BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

NZTDT 2019-95

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	**KELSIE ROUCHELLE MARY TROW** **Respondent**

TRIBUNAL DECISION

28 JULY 2020

HEARING: Held on 5 December 2019 (on the papers)

TRIBUNAL: Theo Baker (Chair)

Neta Sadlier, Sue Ngārimu (members)

REPRESENTATION: Ms Woolley for the CAC

The respondent represented herself

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. There were several allegations:

    a) On or about 22 June 2018 and 26 June 2018 and further unspecified dates, placed a child and/or children in seclusion; and/or

    b) On an unknown date in, or around, June 2018, held a child's face and force-fed him; and/or

    c) On 27 June 2018 and further unspecified dates, rough handled a child and/or children;

    d) On various occasions in 2018:

        i. put a child and/or children to rest and/or sleep for an excessive length of time; and/or

        ii. left a child and/or children to cry themselves to sleep; and/or

        iii. locked a child and/or children in a cot and/or prevented them from leaving the cot; and/or

    e) Belittled and shamed children (on numerous occasions between 5 May and 29 June 2018 and further unspecified dates).

2. The charge arises out of a complaint made to the Teaching Council by the Ministry of Education.

3. On 29 October 2019 the Tribunal had considered a charge against the respondent's daughter, Grace Trow, arising out of the same circumstance. We have issued that decision[1] at the same time as this one.

Summary of decision

4. We found that the allegations were established and amounted to serious misconduct.

5. We have cancelled the respondent's registration and ordered that she contribute 40% of the CAC costs.

6. We have declined to make an order for non-publication of the respondent's name but have suppressed details about her health apart from what is set out in this decision.

[1] *CAC v G Trow* NZTDT 2019-82, 27 July 2020

7. We have ordered non-publication of the name of any child referred to in the Notice of Charge or Agreed Summary of Facts.

Findings

8. The evidence to support the charge was in the form of an Agreed Summary of Facts (**ASF**) signed by the respondent and counsel for the CAC, Ms Woolley. The Tribunal must be satisfied that the agreed facts support the allegations contained in the Charge. We have set out below each allegation and agreed facts followed by our finding on the facts.

9. The CAC made submissions on serious misconduct for the conduct in totality. The Notice of Charge asked us to find that each particular of the charge either separately or cumulatively amounts to serious misconduct. We have therefore applied the test for serious misconduct to each allegation. Serious misconduct is defined in section 378 of the Act. The CAC must satisfy the Tribunal that at least one of the definitions in paragraph (a) is met, as well as the definition in paragraph (b).

10. According section 378:

> ***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*.

11. The criteria for reporting serious misconduct are found in r 9 of the in the Teaching Council Rules 2016 (**the new Rules**).[2] These rules were amended in 2018. The previous Education Council Rules 2016 (**the earlier Rules**) apply to conduct which occurred before 19 May 2018.[3] The CAC alleged that the conduct either separately or cumulatively amounts to serious misconduct pursuant to section 378 of the Education Act 1989 and rule (9)(1)(a) and/or (b) and/or (c) and/or (k) of the new and/or rule 9(1)(a) and/or (c) and/or (f) and/or (o) of the earlier Rules or alternatively amounts to

[2] Previously the Education Council Rules 2016, these were renamed the Teaching Council Rules 2016 by section 12 Education (Teaching Council of Aotearoa New Zealand) Amendment Act 2018.
[3] See Education Council Amendment Rules 2018 Schedule 1 Part 2.

conduct which otherwise entitles the Disciplinary Tribunal to exercise its powers pursuant to section 404 of the Education Act 1989.

12. Rule 9 of the earlier Rules says:

Criteria for reporting serious misconduct

(1) For the purposes of section 394 of the Act, an employer of a teacher must immediately report to the Education Council if it has reason to believe that the teacher has engaged in any of the following kinds of serious misconduct:

(a) physical abuse of a child or young person (which includes physical abuse carried out under the direction, or with the connivance, of the teacher):

…

(c) psychological abuse of a child or young person, which may include (but is not limited to) physical abuse of another person, or damage to property, inflicted in front of a child or young person, threats of physical or sexual abuse, and harassment:

…

(f) neglect or ill-treatment of a child or young person in the teacher's care:

…

(n) any other act or omission that could be the subject of a prosecution for an offence punishable by imprisonment for a term of 3 months or more:

(o) any act or omission that brings, or is likely to bring, discredit to the profession.

13. For the conduct that occurred on or after 19 May 2018 the CAC relies on the following rules:

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) 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:

(b) emotional abuse that causes harm or is likely to cause harm to a child or young person:

(c) neglecting a child or young person:

…

(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.

