screwed up his maths worksheet and threw his maths worksheet and his book across the room. Then he threw his pencil case, followed by some library books that were lying around on the tables and his anger seemed to be escalating very quickly, he seemed to have lost control of what he was doing, he started throwing everything that was in his reach, started throwing heavier objects, and was kicking his feet and hands around. He had knocked over a chair with one of his feet and started bumping the table he was sitting at and the table next to him with both his hands and feet-... I was very concerned for the safety of everyone inside the classroom, that eventually someone could get seriously hit or injured by everything that was flying around the classroom, or that Child K or someone else could get hurt by the furniture he was kicking and pushing around - I was worried that it might fall onto someone. It was a very small classroom with many kids sitting within a close distance to Child K and Child K was sitting right up against a window."

14. He said that he had already verbally told Child K to leave the classroom. In his written response to the CAC, he described his conduct as putting his hands on Child K's shoulders to attempt to guide him out of the classroom, then walking with him and guiding him out of the classroom. He accepts that Child K's leg got briefly stuck. At the CAC hearing, he accepted that he did yell at Child K

through frustration. Mr [REDACTED] said he did not feel safe or properly supported to deal with Child K's behaviour.

15. Mr [REDACTED] acknowledged that behaviour management was an area in which he required further training and guidance. Mr [REDACTED] accepted that he could have managed Child K's behaviour better, however he said that Child K's behaviour leading up to the incident had been more extreme than any other behaviour which he had displayed previously.

5. We must be satisfied on the balance of probabilities that the CAC has proved the charge. Mr [REDACTED] accepts that he used physical force although he explains his actions and does not accept it amounts to serious misconduct. However, on that basis, we find that the particulars of the charge are proven.

Serious misconduct

6. Mr [REDACTED] disputes that his conduct amounts to serious misconduct so we must be satisfied that the established conduct does amount to serious misconduct or alternatively to conduct otherwise entitling the Tribunal to exercise its powers.
7. Section 10 of the Act defines serious misconduct:

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

(iii) may bring the teaching profession into disrepute; and

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

8. The criteria for reporting serious misconduct are found in rule 9 of the Rules. The CAC relies on rules 9(1)(a), and (k).

Criteria for reporting serious misconduct

- (1) *A teacher's employer must immediately report to the Education 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) 1 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):*
- (k) *an act or omission that brings, or is likely to bring, the teaching profession into disrepute.*

CAC submissions

9. The CAC submitted that Mr ██████ conduct was serious misconduct. The CAC referred to previous cases where the Tribunal had found the use of physical force on students was unacceptable and serious misconduct.¹ The CAC submitted that Mr ██████ had other options other than dragging the child out of the room and pointed to other options available to Mr ██████. While the child was difficult to manage, Mr ██████ was aware of the behavioural difficulties of the children in the class that he was teaching. Further, the Principal had told Mr ██████ to come to get her if he was struggling with Child K.
10. The CAC submitted that his conduct was likely to adversely affect the learning or wellbeing of child K. Further the use of force was not proportionate and that the overall circumstances adversely reflected on Mr ██████ fitness to be a teacher. The CAC submitted that the threshold for bringing the teaching profession into disrepute was also met. With regard to the reporting requirements, the CAC submitted that this was unreasonable force and brought the teaching profession into disrepute.

¹ CAC v Dhaliwal NZTDT 2019/80, CAC v Reeve NZTDT 2018/38 and CAC v Teacher F NZTDT 2018/102

