

BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

NZTDT 2020/54

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 under Part 32 of the Act

BETWEEN **COMPLAINTS ASSESSMENT COMMITTEE**

Referrer

AND **LINJINGQUI CHEN**

Respondent

DECISION OF THE TRIBUNAL

16 July 2021

HEARING: Held on 16 June 2021 on the papers

TRIBUNAL: Rachael Schmidt-McCleave (Deputy Chair)
Aimee Hammond and Megan Cassidy (members)

REPRESENTATION: E J McCaughan, Kayes Fletcher Walker for the Complaints Assessment Committee
The respondent, self-represented

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.
2. Prior to the hearing, the CAC sought leave to file an amended notice of charge, making some small amendments to the particular. The respondent consented to the application to amend. Accordingly, this Tribunal granted that leave by consent, and the notice of charge referred to below is the amended notice of charge dated 28 April 2021.
3. The CAC charges that the respondent, a registered teacher of Hamilton:
 - (a) On or around 10 July 2019 pulled and/or dragged Student A, aged approximately 3 years old;
 - (b) One or around 20 August 2019, lifted Student C, aged approximately 20 months old, with one hand by taking his wrist and/or hand and pulling him up and moving him from outside the door to inside the Centre.
4. The CAC alleges that this conduct, separately and/or cumulatively, amounts to serious misconduct pursuant to section 378 of the Education Act 1989 (the "Act") and Rule 9(1)(a) and/or (k) of the Teaching Council Rules 2016 (the "Rules"), or alternatively amounts to conduct which otherwise entitles the Disciplinary Tribunal to exercise its powers pursuant to section 404 of the Act.
5. The matter was heard on the papers.

Ko te hātepe ture o tono nei – Procedural History

6. A Pre-Hearing teleconference was held on 14 April 2021. The respondent had applied for interim name suppression and there was no objection to that from the CAC so an interim order for name suppression was made.
7. The parties indicated at that teleconference that agreement on a summary of facts was likely, and the Chair made timetabling orders accordingly and set the matter down for a hearing on the papers on 16 June 2021. The Chair, in her Minute of the teleconference, reminded the respondent that the Tribunal does not automatically receive all the

documents she may have previously provided to the CAC and so, if she would like the Tribunal to consider those, she should discuss with counsel for the CAC making sure they are included in the Agreed Bundle of Documents for the hearing.

8. On 14 April 2021, the parties filed an Agreed Summary of Facts (the "ASOF"). The ASOF is set out below.
9. On 28 April 2021, the CAC filed an Amended Notice of Charge, removing a particular that had been in the original Notice of Charge.

Kōrero Taunaki - Evidence

Agreed Summary of Facts

10. The ASoF is set out in full below:

"Introduction

1. *Linjinqiu (Zoey) Chen has been a provisionally registered teacher since May 2017. Ms Chen was reissued her provisional registration in August 2020.*
2. *Ms Chen was employed at Kindercare Learning Centre from July 2017 until March 2019. Ms Chen started at Montessori House of Children (MHOC) in March 2019.*
3. *MHOC is located in Hamilton and is licensed for up to 55 children, is privately owned and was established in 2014.*

Allegation: That on or around 10 July 2019, Ms Chen pulled and/or dragged Student A, aged approximately 3 years old

4. *On or around 10 July 2019, the grandmother of Student A (a boy aged approximately 3 years old) went to collect her grandson from MHOC at pick-up time. When she arrived, she stood at the door and witnessed an incident between Student A and Ms Chen.*
5. *Student A was standing at a set of drawers. As he opened the drawer and reached inside, Ms Chen approached Student A. Ms Chen pulled his arm out of the drawer in a rough manner. Ms Chen then slammed the drawer shut.*
6. *Student A screamed and started to cry very loudly.*

