

BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

NZTDT 2018/55

WĀHANGA the Education Act 1989
Under

MŌ TE TAKE of a charge referred by the Complaints Assessment
In the matter of Committee to the New Zealand Teachers
Disciplinary Tribunal

I WAENGA I A **COMPLAINTS ASSESSMENT COMMITTEE**
Between **Kaiwhiu**
 Prosecutor

ME **KAREN KOTIRO PAMELA TUPUHI**
And **Kaiurupare**
 Respondent

DECISION OF THE TRIBUNAL

3 August 2020

HEARING: Held on 9 April 2019 on the papers

TRIBUNAL: Rachel Mullins (Deputy Chair)
 Maria Johnson and Nikki Parsons (members)

REPRESENTATION: E Mok (Meredith Connell) for the Complaints Assessment Committee
 Janette Andrews (NZEI) for the respondent

Hei timatanga kōrero – Introduction

1. The Complaints Assessment Committee (“CAC”) has charged the respondent with engaging in serious misconduct and/or conduct otherwise entitling the Disciplinary Tribunal to exercise its powers. The charge is that on Wednesday, 23 November 2017 the respondent:
 - (a) Yelled at and used inappropriate language towards Student A, who was aged 9 years old at the time; and
 - (b) Pulled Student A by her arm; and
 - (c) Forced Student A down to the ground by pushing her on the back of her neck.
2. The CAC alleges that the respondent’s conduct amounts to serious misconduct pursuant to section 378 of the Education Act 1989 (“the Act”) and Rules 91(a) and/or (c) and/or (f) and/or (n) and/or (o) of the Education Council Rules 2016 (“the Rules”) or alternatively amounts to conduct otherwise entitling the Tribunal to exercise its powers pursuant to section 404 of the Act. The matter proceeded on the papers.

Ko te hātepe ture o tonu nei – Procedural History

3. A prehearing conference was held on 17 October 2018 where timetabling orders were made. An application for interim name suppression was filed on 25 September 2018 with a supporting affidavit. The respondent initially indicated that an application for permanent name suppression would be filed. However, by email dated 9 November 2018 Ms Andrews for the respondent confirmed that no application for permanent name suppression would be filed.
4. The CAC filed submissions on liability and penalty on 12 November 2018 and the respondent filed submissions on liability and penalty on 30 November 2018.

Kōrero Taunaki - Evidence

Agreed Summary of Facts

5. The evidence before the Tribunal was an Agreed Summary of Facts which is set out in full below.

1. The respondent, **KAREN KOTIRO PAMELA TUPUHI**, is a registered teacher.

*At all material times the respondent was employed as a teacher at Fairhaven School (**School**).*

- 2. On 23 November 2017, the respondent was teaching at the School. The respondent had remained at school while most students had gone to a Māori Cultural Festival. A 9-year-old female student (**Student A**) remained behind in the respondent's care, along with two other members of Student A's class, and other younger students aged between five and nine years old.*
- 3. Student A was being disruptive during class, and not following the respondent's instructions.*
- 4. The respondent responded by yelling at Student A. Frustrated, the respondent said, "I'm sick of this shit, I'm taking you to the office." The respondent approached Student A, who started pushing and punching the respondent. The respondent pulled Student A by the arm and said words to the effect of, "Who is the strong one now?" The respondent then forced Student A to the ground by pushing down hard on the back of Student A's neck.*
- 5. The respondent's actions were witnessed by other students, including the younger students in the class.*
- 6. Through this conduct, the respondent contravened the Ministry of Education Guidelines on the use of physical restraint, and cl 2.1 of the Code of Professional Responsibility, which states that teachers will work in the best interests of learners by promoting their wellbeing and protecting them from harm. The respondent's conduct was also contrary to s 139A of the Education Act 1989, which prohibits the use of force towards any student by teachers for the purpose of correction or punishment.*

School Investigation and Subsequent Events

- 7. After the incident, Student A ran away from the respondent to the School Office and spoke to the Deputy Principal. The School subsequently commenced an investigation into the respondent's conduct. The respondent engaged with the School's investigation.*