Background information

14. The parties first set out some background information. Some of these are identical to those in 2019-82.

15. At the relevant time, the respondent was a fully certified teacher who was the Service Provider[4] and Owner/Operator of the Sealey Street Childcare Centre in Thames (**the Centre**) as the manager. The Centre was established in 2012 in Thames. It was a privately owned facility that catered for children from birth to school age. In February 2017 the Centre was evaluated by the Education Review Office to be "well placed" to promote positive learning outcomes for children.

16. On 13 July 2018, the Ministry of Education (**the Ministry**) received two anonymous complaints about the Centre, about ill-treatment of children at the Centre. On 16 July 2018, the Ministry undertook a compliance visit to the Centre and on 18 July 2018, issued a notice to suspend services. On 23 August 2018 the Service Provider was notified that the Services Licences was cancelled, effective from 27 August 2018 and on 4 October 2018 the Ministry submitted a complaint to the Teaching Council outlining serious misconduct allegations against Ms Trow.

17. On 8 October 2018, Ms Trow accepted, by email, an undertaking not to teach.

Particular 1 a): On or about 22 June 2018 and 26 June 2018 and further unspecified times placed a child and/or children in seclusion

18. According to the ASF, on or about 22 June 2018, a two-year-old child who was new to the Centre would not sit down at the table and was crying. Ms Trow roughly carried the child to the back room and held the door shut while the child was inside the room

[4] Section 309 of the Education Act defines a service provider

screaming. Ms Trow came out of the room, holding the door closed and had a conversation with her daughter, Grace Trow. The child continued to scream. When the child came out of the room she ran looking for her sister for comfort and then to a teacher. Ms Trow said to the other staff that the child was running into the doors and cots and she did not touch her. The incident lasted for approximately 40 minutes.

19. On or about 26 June 2018 a two-year-old child was upset on arrival at the Centre. The child liked to have cuddles to settle in and was on the mat next to an employee. The respondent watched as her daughter, Grace Trow, picked up the child and took her to the back room, closed the door and held the door to the room shut from outside the room. The respondent and her daughter talked to each other outside the room while the child was inside the room getting more upset. When the child was let out of the room, she ran to her friend who spoke her language and cuddled her.

20. On other occasions the respondent held a two-year-old child down before picking her up and putting her in the sleep room and holding the door closed. During this time, Ms Trow said, “You’d think she was hurting herself but she’s banging on the walls”.

21. On 3 May 2018 the respondent put children in the back room if they arrived crying in the morning or would not settle down. On 5 May 2018 the respondent put a child a cot in a room alone for an hour with the door shut.

Teacher’s response

22. Ms Trow provided two comprehensive, written responses to the Teaching Council. She accepted that if a child is upset at drop off-time she would take the child to the back room so that the child’s behaviour would not affect other children.

23. Ms Trow accepted she closed the door to the room but said she did this to avoid shame and embarrassment for the child. Ms Trow disputed the incident lasted for 40 minutes stating “it would have been lucky to take 20 minutes”. She explained that for one particular child this was routine because the child did not like to be the centre of attention when she arrived at the Centre and would calm down if better when she was alone. Ms Trow accepts she would close the door and tell the child that when she was ready she could come out and be with her friends.

Findings

24. The respondent has agreed with the facts as outlined in paragraphs 19 to 22 above. Her responses to the allegations are included in the ASF so that we have an

understanding of her initial reaction.

25. We are satisfied that on 22 June and 26 June 2018 the respondent placed a child in a room by themselves. We accept that the children were secluded. This conduct easily meets the definition of "seclude" found in 139AB of the Act:

> ***seclude**, in relation to a student or child, means to place the student or child involuntarily alone in a room from which he or she cannot freely exit or from which the student or child believes that he or she cannot freely exit.*

26. The incident on 5 May where the respondent placed a child in a cot for an hour alone with the door closed also appears to meet this definition, but it would be helpful to have more information surrounding this incident. On other occasions children were placed in a room with the door held shut. The allegation contained in particular 1 (a) of the charge that children were placed in seclusion on various dates is established.