7. *With her hand around Student A's arm Ms Chen pulled him away from the drawer and started to walk very quickly with Student A in tow.*
8. *Student A's grandmother thought that Ms Chen looked angry with Student A.*
9. *As Ms Chen was walking quickly, Student A was stumbling behind her and being dragged.*
10. *Student A's grandmother saw that Ms Chen had a grip on Student A's arm holding his arm in the air as she was leaning forward pulling him along. Student A was crying, and he looked frightened and shocked.*
11. *Student A's grandmother rushed towards him, bent down and picked him up.*
12. *Student A was still crying and telling his grandmother about his arm, saying "hurt, nanny, hurt". Student A cried for the duration of the car trip home, which was approximately 20 minutes.*
13. *Student A's grandmother complained to the centre on the day of the incident.*
14. *Ms Chen subsequently apologised to Student A's mother for being too firm with Student A.*

Allegation: That on or around 20 August 2019, Ms Chen lifted Student C, aged approximately 20 months old, with one hand by taking his wrist and/or hand and pulling him up and moving him from outside the door to inside the Centre.

15. *On or around 20 August 2019, two teachers at MHOC witnessed an incident between Ms Chen and Student C (a boy aged approximately 20 months old).*
16. *One teacher observed Ms Chen telling children to go inside the centre. Student C did not want to go inside. Without saying anything to the other teachers or Student C, Ms Chen grabbed Student C's hand forcefully and pulled the boy inside. This caused Student C to start crying loudly.*
17. *Another teacher saw Student C sitting by the open door. She described Ms Chen pulling on the child's arm and trying to drag him inside the room.*
18. *One of the teachers advised MHOC's manager of the incident on 22 August 2019.*
19. *Ms Chen denied treating Student C in the way described by the two teachers.*

Subsequent events

20. On 25 October 2019 the management of MHOC filed a mandatory report in relation to all three incidents.¹
21. On or around 8 November 2019 Ms Chen went on parental leave from MHOC. Ms Chen did not return to MHOC, and subsequently resigned on 8 March 2020.
22. The mother of Student A withdrew the child from MHOC.
23. The CAC met on 26 November 2020 to consider the allegations. Ms Chen was invited but did not attend the CAC's meeting. Ms Chen had previously provided a written response to the allegations.
24. The CAC considered that Ms Chen's conduct may possibly constitute serious misconduct (as defined in s 378 of the Education Act 1989). On that basis, the CAC had no option but to refer Ms Chen's conduct to the Tribunal under s 401(4) of the Education Act."

Ngā Kōrero a te Kōmiti – CAC and Respondent Submissions

11. The CAC submits in summary that:
- (a) The ASOF is sufficient to prove the factual allegations in the Amended Notice of Charge.
 - (b) The respondent's conduct meets the threshold of "serious misconduct".
12. The CAC's submissions on penalty are discussed below.
13. The CAC referred to the District Court decision in *Teacher Y v Education Council of Aotearoa New Zealand*² in support of the proposition that the definition of "serious misconduct" in section 378 of the Act is conjunctive. The CAC also noted that the District Court in the *Teacher Y* case, and in *Evans v Teachers Disciplinary Tribunal*³, has ruled that if any one of the matters under section 378(1)(a) are made out, the teacher's conduct will amount to misconduct, whereas if the conduct also breaches section 378(1)(b), the

¹ In its written submissions, the CAC noted that the signed version of the ASOF refers to "three" incidents at paragraph 20. The CAC confirmed in its written submissions that this reference is a typo, and there are only two incidents to be considered by the Tribunal.

² *Teacher Y v Education Council of Aotearoa New Zealand* [2018] NZDC 3141, 27 February 2018 at [64].

³ *Evans v Teachers Disciplinary Tribunal* [2020] NZDC 20062, 8 October 2020 at [42].

conduct will amount to “serious misconduct.” The CAC also referred to *CAC v Marsom*,⁴ where, in relation to section 378(1)(a)(i) of the Act, the Tribunal adopted the meaning of “likely” used in the name suppression context, as described by the Court of Appeal in *R v W*.⁵ The Court of Appeal in that case said that “real”, “appreciable”, “substantial” and “serious” are qualifying adjectives for “likely” and bring out that the risk or possibility is one that must not be fanciful and cannot be discounted.

14. The CAC submitted that the criteria for reporting serious misconduct is detailed in rule 9(1) of the Rules, which states relevantly:

“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;

....