8. *On 30 November 2017, the Principal of the School, Paul Hunt, filed a Mandatory Report with the Education Council setting out an allegation of serious misconduct by the respondent.*
9. *The School referred the matter to Oranga Tamariki, which then referred it to the Police. The Police decided to take no further action on the matter, in part because of Student A's mother's wishes. The Police also stated in correspondence dated 28 May 2018 that it considered the matter should be monitored by the Education Council with some form of mentoring or further training for the respondent.*
10. *The respondent's fixed term contract with the School ended in December 2017. On 16 December 2017, the respondent signed a voluntary undertaking not to teach pending the outcome of the Education Council investigation.*

Response to Allegations

11. *The respondent engaged with the Education Council's investigation.*
12. *In a response to the Education Council investigator dated 13 February 2018, the respondent stated that:*

"I looked up and [Student A] was... not at her desk. I approached her (she then sat on the floor) and asked her to returned to her seat, [Student A] stood up, and began pushing and punching me. I raised my hands up (in defence of the punches) asked her to calm down however she continued punching and pushing as she came towards me and each time I stepped backwards, asking her to calm down. I was unable to move further, to avoid the ongoing punches, I pushed her down..."
13. *The respondent further stated that she gave "multiple warnings with a raised voice for Student A to calm down", "alternative resolutions" were suggested for Student A to "take time out", and she asked Student A to go to the office. The respondent stated her only intention was to defend herself, and that there were a number of times she thought Student A was "going to fall as she was aggressively" lunging towards her. She said she pulled Student A towards her "to stabilise her footing". In terms of her language during the incident, the respondent said that her language was "inappropriate, unprofessional and uncalled for". The respondent also stated that she realised that, had she followed School procedures, "there would have been a positive outcome". She stated that she accepted the mistakes she had made and held herself*

“accountable to maintain a high standard of professionalism”. The respondent identified that she would benefit from professional development to “acquire the necessary tools, skills and strategies to further strengthen my weaknesses of a profession I so dearly love and enjoy for my future”.

Ngā Kōrero a te Kōmiti – CAC Submissions

6. The CAC submits that the respondent’s conduct meets each of the limbs of the definition of serious misconduct pursuant to section 378 of the Act. It is submitted that the respondent’s conduct is likely to adversely affect the physical and emotional wellbeing of Student A as well as the younger students who witnessed the incident, reflects adversely on her fitness to be a teacher, and risks bringing the teaching profession into disrepute. In relation to whether or not the respondent’s conduct is also of a character and severity that meets the criteria for reporting serious misconduct, the CAC submits that the respondent’s conduct falls into the following categories of serious misconduct set out in Rule 9:
- (a) Rule 9(1)(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);
 - (b) Rule 9(1)(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;
 - (c) Rule 9(1)(f) – neglect or ill-treatment of a child or young person in a teacher’s care;
 - (d) Rule 9(1)(n) – any other act or admission that could be the subject of prosecution for an offence punishable by imprisonment for a term of three months or more;
 - (e) Rule 9(1)(o) – any act or admission that brings, or is likely to bring, discredit to the teaching profession.
7. The CAC refers the Tribunal to the recent decision of *CAC v Ormsby*¹ where the Tribunal confirmed the reasoning in *CAC v Emile*² that a single push can amount to physical abuse when the teacher either intends to cause harm or is reckless about the likelihood of doing

¹ *CAC v Ormsby* NZTDT 2017/33, 24 October 2018.

² *CAC v Emile* NZTDT 2016/51.

so. In the case of *CAC v Davies*³ the Tribunal found that the application of force to the head, the most vulnerable part of a person's body, is inherently serious.

8. The CAC also referred to the much-quoted decision of *Collie v Nursing Council of New Zealand*⁴ where the High Court said:

"[28] To discredit is to bring harm to the repute or reputation of the profession. The standard must be an objective standard with the question to be asked by the Council being whether reasonable members of the public, informed and with knowledge of all the factual circumstances, could reasonably conclude that the reputation and good standing of the nursing profession was lowered by the behaviour of the nurse concerned."