27. Applying the test for serious misconduct, this behaviour clearly meets all three definitions in paragraph (a) in section 378. The conduct was likely to adversely affect the children. In fact, one child cried for some time when secluded in the back room by herself and when let out of the room ran to her friend who spoke the same language and cuddled her. We also find that the conduct reflects adversely on the respondent's fitness to be a teacher. This type of treatment has no place in any place of learning. The respondent's peers would strongly disapprove of her conduct. Seclusion is prohibited by section 139AB of the Act, and regulation 56 of the Education (Early Childhood Services) Regulations 2008 imposes an obligation on the Service Provider of a licenced service to exclude from a service any employee who:

> *in guiding or controlling a child, has subjected the child to solitary confinement, immobilisation, or deprivation of food, drink, warmth, shelter, or protection.*

28. And finally, it is conduct that might bring the teaching profession into disrepute. Parents would be horrified to think that their child might be treated like this. We are also satisfied that reasonable members of the public, fully informed of those facts and circumstances would reasonably conclude that the reputation and good-standing of the teaching profession was lowered by this behaviour.[5]

29. The second part of the test for serious misconduct requires us to find that the conduct

[5] Applying the test for bringing discredit to the profession, as applied to nurses in *Collie v Nursing Council of New Zealand* [2001] NZAR 74 at [28]

is also of a character or severity to meet the criteria in Rule 9. Applying the old Rules to the incident on or about 11 May 2018, we find that the conduct amounts to ill-treatment under rule 9(1)(f) and is likely to bring discredit to the teaching profession under rule 9(1)(o). For the incident on 26 June 2018, we find that the conduct was likely to bring the teaching profession into disrepute under rule 9(1)(k) of the new Rules. This is a clear case of serious misconduct.

Particular 1 b): held a child's face and force-fed him

30. The parties agreed that on an unknown date in or around June 2018 the respondent force-fed a child who did not want to eat his yoghurt by squeezing his mouth open, putting yoghurt in his mouth, then holding his mouth closed until he swallowed the yoghurt.

Teacher's response

31. Ms Trow agreed that the child did not want to eat his yoghurt but denies that she force-fed him. She said she did not squeeze the child's mouth and explained that to encourage the child to eat she would place a baby spoonful on his lips and wait. Then she would say to him, "Let's play the aeroplane game" (or the train game).

Findings

32. The respondent has admitted the facts in paragraph 30 above. Online definitions of "force feed" include:

- *If you **force-feed** a person or animal, you make them eat or drink by pushing food or drink down their throat*.[6]
- *to feed (a person or an animal) by forcible administration of food.*[7]
- *to compel to take food, especially by means of a tube inserted into the throat*.[8]

33. And in a printed edition the Chambers dictionary:

- *To feed a person or animal forcibly usu(ally) by the mouth.*[9]

34. We find that holding a child's mouth closed until he has swallowed indicates that he was being fed against his will and involves the use of force. It amounts to force-feeding. This allegation is therefore established.

[6] Collins https://www.collinsdictionary.com/dictionary/english/force-feed
[7] Merriam Webster https://www.merriam-webster.com/dictionary/force-feed
[8] Dictionary.comhttps://www.dictionary.com/browse/force-feed
[9] Chambers Harrap published 1998

35. We also find that this behaviour meets all three definitions in s 378(a). It is conduct that was likely to adversely affect the wellbeing of the child, reflects adversely on the respondent's fitness to be a teacher and may bring the profession into disrepute. It is also of a character and severity to meet rule 9(1)(k) of the new Rules and is likely to bring discredit to the profession.

Particular 1 c): On 27 June 2018 and other various dates rough-handled a child and/or children

36. The parties agreed that on 27 June 2018, when the respondent saw a child playing at the table with another child bumping arms, she used force to push the two-year old child off her chair.

37. On other occasions, the respondent physically restrained children at the table and in beds or cots. For example, on 22 June 2018, Ms Trow physically restrained a new child to the Centre when the child was crying at the kai table. Ms Trow said, "We need to clamp down on her". After a few minutes of the child struggling, Ms Trow took her to the back room and shut the child in the room. Ms Trow said to other staff that the child "was throwing herself backwards and hitting her head on the floor", and "I didn't do anything".

38. The parties also agreed that on other occasions the respondent dragged and yanked children by their arms and pushed children down. For example, Ms Trow pulled a child from the sleep room by the child's wrists while she was holding a mattress. Ms Trow pushed the child down onto the mattress and while on her hands and knees, held the child down.

Teacher's response

39. In her responses Ms Trow:

a) denied using force to push a two-year old child off her chair, saying she could not have done that because she sat on the other side of the table to the children.

b) agreed children would be helped to sit down but denied using force to do this.

c) agreed using the words "clamp down" and that, with the benefit of hindsight, she could have selected better words. However, what she meant was that all staff needed to work together with respect to that particular child, whose mother had told the staff upon enrolment that the child had behavioural problem.