Respondent submissions

11. Mr [REDACTED] disputed that it was serious misconduct. Mr [REDACTED] submitted that the use of force was permitted in this case because the physical restraint was necessary to prevent imminent harm to the student or another person and the teacher reasonably believed there were no other options available in the circumstances to prevent the harm.
12. Mr [REDACTED] submitted that the situation was rapidly developing, Child K had lost bodily control and was throwing objects near a window with other children around. Mr [REDACTED] submitted that the situation was too rapidly unfolding for him to be able to get the principal and there would have been a delay in sending the teacher aide to get the principal. Mr [REDACTED] submitted that he could not remove projectiles from the vicinity of Child K, and it would have been too hard to get the other children to leave the classroom. Even if he had done these things, Child K could have injured himself by, for example, breaking the window and cutting himself.
13. While other options were available, they were either too slow, had hazards associated with them, or could have left Child K at risk of harm. For those reasons it was submitted that the use of physical force in this case was justified. It is acknowledged that Child K was upset and bruised but he argued the use of force was justified.
14. Turning to the fitness to teach question, this would be determined by the Tribunal's decision about whether the force was justified or reasonable.
15. With regard to the reputation of the profession Mr [REDACTED] submits that people would have understood that he was in a difficult situation and was acting in the heat of the moment so that the conduct would not damage the reputation of the profession.
16. Mr [REDACTED] essential submission is that the threshold for serious misconduct was not made out and that the cases referred to by the CAC can be differentiated so as not to provide any assistance to the Tribunal in assessing serious misconduct.

Our analysis

17. We must be satisfied that Mr [REDACTED] conduct meets at least one of the definitions of serious misconduct in s 378 of the Act, and that it is of a character or severity that meets the criteria for reporting serious misconduct contained in r 9.
18. The primary focus of our decision is s 99 of the Education and Training Act 2020 which provides:
- Limits on use of physical restraint at registered schools
- (1) A person holding a teaching position or an authorised staff member at a registered school must not physically restrain a student unless the conditions set out in subsection (2) are met.
- (2) The conditions are that—
- (a) the physical restraint is necessary to prevent imminent harm to the student or another person; and
- (b) the person holding a teaching position or authorised staff member reasonably believes that there is no other option available in the circumstances to prevent the harm; and
- (c) the physical restraint is reasonable and proportionate in the circumstances.
19. We do not accept either that the use of force was necessary to prevent imminent harm the student and/or another person or Mr [REDACTED] had no other option but to use force on the Child K. We do not therefore consider that the force was justified or reasonable. To that end, we must base our findings on the agreed summary of facts. On the basis of what is contained in the ASF we consider that there were other options which could have and should have been taken by Mr [REDACTED].
20. We note that there were only 15 children in the class and there was also a teacher aid present, although that teacher aide was new to the role. In our view the options available to Mr [REDACTED] were to send a student to get the principal, or to remove the children from the classroom, or to ask the teacher aid to go and get the principal and remove the children from the classroom.
21. We do not accept that there was a real risk of harm to Child K from actions such as breaking the window. This risk is simply speculative. On the basis of the summary of

facts 'he was throwing items (books and a pencil case) around'. It is a speculative leap from that to him harming himself. So we do not accept the use of force was necessary.

22. Turning to the criteria for serious misconduct, the first is adverse effect on the learning or wellbeing of the student. We consider this is made out both in respect of Child K and the other children in the classroom. Child K was dragged out of the classroom and was upset. He was described as crying and “worried and scared”. He was also physically hurt. It would have also been upsetting for the other children in the class to see the teacher drag a student out of the class in that way while yelling at him. For those reasons, we have no doubt that the first criteria for serious misconduct is made out.
23. Turning to the fitness of Mr [REDACTED] to be a teacher, we are also satisfied this is made out. While this was a momentary lapse of judgement under trying circumstances and when he was new to the profession, nonetheless this is the type of behaviour that clearly impacts on his fitness to be a teacher. The combination of using physical force and yelling impacts on his fitness to teach.
24. The test for deciding whether a teacher’s actions are likely to bring the teaching profession into disrepute is set out by the Court in *Collie v Nursing Council of New Zealand*.² It is an objective test and requires consideration of whether reasonable members of the public informed of the facts and circumstances, could reasonably conclude that the reputation and good standing of the profession is lowered by the respondent’s actions.
25. Ordinarily but not invariably the use of physical force against a student for corrective or punishment purposes will bring the teaching profession into disrepute.
26. We are satisfied that the respondent’s conduct involving the yelling and the use of physical force against a student in front of other children is the type of conduct that ordinary members of the community would consider brought the teaching profession into disrepute.
27. Turning to the reporting criteria, this was clearly unreasonable force against a student

² *Collie v Nursing Council of New Zealand* [2001] NZAR 74.

and has the tendency to bring the teaching profession into disrepute.