9. The CAC also relies on the decisions of the Tribunal in *CAC v Teacher*,⁵ *CAC v Haycock*,⁶ *CAC v Maeva*⁷ and *CAC v Allen*.⁸

10. Further, the CAC highlights the relevant principles in relation to the use of physical force:

- (a) In decision of *CAC v Rangihau*⁹ the Tribunal said, *"It is incumbent on all the teaching profession to have a clear appreciation of the prohibition on the use of corrective and disciplinary force under section 139A of the Act"*;
- (b) The importance of ensuring the protection and safety of children in educational settings has been reinforced by the enactment of the Vulnerable Children's Act 2014 ("VC Act") and the subsequent amendments to that Act in 2015. In *CAC v Mackey*¹⁰ the Tribunal found that the VC Act reinforced the importance of closely scrutinising the ongoing fitness to teach of any practitioner who faces a disciplinary charge for behaviour of a type that may pose ongoing risks to students;
- (c) In *NZTDT 2014/18*, the Tribunal commented that any breaches of the Education Council's Code of Ethics for Certified Teachers (which has now been replaced by the Code of Professional Responsibility) will be a highly relevant consideration to

³ *CAC v Davies* NZTDT 2016/28.

⁴ *Collie v Nursing Council of New Zealand* [2001] NZAR 74 (HC) at [28].

⁵ *CAC v Teacher* NZTDT 2017/1, 6 March 2017.

⁶ *CAC v Haycock* NZTDT 2016/2, 22 July 2016.

⁷ *CAC v Maeva* NZTDT 2016/37, 24 May 2017.

⁸ *CAC v Allen* NZTDT 2015/15, 26 May 2015.

⁹ *CAC v Rangihau* NZTDT 2016/18 at [58].

¹⁰ *CAC v Mackey* NZTDT 2016/60, 24 February 2017.

whether there has been serious misconduct. The Code of Professional Responsibility relevantly provides that teachers “*will work in the best interests of learners by promoting the wellbeing of learners and protecting them from harm. That teachers shall manage the learning setting... to maximise learners physical... and emotional safety.*”;

- (d) In *NZTDT 2014/49*¹¹ the Tribunal said that:

“... we repeat as we have said in a number of cases in the past that the use of physical force – even at a lower scale such is evident in this case – is unacceptable in New Zealand schools, and that any teacher who uses physical force contrary to section [139A] puts his or her status as a teacher in peril.”

- (e) In *Haycock*¹², the Tribunal also affirmed that the use of force for corrective purpose even if no aggression or anger is involved, will typically amount to serious misconduct;
- (f) Finally, in *NZTDT 2016/50* the Tribunal said that any use of force contrary to section 139A will not automatically comprise serious misconduct. For serious misconduct to be found, “*the behaviour concerned must satisfy the character and severity threshold established in the Rules. This is an assessment that must be undertaken on a case by case basis to determine if the charge is proved – thus it is not merely a question of dealing with gradations at the penalty stage.*”¹³

11. The CAC’s position is that there is no question that the respondent’s conduct amounts to serious misconduct. The comment made by the respondent to the child, “*Who is the strong one now?*”, suggests that the use of force was a deliberate response to the student’s conduct, which the respondent was finding challenging and difficult to manage, rather than a spontaneous loss of self-control. Further, it is submitted that the application of force to the student’s neck was a particularly serious aspect of the conduct as was the fact the student was only 9 years old.

¹¹ *CAC v Teacher NZTDT 2014/49*, 20 May 2014.

¹² Above n 6

¹³ *CAC v Teacher NZTDT 2016/50*, 6 October 2016 at [26].

12. In terms of penalty, the CAC submits that the cases of *CAC v Karklins*¹⁴, *CAC v Usofono*,¹⁵ and *CAC v Ormsby*¹⁶ would be of assistance to the Tribunal.
13. In *CAC v Karklins*¹⁷, the teacher lost his temper at a student that was misbehaving and removed him from the classroom by picking him up and taking him to the cloakroom. The student was thrashing around and inadvertently banged his head against wall. The teacher acknowledged he had acted inappropriately and was wrong to lose his temper. He expressed remorse. The Tribunal censured the teacher, ordered that the register be annotated, and that the teacher complete a professional development course focusing on classroom management.
14. In *CAC v Usofono*¹⁸, the teacher grabbed a Year 10 student by the collar with force, accidentally scratching him on the neck. The student attempted to punch the teacher, missed, and fell on the ground. The teacher picked the student up by the collar and removed him from the classroom. The teacher acknowledged his conduct was unprofessional and unacceptable and expressed remorse and shame for his actions. While the Tribunal considered the force used was relatively low level, it also found that the conduct had arisen from the lack of self-control on the part of the teacher and had been for a corrective purpose which is contrary to section 139A of the Act. However, the Tribunal considered the conduct was different from intentional violent conduct such as hitting or kicking a student, rather it was physical force used to overpower a student.
15. In that case, the Tribunal censured the teacher, ordered annotation of the register and imposed conditions requiring the teacher to show prospective employers the Tribunal's decision, undergo mentoring and to provide reflective reports to the Education Council.
16. In *CAC v Ormsby*¹⁹, a 6-year-old was misbehaving and would not stop when asked by the teacher. The teacher then asked the student to approach him which he did and the teacher then pushed the back of his head with his hand and he went face first into the wall of the classroom causing his nose to bleed. The Tribunal viewed the teacher's conduct as a clear-cut example of the worse kind of misconduct for which the maximum penalty of