Findings

40. The respondent has accepted that she did the things outlined in paragraphs 36 to 38. We find that that pushing a child off a chair, physically restraining, dragging and yanking children by their arms and pushing them down, and holding a child down on a mattress amounts to rough handling. The factual allegation is established.

41. We now need to consider whether the conduct amounts to serious misconduct. In early childhood settings small children are routinely lifted, carried and held, but all of the conduct covered in particular 1 c) falls well outside the reasonable physical contact acceptable for any teacher. Even one instance of pushing a child off a chair would meet the threshold for serious misconduct. It is an assault. The incidents outlined form a pattern of rough-handling that were likely to adversely affect the wellbeing of the child concerned, and those witnessing the conduct. It meets all three definitions in section 378 and amounts to using unjustified or unreasonable physical force on a child or young person or encouraging another person to do so under rule 9(1)(a) of the new Rules. Some instances, such as pushing the child off the chair are also of a sufficient character and severity to amount to 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 under rule 9(1)(j). We are in no doubt that the test in *Collie* is again meant and her physical handling of children amounts to an act or omission that brings, or is likely to bring, the teaching profession into disrepute under rule 9(1)(k).

42. Similarly, restraint, dragging, yanking have often been found to meet the threshold for serious misconduct.

Particular 1(d): On various occasions between 11 May and 3 July 2018:

(i) put a child and/or children to rest and/or sleep for an excessive length of time;

43. The parties agreed that on 11 May 2018 the respondent made three children lie in bed for three hours from 12:30pm for not sleeping.

44. The respondent also made children who were nearly four years of age sleep after lunchtime when they did not appear to want to sleep.

45. On 25 June 2018 the respondent left a child to cry in the bottom of the double cot with no teacher in the room for about half an hour. This was because the child was not sitting at the table and had been told to sit in the hallway, but had not done so.

46. On 27 June 2018 the respondent left the same child in a cot for two hours when the child was awake.

Teacher's response

47. Ms Trow said that in her view parents' wishes about sleeping were followed and that she was in constant communication with their parents about their children's sleeping. It was a gross exaggeration that Child A had been left in a cot for two hours awake.

Finding

48. Making children who were nearly four sleep after lunchtime when they did not appear to want to sleep (as set out in paragraph 44 above) may be inappropriate, but there is insufficient evidence that this was done for an excessive length of time.

49. We accept that each of the incidents on 11 May 2018, 25 June 2018 and 27 June 2018 incidents outlined above are examples of the respondent putting children to rest or sleep for an excessive amount of time.

50. All three definitions of serious misconduct in section 378 (a) are met.

51. As for the second part of the test, the criteria in Rules 9(1)(f) and (o) of the old Rules are met for the incident on 11 May 2018, when children were left in bed for three hours. The incident on 25 June 2018 is probably of a sufficient severity to meet Rule 9(1)(k) of the new Rules, and the 28 June incident clearly does. In any event, we are satisfied that the respondent's pattern of behaviour of putting children to rest or sleep for an excessive length of time on amounts to serious misconduct.

(ii) Left a child and/or children to cry themselves to sleep;

52. It was an agreed fact that the respondent left one particular child in a cot screaming on a daily basis. A footnote to that statement in the ASF read "On 27 June 2018". We were told that child was scared of the sleep room because she had been forced in there.

Finding

53. The allegation of leaving a child to cry themselves to sleep is established. On its own, this particular might not amount to serious misconduct, but it fits within a course of conduct concerning children's sleep between 11 May 2018 and 5 July 2018. When viewed cumulatively, this amounts to serious misconduct.

(iii) locked a child in the bottom cot when the child was crying and left the child to cry herself to sleep;

54. The respondent has agreed that on 22 June 2018 she locked a child in the bottom cot when the child was crying and left her to cry herself to sleep. It is also an agreed fact that the respondent put a child aged 2 years and 10 months into the bottom cot, which is described by the complainants as a "cage" because children cannot get out of the cot.

Teacher's response

55. In her response to the Council, the respondent said that the cots at the centre are regulation and do not resemble a cage in any way and do not lock in the traditional sense. They have a latch that hangs freely down stopping the child from injuring themselves.

56. The respondent said that if child "K" was put in the cot, it would have been because he was disrupting all other children in the sleep room and he had been given a choice of "are you going to lay nicely or do you want to go into the cot". Child K chose the cot and was happy in there

Finding

57. It was not clear to us if there were two separate incidents. It is also not clear to us if the "complainants" are the Ministry of Education or the people who made anonymous complaints to the Ministry as outlined above in paragraph 16. However, there is no doubt that there was at least one occasion when the respondent locked a child in the bottom cot when the child was crying and left her to cry herself to sleep. The factual allegation is established.