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

15. The CAC also refers to Rule 9(2) which states that misconduct as described in Rule 9(1) may be a single act, or a number of acts forming part of a pattern of behaviour, even if some of the acts when viewed in isolation are minor or trivial.
16. The CAC submits that the “disrepute” test under Rule 9(1)(k) will be satisfied if reasonable members of the public, informed of the facts and circumstances, could reasonably conclude that the reputation and standing of the profession was lowered by the respondent’s behaviour (citing *CAC v Collins*⁶, which in turn relied on the High Court decision in *Collie v Nursing Council of New Zealand*⁷).

⁴ *CAC v Marsom* NZTDT 2018/25.

⁵ *R v W* [1998] 1 NZLR 35 (CA).

⁶ *CAC v Collins* NZTDT 2016/43, 24 March 2017 at [40].

⁷ *Collie v Nursing Council of New Zealand* [2001] NZAR 74 at [28].

17. Next, the CAC submitted that the following clauses from the Code of Professional Responsibility are relevant:
- (a) Clause 1.3 – Commitment to the teaching profession – “I will maintain public trust and confidence in the teaching profession by demonstrating a high standard of professional behaviour and integrity.”
 - (b) Clause 2.1 – Commitment to learners – “I will work in the best interests of learners by promoting the wellbeing of learners and protecting them from harm.”
18. Finally, the CAC referred to section 139A of the Act, which provides that no teacher “shall use force, by way of correction or punishment, towards any student or child enrolled at or attending the school, institution or service.”
19. The CAC submissions and the respondent’s submissions on penalty and name suppression are addressed below. The comparable cases referred to by the CAC are also addressed later in this decision.

Te Ture - The Law

20. 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.*

21. The Tribunal agrees with the CAC’s submission that the test under section 378 is conjunctive⁸, 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, pursuant to Rule 9 of the Teaching Council Rules 2016.

⁸ *Teacher Y and Education Council of Aotearoa New Zealand*, [2018], NZTDT 3141, 27 February 2018 at [64].

22. The Tribunal accepts also the CAC's submission that the respondent's conduct falls within the following sub-rules of Rules 9(1):
- (a) Rule 9(1)(a): using unjustified or unreasonable physical force on a child or young person.
 - (b) Rule 9(1)(k): an act or omission that that brings, or is likely to bring, the teaching profession into disrepute.
23. The Tribunal has also taken into account section 139A of the Act, as described above, and the cited clauses of the Code of Professional Responsibility.

Kupu Whakatau – Decision

24. We are satisfied that the respondent's conduct meets the threshold for serious misconduct in terms of section 378 of the Act, and Rules 9(1)(a) and (k). We also accept that section 139A is relevant, as are the cited clauses of the Code of Professional Responsibility, which we are satisfied have been breached by the respondent.
25. We would also like to record here our appreciation of the clear, concise and well-ordered way that the CAC, through its counsel, has presented its case.
26. As stated by this Tribunal in *CAC v Teacher*⁹:
- “We repeat as we have said in a number of cases in the past that the use of physical force – even at a lower level such as evident in this case – is unacceptable in New Zealand schools, and that any teacher who uses physical force contrary to s 139A puts his or her status as a teacher in peril.”
27. In terms of rule 9(1)(k), the High Court in *Collie v Nursing Council of New Zealand*¹⁰ confirmed that the test for bringing the profession into disrepute is an objective one. In making its determination, the Tribunal must ask itself whether reasonable members of the public fully informed of the facts of the case could reasonably conclude that the reputation and good standing of the profession has been lowered by the respondent's actions.

⁹ *CAC v Teacher* NZTDT 2014/49.

¹⁰ *Collie v Nursing Council of New Zealand*, [2001] NZAR74 at [28] regularly applied by the Tribunal, for example see *CAC v Harrington* NZDT 2016/63, 6 April 2017