¹⁴ *CAC v Karklins* NZTDT 2016/38, 3 October 2016.

¹⁵ *CAC v Usofono* NZTDT 2017/30, 26 April 2017.

¹⁶ Above n 1

¹⁷ Above n 14

¹⁸ Above n 15

¹⁹ Above n 16

cancellation was reserved. The Tribunal found that the use of force was gratuitous as the child had complied with the teacher's direction and was not a spontaneous loss of self-control. Further, the force was applied to the child's head and was sufficient to cause injury. The Tribunal also considered that the teacher lacked insight into this conduct which also impacted on the penalty. The CAC submits that the current case is more serious than that in *Usofono* and *Karklins* but not as serious as *Ormsby*.

17. The CAC submits the following are the aggravating factors:
 - (a) The respondent's comment, "*Who is the strong one now?*" suggests the use of force was a deliberate response to the student's conduct rather than a spontaneous loss of self-control;
 - (b) The respondent was unable to de-escalate the situation and appeared unable to manage the student's challenging behaviour which the CAC submits reflects adversely on her fitness as a teacher;
 - (c) The physical force used against the student was directed at the back of the neck and the student was only 9 years old;
 - (d) The student was affected by the respondent's conduct as she was upset and ran away to the School office;
 - (e) The respondent's actions were witnessed by others, including younger students.

18. The CAC also acknowledges that there are genuine mitigating factors which leads towards a penalty less than cancellation:
 - (a) The respondent has no previous disciplinary history;
 - (b) The respondent has expressed remorse and some insight into her conduct. Although the CAC notes that the respondent has previously stated that she was acting in self-defence in pushing the student;
 - (c) The respondent accepted that her actions amounted to serious misconduct at an early stage;

- (d) The respondent has indicated a willingness to undertake professional development;
 - (e) The respondent signed a voluntary undertaking not to teach pending the outcome in December 2017, indicating her willingness to co-operate with the disciplinary process.
19. Taking into account all the relevant factors, the CAC submits that the following orders should be made:
- (a) Censure;
 - (b) Annotation of the Register;
 - (c) The following conditions be imposed on the respondent's practising certificate:
 - (i) A condition requiring the respondent to undergo mentoring for a period of 12 months (with regular reports to the Manager of Teacher Practice);
 - (ii) A condition requiring the respondent to inform any prospective employers of the Tribunal's decision for a period of two years from the date of the Tribunal's decision;
 - (iii) A condition requiring the respondent to undertake professional development on appropriate classroom management within six months of the Tribunal's decision.

Ngā kōrero a te Kaiurupare – Respondents' submissions

20. The respondent accepts the CAC's submissions in relation to her conduct meeting the limbs of section 378 of the Act. It is further accepted that the respondent's use of force was intentional and unjustifiable.
21. In response to the CAC's position that this was a case of a deliberate response as opposed to a spontaneous loss of self-control, the respondent's position is that if there was any intention it was scant in light of the speed that the situation unfolded. The respondent's submission is that the respondent lost control of the situation before the student became aggressive. As the student became angrier, the situation rapidly escalated to the point

that there was no one in control and the respondent finally reacted to her own emotions, losing control of herself.