58. It is not clear how long the child was left to cry herself to sleep. The Tribunal was not certain how the lock, which we assume was a safety feature of the cot was supposed to be used. Without further information, we have not found that this particular amounts to serious misconduct.

Particular 1 e): Belittled and shamed children (on numerous occasions between 5 May and 29 June 2018 and further unspecified dates).

59. The parties agreed that the range of strategies used by Ms Trow, and her daughter Grace Trow, at the Centre were described as shaming, punishment, belittling, deliberately scaring children, time out in sleep room, time out in cots and no blankets.

In particular, on numerous occasions between 5 May and 29 June 2018 and on other unspecified dates, Ms Trow:

a) On 5 May 2018 told the other children to laugh at a child because she was going to the back room to be put in the cot. The child was left alone in the room with the door shut and cried for half an hour.

b) On 7 May 2018 did not allow children to have lunch, or would put children into a cot, when they did not wash their hands when told do so.

c) On 5 June 2018 threw a child's lunch box on the ground, and on another occasion threw a child's lunch box across the playground.

d) On 18 June 2018 told her daughter Grace Trow, in front of other children at the Centre, to "shame" a child for not singing karakia. The child was made to sing the karakia by herself.

e) On 27 June 2018 laughed at a child after she had pushed the child off her chair. Ms Trow said that was what the child deserved as the child was crying.

f) On 29 June 2018 told a child, "You don't get a blanket til you sleep".

g) On 6 July 2018 told a child to sit on the mat and watch the other children eating morning tea because the child had run away from her. The child was allowed at the table when all the other children had left.

h) On an unspecified date, told other staff "bags not" when they suggested speaking to a child's mother about the child's behaviour.

Teacher's response

60. Ms Trow stated, "I strongly believe that this listed range of strategies used by Grace and I, including shaming, punishment, belittling, shaming, yanking, grabbing, deliberately scaring children, time out in sleep room/cots and no blankets are complete and utter lies, stretches of the truth and/or complete exaggerations of what actually happened". She agreed that she did say "bags not" in jest because the child's mother was not very receptive to hearing issues about her daughter. Ms Trow said she made it clear to other staff that they could talk to the mother if they wanted to.

Finding

61. The “bags not” comment sounds unprofessional and perhaps belittling of the mother, but we do not classify it as belittling or shaming of children. It is not clear that it was said in the presence of the child and we do not know the age of the child.

62. We are satisfied that all the other examples could be described as belittling or shaming. Again this conduct is unacceptable. They meet all three definitions under s 378(a). Individually each example is probably of a character and severity to amount to psychological abuse under rule 9(1)(c) of the earlier Rules and emotional abuse under rule 9(1)(b) of the new Rules. Cumulatively the conduct clearly meets those criteria. It also meets rule 9(1)(o) of the earlier Rules and 9(1)(k) of the new Rules.

Serious misconduct

63. In summary we have found that each particular 1 a) to e) amounts to serious misconduct. In fact, in many cases each example on its own would amount to serious misconduct. In totality there is no doubt that over the course of about 2 months in 2018 the respondent’s conduct amounted to serious misconduct.

Penalty

64. Section 404(1) of the Act provides:

> ***404 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.

65. The CAC submitted that cancellation of the respondent's registration is necessary to ensure public protection, deterrence and maintenance of professional standards.

66. The CAC referred to the following cases to provide context for our view of the respondent's conduct:

67. In *CAC v Tregurtha* NZTDT 2017/39 a kindergarten teacher regularly used force to hold children down on their stomachs with their hands behind their backs for up to 30 minutes or until they fell asleep. She also wrapped her arm and/or leg around children during mat time to prevent them getting up or moving away. On one occasion, she forced a child to remain at the kai table for up to 30 minutes until he said "please". During this time, she withheld his dummy (soother) from him when he became upset. The respondent did not allow the child to leave the table until another teacher lied and said the child had said "please". We considered that the teacher lacked insight both into the seriousness of her conduct, and into the role of a teacher; her shortcomings as a teacher were so fundamental that cancellation of the teacher's registration was the only outcome possible to ensure children's safe learning.