Penalty

28. In *CAC v McMillan*,³ we summarised the role of disciplinary proceedings against teachers as:

... to maintain standards so that the public is protected from poor practice and from people unfit to teach. This is done by holding teachers to account, imposing rehabilitative penalties where appropriate, and removing them from the teaching environment when required. This process informs the public and the profession of the standards which teachers are expected to meet, and the consequences of failure to do so when the departure from expected standards is such that a finding of misconduct or serious misconduct is made. Not only do the public and profession know what is expected of teachers, but the status of the profession is preserved.

29. Section 500 of the Act provides:

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 497(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:*

³ NZTDT 2016/52, 23 January 2017, paragraph 23.

- (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 Teaching Council in respect of the costs of conducting the hearing:*
- (j) *direct the Teaching Council to impose conditions on any subsequent practising certificate issued to the teacher.*

CAC submissions

30. With regard to penalty, the CAC submits that our task is to impose a fair, reasonable and proportionate response to the circumstances. The CAC notes that Mr [REDACTED] was a beginner teacher, and his actions were a spontaneous reaction in a time of stress where he has acknowledged his wrongdoing and recognises his need for further training in behaviour management. They also note that he has not previously been subject to disciplinary proceedings.
31. The CAC submits the appropriate penalty is censure, annotation and conditions focused on attending professional development as well as notification of future employers of the Tribunal's decision.

Respondent's submissions

32. Mr [REDACTED] primary submission is that it is not serious misconduct, but he accepts that if the Tribunal makes a finding against him, then the penalty proposed by the CAC would "*fulfil the Tribunal's obligations to the profession and the public*".
33. Mr [REDACTED] points to significant mitigating features, that he was a beginner teacher who only had the support of a new teacher aide when dealing with a class of challenging children. There was no behaviour management plan in place for Child K, who had serious behavioural issues. This plan should have been put in place and explained to

Mr [REDACTED] before the class started. Mr [REDACTED] submits that calling the principal is not a suitable replacement for a behaviour management plan and is problematic in a rapidly developing situation like this. Mr [REDACTED] accepts there were steps that he could have done differently, and he recognised the importance of pre-planning in his reflective statement.

34. Finally, it is submitted Mr [REDACTED] actions were reaction in a moment of extreme stress and not designed to punish Child K.

Analysis

35. When considering the appropriate penalty, we agree that the school did not have systems that would assist a beginner teacher in dealing with difficult students. We were concerned that there was no behaviour management plan in place on how to manage Child K when being placed in the care of a new teacher. So, while we have found this is serious misconduct, we agree with both the CAC and Mr [REDACTED] that there are significant mitigating features.
36. The penalty we impose is designed to recognise the seriousness of what happened, but also to assist Mr [REDACTED] to return to the teaching profession as he advised was his desire and intention.
37. We impose the following penalty:
- (a) Censure
 - (b) Annotation of Mr [REDACTED] registration with the decision of the Tribunal for a period of two years from the date of this decision.
 - (c) Imposition of the following conditions:
 - (i) to attend a professional development course focusing on behaviour management, classroom management and/or de-escalation such as Incredible Years or a similar course approved by the Manager Professional Responsibility of the Teaching Council; and
 - (ii) to teach under the supervision of a mentor for two years; and

(iii) to notify future employers of the Tribunal's decision within two years of recommencing employment in the teaching profession.

Costs

38. The CAC sought a contribution of 40% of its costs under s 500(1)(h). My [REDACTED] asked for a lesser costs award.
39. The Tribunal has previously indicated that 40% will ordinarily be appropriate in cases determined on the papers. While on its face it appears that 40% of the costs is appropriate, nonetheless we will give Mr [REDACTED] the opportunity to provide evidence of his personal circumstances or of any other reasons why a lesser costs award should be imposed.
40. The Tribunal delegates to the Deputy Chair authority to determine the quantum of those costs and issues the following directions:
- (a) Within 10 working days of the date of this decision the CAC is to file and serve on the respondent a schedule of its costs; and
 - (b) Within a further 10 working days the respondent is to file with the Tribunal and serve on the CAC any submissions he wishes to make in relation to the costs of the Tribunal or CAC and advise of his personal circumstances justifying lesser a costs award.
 - (c) Within a further 10 working days the CAC is to file and serve any reply to the respondent submissions.
41. The Deputy Chair will then determine the total costs to be paid.