22. The respondent has acknowledged that if she had followed School procedure, she would have had a positive outcome, and this is the rational response uncluttered by the heightened emotion of the moment. The respondent also acknowledges that she should have not allowed the situation to develop to a point where her attempts to de-escalate things failed and she lost control over the situation and her emotions.
23. In regards to the CAC's proposal for penalty, this is accepted by the respondent.
24. The respondent addresses the cases referred to by the CAC in relation to penalty, those being *Karklins*²⁰, *Usofono*²¹ and *Ormsby*²². The respondent submits that in these cases the teacher manhandled a student in an attempt to modify their behaviour.
25. It is the respondent's submission that none of the cases referred to by the CAC involved the situation where the teacher was under the extreme stress of being attacked or some other extreme stress inducing event. It is submitted that in this case the respondent was dealing with much more than routine misbehaviour when she became angry and inappropriately used physical force. She had been subjected to ongoing assault by the student which involved her being pushed and punched multiple times to the point that she needed to raise her hands up to protect herself.
26. For the respondent Ms Andrews submitted that the situation would have been "*very frightening and it is explicable and understandable that her emotions would have been elevated.*"²³ Her case therefore should be considered in the context of other cases where the teacher has reacted emotionally to a stressful situation and made a poor choice.
27. By way of comparison the Tribunal is referred to the cases of *NZTDT 2016/26*²⁴ and *NZTDT 2017/1*²⁵ which involved teachers that were in extremely difficult situations and

²⁰ Above n 14

²¹ Above n 15

²² Above n 16

²³ Refer respondent's submissions at [11.b]

²⁴ *CAC v Teacher NZTDT 2016/26* 10 November 2016

²⁵ *CAC v Teacher 2017/1*, 6 March 2017

instead of removing themselves so that they could calm down, they reacted emotionally towards a student.

28. In *NZTDT 2016/26*, the teacher was waiting for a hip replacement as a result of an injury she had sustained at the school some years previously when she had had a bad fall. She was fearful that another fall would further aggravate her injury. A student had left his computer case on the floor despite being asked previously to put it away. The teacher tripped on the case and as she fell, she caught her bad hip on the corner of the desk causing her excruciating pain. She picked up the student's computer case and clipped him across the ears three or four times whilst telling him to not leave the case on the floor. When he started crying, she told him to stop blubbering. Prior to this incident, she had a blemish free career and was well regarded by her colleagues. There was no evidence that she ever had troubles with classroom management, but it was a situation in which at the time she was dealing with immense stress and reacted. She showed remorse but was inclined to minimise the impact on the student. The Tribunal censured her and required her to undergo mentoring supervision for a period of 12 months.
29. In *NZTDT 2017/1*, the teacher had been counting money that had been collected to assist a grieving family where one parent had passed. She put the money in two envelopes in her diary in her desk. The envelopes contained \$1,298.00. The teacher left the room briefly and when she returned, the envelopes were no longer there. She panicked and became very stressed and asked the children to look in their desks and bags and pleaded for anyone who knew anything to come forward.
30. Student A was the teacher's grandson and was part of a group of boys who started to be silly and wander off. The teacher asked the boys to re-join the group and as they came back, the teacher said to her grandson, "Do you think this is a joke?". He sat beside her and continued to giggle, and she lashed out and slapped him.
31. She accepted that she had lost control momentarily and it had been an isolated event in stressful circumstances. She undertook three anger management sessions and was remorseful. She was censured by the Tribunal and required to undertake mentoring for a period of six months.
32. The respondent submits that the present case has parallels with *NZTDT 2016/26* and *NZTDT 2017/1* in that all three cases involved teachers that had been "*under a heightened*

*level of stress and could not cope with the preceding event and instead of taking themselves away to calm down, used inappropriate force.*²⁶

33. The respondent also says all three cases feature the same aggravating aspects:
- (a) the degree of force used;
 - (b) the force was focused on a vulnerable part of the student's body;
 - (c) there was an element of deliberation but no real forethought;
 - (d) the vulnerability of the student; and
 - (e) the incidents all happened in front of other students.
34. Ms Andrews submits that in these examples as in the present case, in hindsight the teachers were remorseful, and the behaviour was out of character and driven by an emotional response. Further Ms Andrews says that the purpose of identifying cases where teachers have reacted inappropriately when under extreme stress, is *"not to justify or excuse the behaviour, but merely to provide context as the penalty is significantly driven by the understandings that the teacher gains about what happened in the aftermath. To develop this understanding, it is important that what happened and why is understood."*²⁷
35. Ms Andrews refers to the fact that respondent was not coping with what was happening at the time and did not manage the situation in an appropriate way. That said, she had come to understand that her failure to abide by school procedures led to a situation that if she had followed them, would have resulted in a positive outcome.
36. It is further submitted that the respondent has self-identified she would benefit from professional development and this shows that she is taking steps to ensure she does not find herself in a similar situation in the future.
37. The penalty identified by the CAC is accepted by the respondent as fair and an inevitable consequence for her actions. She welcomes the opportunity to engage in professional

²⁶ Above n 23 at [11.f]

²⁷ Above n 23 at [12.a]

development and if she is able to return to teaching, would like to enrol in the Incredible Years Programme.