68. The teacher in *CAC v Kainaz Jamasbnejid* NZTDT 2015/29 had, amongst other things, physically assaulted her own child and put the child in isolation at an early childhood centre. She had also spoken inappropriately to other children, belittled them, had a non-caring relationship with them, tried to forcefully administer medicine to a child, had grabbed a child, yanking him off the ground. She accepted her actions amounted to serious misconduct but pleaded for her registration not to be cancelled, providing a statement outlining personal difficulties with stress that had affected her at the time of the conduct. Her statement detailed the steps she had taken to address her problems in the time between the conduct issues arising and the hearing of the charge. In that time she had been employed at another centre and a reference was provided to the Tribunal from her employer. Having heard from the teacher directly and considering

her record of employment in the year prior to the hearing, we considered she had turned a corner and her behaviour was unlikely to be repeated. After careful consideration imposed a censure; conditions including participation in an anger management programme and restriction on her capacity to assume responsibility for the care of pre-school children. The register was annotated.

69. *CAC v Finau* involved an early childhood teacher using inappropriate language with, and to, young children, grabbing children by the arm, encouraging children to use force in retaliation when hurt, and pulling children's hair. We agreed that the teacher's behaviour engaged the safety concerns addressed by the Vulnerable Children's Act 2014,[10] and repeated the comments made in *Mackey* about this Act, accepting that the Act's introduction reinforced the importance of the Tribunal's obligation to closely scrutinise the fitness to teach.

70. We said that where the cancellation of a teacher's registration is mandated it tends to turn on the teacher's reflection and any remedial steps taken since the event. We found that the conduct did not fall into the clear-cut category in which cancellation is the inevitable response. We considered it important that the teacher ultimately took responsibility for her behaviour and we accepted that she had insight into the inappropriateness of her behaviour, which suggested that the risk of repetition was low. Therefore we imposed a penalty of censure, mentoring for 18 months and to undertake a professional learning and development course focused on developing respectful practices approved by the Education Council's senior manager of teacher practice and annotation.

71. The CAC sought cancellation of Ms Trow's registration, saying it is necessary to ensure public protection, deterrence and the maintenance of professional standards. The following aggravating features were identified:

a) The respondent's conduct was not isolated to one incident, but rather involved multiple instances of extremely concerning conduct, which affected the wellbeing of a number of children.

b) The conduct indicates a persistent lack of judgement and awareness of the implications of her actions, and the impact of her actions on the wellbeing of the relevant children. The conduct demonstrates a lack of understanding of the

[10] Now the Children's Act 2014

needs of young children and indicates that she is not fit to be a teacher.

c) The conduct occurred while the children had been entrusted to the care of the Centre. The children concerned were very young and vulnerable, and they were reliant on Ms Trow to provide a safe and supportive environment.

d) As Owner/Operator of the Centre, the respondent was in a position of responsibility. She should have been a role model for appropriate behaviour.

72. It was submitted that the respondent's conduct was at a similar level of seriousness to all three of the cases cited above. A key reason for not deregistering in *Finau* and *Jamasbnejid* was that both teachers had taken measures that displayed insight into their behaviour and were committed to ensuring they would not behave in similar ways again.

73. In the current case there is an absence of evidence indicating reflection or remedial steps and this case is therefore most similar to *CAC v Tregurtha* where we found the teacher had taken no steps to demonstrate she understood her responsibilities as a teacher, and failed to show any insight into the harm that her actions may have had on the children. Cancellation was the only outcome available to ensure the safety of children.

74. The respondent made no submissions on penalty.

Discussion

75. The number and range of instances of inappropriate and harmful behaviour towards small children make this is one of the worst cases of ill-treatment of children we have seen. We query why the respondent was interested in early childhood education. Based on her conduct she seemed to have little aptitude for it.

76. In the absence of any submissions from the respondent, we fully accept the CAC submissions. We agree with the distinctions made between the cases cited. The respondent has not expressed any desire to continue teaching, let alone demonstrated any insight or rehabilitative steps. The respondent is censured under section 404(1)(b) and her registration cancelled under section 404(1)(g)

Costs

77. The CAC sought 40% of its costs under section 404(1)(h) of the Act. The respondent has made no comment.

78. We order a contribution to the CAC costs of 40% under section 404(1)(h) and 40% of the Tribunal's costs under section 404(1)(i).

79. We direct that the CAC and the Tribunal Secretary file and send to the respondent schedules of costs by **17 August 2020.** The respondent should file and send to the CAC any reply by **31 August 2020**.

80. The Tribunal delegates to the Chairperson the authority to fix the final costs.

Non-publication

81. Ms Trow applied for permanent suppression of her name and that of the Centre. The grounds were her health and the impact on her relatives who also felt their business had been affected.