Non-publication

42. Section 501 (3) provides that hearings of this Tribunal are in public. This is consistent with the principle of open justice. The provision is subject to subsections (4) and (5) which allow for whole or part of the hearing to be in private and for deliberations to be in private. Subsection (6) provides:

(6) *If the Disciplinary Tribunal is 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, it may make any 1 or more of the following orders:*

(a) an order prohibiting the publication of any report or account of any part of any proceedings before it, whether held in public or in private:

(b) an order prohibiting the publication of the whole or any part of any books, papers, or documents produced at any hearing:

(c) an order prohibiting the publication of the name, or any particulars of the affairs, of the person charged or any other person.

43. Mr [REDACTED] has sought non-publication of his name due to serious health problems. The CAC responsibly accept that suppression is appropriate. We agree and so we order non-publication of Mr [REDACTED] name.
44. We also order suppression of Child K's name in accordance with the protections afforded to young persons under Rule 34 of the Teaching Council Rules 2016.
45. We also considered whether suppression of the school's name was necessary to preserve the other suppression orders. The Tribunal has previously order suppression of the school's name to prevent identification of the student involved.⁴ Ultimately we concluded that given the rural location and the small role of students, there is a similar risk here and for that reason we suppress the name of the school.



Ian Murray
Deputy Chair

⁴ CAC v Teacher D NZTDT 2020-20

NOTICE - Right of Appeal under Section 504 of the Education and Training Act 2010

1. This decision may be appealed by 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. Clause 5(2) to (6) of Schedule 3 applies to an appeal under this section as if it were an appeal under clause 5(1) of Schedule 3

BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

NZTDT 2022-07

IN THE MATTER of the Education Act 1989

AND

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

BETWEEN **COMPLAINTS ASSESSMENT COMMITTEE**

AND

Respondent

TRIBUNAL MINUTE ON COSTS AND AMENDMENT OF DECISION

Dated: 25 October 2022

HEARING: On the papers

TRIBUNAL: Ian Murray (Deputy Chair)

REPRESENTATION: Adelaide McCluskey for the CAC
Janette Brown for the Respondent

Costs

1. In our substantive decision, we indicated our preliminary view was that the respondent should pay 40% of the CAC and Tribunal fees. We reserved the quantum of costs for the Deputy Chair to determine after hearing from both parties. Because he disputed the quantum of costs, we gave Mr. [REDACTED] an opportunity to provide reasons why that quantum of costs should not be imposed. He has now confirmed that he “accepts the decision that he will be required to pay 40% of the CAC’s and DT’s costs”.
2. The CAC has advised that their costs were \$6,076.14 and 40% of that is \$2,430.45. Accordingly, the sum of \$2,430.45 is ordered to be paid costs under s 404(1)(h).
3. The Tribunal’s costs are:

Chair (estimated) Sitting Fee (1/4 day) x 2 Pre and post hearing	\$ 675
Tribunal Members x 2 Sitting Fee (1/4 day) x 2 Pre and post-hearing	\$ 620
Disciplinary Tribunal Coordinator costs x 2 hrs @ \$80/hr	\$ 160
TOTAL ESTIMATED COSTS	\$ 1450

4. The respondent’s share of the costs is 40% of \$1450 which is \$582.00. Accordingly, the sum of \$582.00 is ordered to be paid under s 404(1)(i).

Amendment of decision

5. By memorandum dated 28 September 2022, The CAC noted that our substantive decision appeared to have “ordered an indefinite period of annotation on the public register.” They further noted “the conduct in this case is unlikely to require permanent

annotation of the register.” The CAC submits that “annotation for a prescribed period (namely, two years), rather than indefinite annotation, would appear to be more consistent with the conditions imposed

6. That submissions appears well founded and the decision will be amended to make it clear that annotation will only be for two years.

A handwritten signature in blue ink, consisting of several loops and a long horizontal stroke at the end.

Ian Murray
Deputy Chair