38. Finally, it is submitted that the respondent's remorse, self-awareness and willingness to embrace training and mentoring, can give the Tribunal confidence that a remedial penalty is appropriate and that they can discharge their duties to the public and the profession by prescribing it.

Te Ture - The Law

39. The respondent has accepted that her conduct amounts to serious misconduct. Section 378 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 wellbeing or learning of 1 or more students; or
 - (ii) reflects adversely on the teacher's fitness to be a teacher; or
 - (iii) may bring the teaching profession into disrepute; and
- (b) that is of a character or severity that meets the Teaching Council's criteria for reporting serious misconduct.

40. The test under section 378 is conjunctive²⁸, meaning that as well as meeting one or more of the three adverse consequences, a teacher's conduct must also be of a character or severity that meets the Teaching Council's criteria for reporting serious misconduct.

41. The CAC alleges that the respondent's conduct falls within the definition of Rule 9(1)(a) and/or (c) and/or (f) and/or (n) and/or (o) of the Rules. Rule 9 sets out the criteria for reporting serious misconduct and misbehaviour that amounts to serious misconduct:

- (a) Rule 9(1)(a) – the physical abuse of a child or young person (which includes physical abuse carried out under the direction, or with connivance, of a teacher);
- (b) Rule 9(1)(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,

²⁸ *Teacher Y and Education Council of Aotearoa New Zealand*, [2018], NZTDT 3141, 27 February 2018 at [64].

inflicted in front of a child or young person, threats of physical or sexual abuse, and harassment;

- (c) Rule 9(1)(f) – neglect or ill treatment of a child or young person in the teacher's care;
- (d) Rule 9(1)(n) – any other act or omission that could be the subject of a prosecution for an offence punishable by imprisonment for a term of three months or more;
- (e) Rule 9(1)(o) – any act or omission that brings, or is likely to bring, discredit to the teaching profession.

42. Rule 9(2) provides that:

Physical, sexual or psychological abuse is reportable whether it occurs as –

- (a) *A single act; or*
- (b) *A number of acts forming part of a pattern of behaviour, even if some or all of those acts, viewed in isolation, are minor or trivial.*

43. As this case involves an allegation of physical abuse, we note further section 139A of the Act which provides that no teacher, “*shall use force, by way of correction or punishment, towards a student or child.*”²⁹

44. We also note for completeness we also note section 139AC of the Act which prohibits the use of physical restraint on a child unless the teacher “*reasonably believes that the safety of the student or any other person is at serious or imminent risk*”, and that the physical restraint is “*reasonable and proportionate in the circumstances*”.

Kōrerorero – Discussion

45. The respondent accepts that she spoke unprofessionally to Student A, pulled her by the arm and pushed her to the ground by the back of her neck. She has therefore accepted all particulars of the charge.

²⁹ Section 139A Education Act 1989

46. The respondent has acknowledged that she did not follow school procedures and that in a state of heightened emotion, lost control of the situation and used physical force against a student.
47. In terms of the wider context, it is not disputed that the student was pushing and punching the respondent. It is also not disputed that the respondent acknowledges that her actions were inappropriate and unprofessional, and she is incredibly remorseful.
48. That said, although we acknowledge the challenging context in which the respondent found herself in, to respond in the way she did by forcing the student to the ground and pushing down hard on the back of her neck, was unacceptable. This coupled with the choice of words "*who is the strong one now?*" suggests intimidation and the respondent wishing to assert her power or dominance over the child. We are therefore satisfied that the respondent's conduct meets all the limbs of the test of serious misconduct.
49. In relation to section 378 of the Act, there is no doubt that the conduct adversely affected Student A's wellbeing, reflects adversely on the respondent's fitness to be a teacher and may bring the profession into disrepute.
50. Further the respondent's conduct amounts to physical abuse in contravention of Rule 9(1)(a) of the Rules and thus was also in breach of section 139A of the Act. We are assisted by the cases referred to by the parties in reaching that determination.³⁰
51. Whilst we are not required to go on to consider whether the conduct is also in breach of Rule 9(1)(c) and/or (f) and/or (n) and/or (o) as pleaded by the CAC as we have already found a breach of Rule 9(1)(a) being the most context specific, we make the point that it is likely that these other Rules would also have been breached.
52. This is also not a situation of an acceptable level of physical restraint being used as provided for in section 139AC of the Act. Although Student A was punching and pushing the respondent there is no evidence to suggest she felt at "*serious or imminent risk*", and even if that was the case, pushing a student down by the back of the neck is not "*reasonable and proportionate*" in the circumstances.