82. The respondent[11] referred to heart-related illnesses and a brain aneurysm which had been well-monitored, medicated and controlled, but since the complaint, publicity in the media, gossip in and around town, her overall health has deteriorated. She has noticed anxiety, stress, and depression. The respondent had also undergone exploration of some other abdominal presentations which she described. She said that she had visited her Nurse Practitioner and Doctor and they told her that it was not in their best interest to write a letter for her on this matter due to them not knowing the legislative implications that a letter of this nature would have on their practice.

83. The respondent provided evidence of two outpatient referrals during 2018 and one in 2019 as well as an acute referral on 30 April 2019. Information about the outcome of these referrals and current status was not included.

84. In a note dated 10 October 2019, the respondent's GP said he had evaluated the respondent that day and that she had a complicated medical history. He said:

She is under significant psychological stress at the moment and her mental state is fragile. Increased mental stress will lead to a further deterioration of her emotional condition. I would therefore recommend that she not be exposed to more stressful

[11]Although she is the applicant in the application for name suppression, we have referred to her as the respondent throughout this decision for the sake of consistency.

situations.

CAC's position

85. The CAC opposed name suppression being granted in this case because:

a) It would be contrary to the principle of open justice.

b) It appears from Ms Trow's application that the fact of the proceedings is already well known in the local community, and there has already been publication in the media about the Centre closing and of Ms Trow's daughter, Ms Grace Trow's name (links provided).

c) Ms Trow's concern for her extended family, does not outweigh the default position. The Committee submits that given the events occurred in a small town, it is likely that anyone who is aware of personal details such as Ms Trow's maiden name would already be aware of the details of the case.

d) While the respondent has had difficulty coping with the disciplinary proceedings, the symptoms described appear to be consistent with the natural stress, embarrassment and shame that follow disciplinary proceedings. That is a natural consequence of open justice. The CAC referred to NZTDT 2016-27 in which we said:

> [63] We start by addressing the ground that the respondent's mental health may be jeopardised if suppression is not ordered. Without wishing to sound unsympathetic to its sufferers, anxiety (and associated mental conditions) is not an unexpected consequence of a proceeding involving allegations of serious professional misconduct. It is important that the nature and effects of any such condition are carefully scrutinised when it is put forward as a ground for name suppression. A bare assertion that a condition exists, or that it may render an applicant seeking suppression more vulnerable to harm, will not suffice.
>
> [64] We of course have been provided with an opinion from the respondent's GP stating his concern that publication "would" lead to a further deterioration in her mental health. However, the lack of detail in the letter is somewhat unsatisfactory, as it does not address precisely what the respondent suffers from, the likely duration of the condition, or its associated risks. …

86. The CAC submitted there is nothing in the doctor's letter indicating that publication of the respondent's name would result in any particular outcome occurring to her. The letter also does not place the respondent's case outside the ordinary run of cases

where teachers feel a degree of stress at being named in proceedings. It does not specify any particular medical condition that would make the present case an "exceptional circumstance" and shift the balance towards name suppression. The reasons submitted do not reach the high threshold required to justify a departure from the usual position of publication.

87. The CAC sought non-publication of the names of the children involved, in order to protect their wellbeing.

Principles

88. Consistent with the principle of open justice, section 405(3) provides that hearings of this Tribunal are in public.[12] In the present case, although the hearing of the charge was "on the papers", rather than in person, it is still a public hearing. Had a member of the public, including the media, attended, relevant information would have been made available to them before the panel deliberated in private.

89. Section 405(3) is subject to the following subsections (4) to (6) which provide:

> *(4) 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 hold a hearing or part of a hearing in private.*
>
> *(5) The Disciplinary Tribunal may, in any case, deliberate in private as to its decision or as to any question arising in the course of a hearing.*
>
> *(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.*

90. Therefore if we are to make an order for non-publication, we must first have regard to:

[12] Section 405 was inserted into the Act on 1 July 2015 by section 40 of the Education Amendment Act 2015.

- the interest of any person (in this case the respondent and her mother);
- the privacy of the complainant (the Ministry of Education);
- the public interest.

91. Open justice forms a fundamental tenet of our legal system and "exists regardless of any need to protect the public",[13] but the public interest in publication of a teacher's name may include the need to protect the public. This is an important consideration where profession is brought into close contact with the public. Conversely, in certain instances, the public interest may include the suppression of witness names (usually alleged victims of conduct) to ensure that they are prepared to come forward and give evidence in court proceedings.[14]

92. In *CAC v Jenkinson* NZTDT 2018-14[15] we summarised the principles on non-publication in this Tribunal. We referred to CAC v Teacher NZTDT 2016-27, where we acknowledged what the Court of Appeal had said in *Y v Attorney-General* : While a balance must be struck between open justice considerations and the interests of a party who seeks suppression, "[A] professional person facing a disciplinary charge is likely to find it difficult to advance anything that displaces the presumption in favour of disclosure". [16]

93. Where a person argues that harm would be caused by publication of a name, we must be satisfied that the consequence(s) relied upon would be "likely" to follow if no order was made. In the context of s 405(6), this simply means that there must be an "appreciable" or "real" risk.[17]

94. We must then consider if it is "proper" to make an order.

95. If we decide it is proper, it does not follow that the order is automatically made. The use of the word "may" indicates it is a "discretionary decision". This was set out in *CAC v Finch* NZTDT 2016-11[18] as a two-stage test. That said, we are not aware of any cases where we have decided it is proper to make an order but have then not done so.