28. Turning now to look at whether the respondent's conduct is also of a character or severity that makes the Teaching Council's criteria for reporting serious misconduct, we note that we only need to find contravention of one of the specific rules covered in Rule 9(1) for this limb to be satisfied. The CAC has focussed on Rules 9(1)(a) and (k) in this regard and we are satisfied that the respondent's actions breach both those sub-Rules for the reasons discussed further below.
29. The comparable cases confirm the position we have reached that the respondent's conduct here, with respect to both particulars, constitutes serious misconduct. We discuss these comparable cases below.
30. In *CAC v Risuleo*¹¹, Mr Risuleo was teaching a class of Year 1 and 2 students. The students were engaged in a colouring-in exercise, when two children tipped a jar of pens on the floor. They picked up the pens, but then one of the children threw a pen on the ground. Mr Risuleo walked over to the child, grabbed his arm and pulled the child towards him, admonishing him and instructing him to pick the pen up. Mr Risuleo's actions caused the child to fall to the floor and hit his head. The child told his mother and Mr Risuleo phoned her after school to apologise and explain what happened.
31. Ultimately, Mr Risuleo resigned from his job and voluntarily de-registered. This Tribunal stated:¹²

“In some cases the degree of force used easily sits within a common understanding of physical abuse. Sometimes the effect of the use of force is humiliation and might therefore amount to psychological abuse. As we said in *CAC v Tregurtha*:

Section 139A makes it clear that a teacher has no unique right to use force. We assume most teachers would not hit another adult if unhappy with their behaviour. A teacher's position does not legitimise actions that amount to crimes if committed in the community. Therefore teachers must be careful not to abuse the position of authority that they have in a classroom.”

32. The Tribunal in *CAC v Risuleo* went on to find that the respondent had used more force than was required, and although this may have been motivated by frustration rather than

¹¹ *CAC v Risuleo* NZTDT 2018-8

¹² Para [30]

anger, it was conduct likely to bring the teaching profession into disrepute, and it was also serious misconduct. The Tribunal censured Mr Risuleo and ordered that, if he wished to return to the profession, conditions would be imposed on any subsequent practising certificate for a period of three years, and that he must complete any programmes the Teaching Council may require. Mr Risuleo was also ordered to provide any prospective employers with a copy of the Tribunal's decision and the register was annotated to reflect the censure and conditions.

33. Another such case was *CAC v May*.¹³ In that case, Ms May was alleged to have forcefully grabbed an 18-month child by the lower arm and swung him in the air. Ms May accepted she used force to the child, but denied she committed serious misconduct. The Tribunal considered that the conduct satisfied all three limbs of section 378(1)(a) of the Act:

“A key focus in Ms May’s evidence was that she did not intend to cause Child A harm, and he suffered no demonstrable ill-effect as a consequence of her use of force. While we accept that Ms May did not intend to cause harm; that does not detract from the fact that she intentionally applied force to Child A - in other words, assaulted him. We do not know whether the respondent’s conduct did, in fact, adversely affect Child A’s well-being or learning. It is not necessary for us to reach a conclusive view about that, given the wording of s 378(1)(a)(i) of the Education Act. We are satisfied that behaviour of the type being addressed here is “likely” to have had that effect on an inherently vulnerable 18-month-old child – even if only fleetingly so.”

34. In relation to s 378(1)(a)(ii), the Tribunal in *May* said:

“Turning to s 378(1)(a)(ii), there is no doubt that the respondent’s assault of Child A adversely reflects on her fitness to teach. As we said in *CAC v Rangihau*, it is incumbent on all in the teaching profession to have a clear appreciation of the prohibition on the use of corrective and disciplinary force contained in s 139A of the Education Act...

...[there could be no doubt] that Ms May’s behaviour towards Child A risks lowering the profession’s standing in the eyes of the public.”

35. The Tribunal in *May* made clear that the conduct itself would not have required cancellation of Ms May’s practising certificate but she showed little to no insight or

¹³ *CAC v May* NZTDT 2019/86

remorse, and therefore reluctantly the Tribunal concluded that the only possible outcome was cancellation.