³⁰ Above n 1,2, 4-11, 12-15

53. Further, force of that nature to a child's head/neck area while using intimidating language is to takahi the mana of that child, which is unacceptable in any context.

Kupu Whakataua – Decision

54. Having determined that this case is one in which we consider exercising our powers, we must now turn to consider what is an appropriate penalty in the circumstances.

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.*
- (2) *Despite subsection (1), following a hearing that arises out of a report under section 397 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.*

55. 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.³¹
56. The parties agree as to a penalty they believe meets these three objectives. Several recent cases have reviewed the penalty principles and the leading cases, and we adopt those reasonings here.³²
57. We wish to comment on the respondent's submissions regarding the circumstances the respondent found herself in at the time of the incident. Ms Andrews submits that whilst the respondent's conduct is unacceptable, the Tribunal needs to look at the situation as a whole including the fact that the respondent was in a heightened emotional state and lost control of the situation. Her behaviour was out of character and she is remorseful. We agree that context is always important, and the respondent was in a difficult position which would have undoubtedly caused her some stress. However, at all times she was the adult, the teacher, the professional. The onus was on her to behave accordingly.
58. We acknowledge the respondent's open and reflective approach to the school investigation and the Tribunal process. She has also indicated a willingness to receive training and/or mentoring to upskill her classroom management approach.

Our decision on penalty

59. In light of the above, the Tribunal orders as follows:
- (a) Censure under s 404(1)(b) of the Act;
 - (b) Under section 404(1)(c) of the Act the following conditions are to be placed on the respondent's practising certificate:

³¹ *CAC v McMillan*, NZTDT 2016/52.

³² See for example

- (i) The respondent is to undergo mentoring for a period of 12 months from the date of the full decision with quarterly reports of reflection to be sent to the Teaching Council;
 - (ii) The respondent is to enrol in a professional development course on positive guidance for better learning outcomes/classroom management by a provider approved by the Manager, Professional Responsibility of the Teaching Council and proof of completion sent to the Teaching Council;
 - (iii) The respondent shall enrol in a professional development course such as *Understanding Behaviour, Responding Safely* to upskill in prevention and de-escalating strategies and proof of completion to be sent to the Teaching Council;
 - (iv) The respondent must inform her current and any prospective future employer of this decision and provide them with a copy for a period of two years from the date of the full decision with evidence to the Teaching Council of this disclosure.
- (c) Annotation of the register of all the above for two years under s 404(1)(e) of the Act.

60. We note that a decision only minute has previously been issued with respect to this matter setting out the Tribunal's findings and penalty. Given the timing of the full decision it may be that the respondent has already fulfilled the conditions set out in paragraph 59(b)(i) - (iii). If that is the case, so long as the Teaching Council has evidence of completion, then those conditions are deemed to have been satisfied. For clarity, the condition in paragraph 59(b)(iv) is triggered from the date of this full decision.

Utu Whakaea – Costs

61. The CAC seeks an award of costs of 40%. The respondent agrees with this.
62. The CAC is to file and serve a copy of its cost schedule. Under section 404(1)(h) the respondent is ordered to pay 40% of the costs shown in the CAC schedule unless the respondent files and serves submissions as to costs within 10 days of the date the CAC

has sent the cost schedule. If these submissions are received the Tribunal delegates to the Deputy Chair the task of fixing the amount of the CAC's costs.

63. The respondent is also ordered to pay 40% of the Tribunal's costs. This matter was dealt with on the papers and the schedule submitted by the Tribunal shows \$1,145.00 of total costs. The respondent is to pay \$458.00 pursuant to section 404(1)(i). Any objection should be filed within 10 days of receipt of the decision and referred to the Deputy Chair.



Rachel Mullins
Deputy 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).