96. Although in an early decision of this Tribunal soon after the enactment of section 405

[13] CAC v McMillan NZTDT 2016-52, at [45]
[14] Y v Attorney-General [2016] NZCA 474
[15] CAC v Jenkinson NZTDT 2018-14
[16] Above, note 14 at [32]
[17] See C*AC v Jenkinson* above, note 15 at [34]; CAC v Teacher NZTDT 2016/68, at [46]; *R v W* [1998] 1 NZLR 35 (CA).
[18] *CAC v Finch* NZTDT 2016-11, 27 September 2016

we said that our expectation is that orders suppressing the names of teachers (other than interim orders) will only be made in "exceptional" circumstances, we have since said that may have overstated the position; [19] "proper" does not import the standard expected in the criminal context.[20] Similarly in *CAC v Teacher S* NZTDT 2016-69,[21] we referred to *Director of Proceedings v I*,[22] where Frater J found that any differences between the Courts and medical disciplinary processes (under the Medical Practitioners Act 1995) were ones of emphasis and degree. Unlike the courts, where "exceptional" circumstances are commonly required, the criterion for cases before the Medical Practitioners Disciplinary Tribunal (and its successor, the Health Practitioners Disciplinary Tribunal), is whether suppression is desirable.

97. We noted that in this jurisdiction, the threshold of whether it is "proper", is the same as under the Lawyers and Conveyancers Act 2006. That Tribunal has suggested that "proper" is arguably between "exceptional" and "desirable", but in any event the threshold is somewhat lower than that imposed in the courts.[23]

98. Therefore for the past 3 to 4 years this Tribunal has repeatedly not required "exceptional circumstances" in order to grant name suppression to a teacher.

99. However, we fully accept the CAC's submission that the respondent's concerns would apply to most cases that come before us. Her GP has described the respondent's mental state as "fragile" but has provided no diagnosis, details of a treatment regime or specifics as to the impact of publication on her mental wellbeing. We endorse the comments made in 2016-26, set out above. In *CAC v Teacher S* [24] we described a GP's letter as not so much an expert medical opinion, but an expression of advocacy for what he believed to be in his patient's best interests. As we noted, this was a reasonable and proper stance for him to take as her GP, but that is not the same as cases that we see where an applicant for name suppression has been under psychiatric care and there is a demonstrable risk of harm.

100. We appreciate that the respondent has had some significant physical health issues to deal with but we have not been provided with an expert opinion as to how publication

[19] See *CAC v Kippenberger* NZTDT2016-10S, 29 July 2016,
[20] *CAC v Finch*, above, note 18
[21] CAC v Teacher S NZTDT 2016-69, 14 June 2017
[22] *Director of Proceedings v I* [2004] NZAR 635,
[23] *Canterbury Westland Standards Committee No.2 v Eichelbaum* [2014] NZLCDT 23
[24] Above, note 21

would adversely affect those conditions. We do not understand why any health practitioner would say that it was not in their best interest to write a letter for a patient or be concerned about any sort of legal implications that a letter of that nature would have on their practice. It may be that it was difficult for them to reach an opinion that publication of name would lead to an exacerbation or deterioration of any of her conditions.

101. The starting point is publication. The respondent's grounds are weak. There are two factors that weigh heavily in favour of publication:

a) The established conduct is very serious. There is a strong public protection interest in favour of publication;

b) The fact that the Ministry cancelled the Centre's licence following an investigation into multiple complaints including allegations of children being shut in a back room, having food withheld from them as punishment or being force-fed" has been in reported the media, along with the fact that the respondent was the owner.

102. We are not satisfied that it is proper to order non-publication of the respondent's name. Under section 405(6), we order non-publication of any details of the respondent's health, other than those set out in this decision.

103. No names of any child have been included in any of the material before us. However, under section 405(6) we order non-publication of the name of any child referred to in the ASF or Notice of Charge.

Theo Baker
Chair

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

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