36. In *CAC v Teacher Q*¹⁴, Teacher Q grabbed a six-year old's arm when he ran past her during a session of "Jump Jam". As she grabbed his arm, it caused his arms and shoulders to be yanked and he fell heavily to the ground. He began to cry and told another teacher he had a sore arm. Later, when trying to apologise to the boy, Teacher Q held onto him while he was squirming and beginning to cry.
37. Teacher Q accepted her conduct amounted to "serious misconduct", and she was censured, required to provide a copy of the decision to her employer and any future education sector employers for 12 months, and required to undertake a formalised mentoring and supervision programme for 12 months.
38. The Tribunal considers that similar considerations as occurred in all three of the above cases apply to the respondent's conduct in this case. Although her conduct was not intentional, and came from a place of frustration, it was nonetheless forceful conduct that cannot be tolerated towards children of such vulnerable age. Child A cried for some time, and complained about his sore arm. We also accept Child C was crying when grabbed and pulled inside. Both children were of an age when such reactions are to be expected, especially when treated with force for behaviours (curiosity and a refusal to go inside respectively) which are part and parcel of being a toddler.
39. As submitted by the CAC, the importance of ensuring the protection and safety of children in educational settings has been reinforced by the enactment of the Children's Act 2014 and the amendments in 2015.
40. The Tribunal has no doubt that the respondent was in a highly pressured and stressful situation, exacerbated by the fact she was pregnant. However, it is part of professional behaviour for teachers to recognise when they are not coping and take steps to address the stress, and put in place self-regulation. Not to do so places children like Child A and Child C at risk of adverse consequences for their learning. This is the reason why the use of force is expressly prohibited by section 139A of the Act.

¹⁴ *CAC v Teacher Q* NZTDT 2020/23

41. Finally, the Tribunal considers that, bearing in mind the above points, reasonable members of the public fully informed of the facts of the case would reasonably conclude that the reputation and good standing of the profession has been lowered by the respondent's actions. As we have said above, it is incumbent on teachers to exercise self-regulation when dealing with feelings of frustration and anger, and to be seen to do so.

Whiu - Penalty

42. 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.*

43. We note that, in determining penalty, the Tribunal must ensure that the three overlapping principles are met, that is, the protection of the public through the provision of a safe learning environment for students and the maintenance of both the professional standards and the public's confidence in the profession.¹⁵ We refer to the decisions of the superior Courts which have emphasised the fact that the purpose of professional disciplinary proceedings for various occupations is actually not to punish the practitioner for misbehaviour, although it may have that effect.¹⁶
44. In *Mackay* we looked at the principles the Tribunal must turn its mind to when considering penalty following a finding entitling it to exercise its powers¹⁷:
- (a) Protecting the public;
 - (b) Setting the standards for the profession;
 - (c) Punishment;
 - (d) Rehabilitation;
 - (e) Consistency;
 - (f) The range of sentencing options;
 - (g) Least restrictive;
 - (h) Fair, reasonable and proportionate.
45. We do not intend to repeat what we said in that decision, other than to note that we have turned our mind to these principles in reaching our decision on penalty.

¹⁵ *CAC v McMillan*, NZTDT 2016/52.

¹⁶ *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [97]; *In re A Medical Practitioner* [1959] NZLR 784 at p 800 (CA).

¹⁷ Above n 16 at [40] – [62]

46. The CAC, after reviewing what it submitted are analogous cases, submitted that this is conduct does not rise to the level where a penalty of cancellation is required. The respondent apologised to Student A's mother, thereby showing insight into why her conduct was wrong. Whilst Ms Chen initially denied that she had done anything wrong in relation to Student C, Ms Chen has subsequently reached agreement with the CAC regarding the description of her conduct, which demonstrates a level of insight.
47. The CAC also acknowledges that Ms Chen's current employer (New Shoots Children's Centre) has provided the CAC with information suggesting that she is doing well in her new role, and that her employer supports her. The Tribunal has considered this material and is encouraged that the respondent is showing reflection and professionalism in her current role.
48. The CAC therefore advocated for censure and certain conditions to apply for a period of up to two years.
49. The respondent has urged the Tribunal to take into account the following mitigating circumstances:
 - (a) When the incidents occurred she was pregnant with her son and was suffering from extreme fatigue brought on by the MHOC's management's alleged denial of 10-minute breaks to their employees during their work days.
 - (b) The exhaustion and hormonal imbalance brought on by her pregnancy compounded by the lack of breaks she needed in order to be able relieve and recuperate during her very busy days at MHOC brought on stress, fatigue and exhaustion that unfortunately interfered with her ability to effectively regulate her emotions, which she feels was a significant contributing factor in the regrettable incidents that occurred.
50. Considering the above, as well as the obligation upon us to impose the least restrictive penalty in the circumstances, pursuant to section 404(1) of the Act, we therefore order as follows:
 - (a) A censure under section 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:
 - (i) The respondent must provide a copy of this decision to her current teaching employer and any prospective teaching employer.
 - (ii) The respondent must practise under the guidance of a mentor approved by the Teaching Council, which may also stipulate the form of mentorship and the provision of mentorship reports or updates.
- (c) Pursuant to section 404(1)(e) of the Act, annotation of all the above for a period of two years following the date of the full decision.

Utu Whakaea – Costs

- 51. The CAC submits that a 40% contribution to the CAC's overall costs is appropriate and will file a memorandum in due course.
- 52. The Tribunal sees no reason to depart from the usual principles and therefore orders 40% costs in favour of the CAC.
- 53. 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.
- 54. 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.

He Rāhui tuku panui – Non-publication

- 55. The respondent seeks permanent name suppression for herself on the basis, in summary, that having her name made public would disproportionately jeopardise her reputation as an Early Childhood Educator and undermine the efforts she has making to improve her practice and redeem herself in both the eyes of her peers and herself.

56. The CAC opposes name suppression. The CAC submits that the respondent's grounds do not justify an exception to the fundamental principle of open justice, and therefore it is not proper for the Tribunal to make the orders sought pursuant to s 405(6).
57. The CAC further submits that, given the gravity of the respondent's conduct, it is not "disproportionate" to publish her name. Given the circumstances in which the serious misconduct occurred (i.e. rough handling of two children in an ECE environment), unless there are particular personal circumstances which would make it proper to suppress the teacher's name, it is entirely appropriate that the respondent's name should be published so that future ECE employers can be aware of the issue, so that they can determine whether the respondent represents a risk of similar conduct in the future. It would be expected that such employers would also take account of the steps that the respondent has taken to improve her performance since that time, as well as her work history since the time of the conduct.
58. The CAC further points out that the respondent's conduct has not prevented her from obtaining a position with another ECE employer, which appears to be highly supportive of her. Therefore, the respondent has not demonstrated that there is a real or appreciable risk that publication of her name will jeopardise her reputation as an educator.
59. Finally, the CAC submits that the submission that publication would undermine the efforts that the respondent has made to improve her practice could be made by every teacher who appears before the Tribunal. There is nothing unusual about the respondent's position in this regard. For example, there is no suggestion that the respondent suffers from a medical or psychiatric condition which would be exacerbated should her name be published.
60. The Tribunal accepts, and agrees with the CAC's submissions on name suppression. The application of the principle of open justice to proceedings before the Tribunal is contained in section 405(3) of the Act. The primary purpose behind open justice in a disciplinary context is the maintenance of public confidence in the profession concerned through the transparent administration of the law.¹⁸

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

61. The Tribunal's powers to prohibit publication is found in section 405(6) of the Act. It can only make one of the non-publication orders in (a) to (c) of section 405(6) if it is of the opinion that it is "proper" to do so having regard to the interests of any person, including but not limited to, the privacy of the complainant and to the public interest.
62. The Tribunal has adopted a two-step approach to applications for non-publication orders. First, it considers whether it is proper to make a non-publication order having regard to the various interests identified in section 405(6); and, secondly, it decides whether to exercise its discretion to make the orders sought.¹⁹ Bare assertions will not suffice for displacing the principle of open justice and nor will the "ordinary" hardships or expected consequences of a proceeding involving allegations of serious professional misconduct.²⁰
63. The Tribunal does not consider there to be a basis to displace the presumption of open justice by suppressing the respondent's identity. There is no evidence before the Tribunal of negative impact on the respondent, or people connected to her, beyond that which ordinarily exists in proceedings of this kind. The respondent has not brought evidence to demonstrate that publication of her name will affect her proposed career path and, indeed, she is currently employed.
64. The Tribunal therefore declines the respondent's application for permanent name suppression.



Rachael Schmidt-McCleave
Deputy Chair

¹⁹ Ibid at [61].

²⁰ *Y v Attorney-General* [2016] NZCA 474 citing *Hart v Standards Committee (No 1) of the New Zealand Law Society* [2011] NZCA 676 approved by the Supreme Court declining leave to appeal in *Hart v Standards Committee (No 1) of the New Zealand Law Society* [2012] NZSC 4.

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

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