

BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

NZTDT 2020/08

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 **PAMELA GILMOUR**
Respondent

TRIBUNAL DECISION DATED 5 OCTOBER 2020

HEARING: Held in Whanganui on 31 August 2020

TRIBUNAL: Theo Baker (Chair)
David Spraggs and Simon William (members)

REPRESENTATION: Ms Watts for the CAC
The respondent represented herself

1. In a Notice of Charge dated 2 March 2020, the Complaints Assessment Committee (**CAC**) alleged that on or about 2 April 2019, while working at BestStart Glasgow Street the Respondent:
 - (a) Grabbed Child A by her hand and/or arm and pulled Child A using unjustified or unreasonable physical force; and/or
 - (b) Yelled at Child A; and/or
 - (c) Grabbed Child B by her hand and/or arm and pulled Child B using unjustified or unreasonable physical force;
 - (d) Spoke in an angry and/or rough voice to Child B; and/or
 - (e) Grabbed Child C by her hand/or arm and pulled Child C using unjustified or unreasonable physical force; and/or
 - (f) Grabbed Child D by his¹ hand and/or arm and pulled Child D using unjustified or unreasonable physical force.
2. It was alleged that separately or cumulatively the conduct amounted to serious misconduct under section 378 of the Education Act 1989 (**the Act**) and rules 9(1)(a) and/or (b) and/or (j) and/or (k) of the Teaching Council Rules, or alternatively amounts to conduct otherwise entitling the Tribunal to exercise its powers under section 404 of the Act.
3. We must first decide if the CAC has proved the allegations in the charge. If we are satisfied on the balance of probabilities that the conduct occurred, we may then consider whether the conduct amounts to serious misconduct.

Summary of decision

4. We found that the respondent had grabbed Children A, B and C and pulled them using unreasonable and unjustified force. We also found that she had yelled at Child A and spoke in an angry voice to Child B. There was insufficient evidence that the respondent had grabbed and pulled Child D.
5. We found that the respondent's conduct amounted to serious misconduct. We censured the respondent and imposed conditions as set out in paragraph 92. The register will be annotated for a period of two years.
6. We have invited submissions on non-publication and costs as set out in paragraphs 93

¹ The charge originally referred to "her" hand, but this was amended to "his" hand before the commencement of the evidence.

to 97.

Evidence at the hearing

7. At the hearing, we considered the following evidence:
 - a. An agreed summary of facts;
 - b. Oral evidence from Korey Te Patu and Sophie Joines for the CAC;
 - c. Oral evidence from the respondent;
 - d. Documents contained in the Agreed Bundle of Documents;
 - e. Two floor plans of the Centre
 - f. Photographs taken of relevant parts of the Centre.
8. The last two items were produced by consent.

Agreed facts

9. Included in the Bundle was an Agreed Summary of Facts (ASF), which was not signed by the parties. Ms Gilmour confirmed at the hearing that with the exception of the matters that were highlighted in bold, she agreed with the statements in the ASF. The following facts were not disputed.
10. Ms Pamela Gilmour was first provisionally registered as a teacher in 2000. She became fully registered in 2003. The respondent was employed by various BestStart centres from 3 September 2007. BestStart Glasgow St is an early childhood education centre in Whanganui. At the relevant time, it had a roll of approximately 81 children. The respondent started teaching there on 14 August 2018.
11. On 2 April 2019, the respondent was teaching at BestStart Glasgow St. The day and the room had been particularly hectic because of new children and the range of young children in attendance.
12. The respondent was with a number of children (at least 6) around the bathroom area attempting to line the children up for the sleep room at approximately 12.30 pm. Sophie Joines, a teacher in training, was inside the changing room attending to other children. The children do not usually line up before they go into the sleep room, so they were not listening to the respondent's instructions, which added to the stress levels that day. It was also agreed that the noise level was high. The respondent's voice was increasing in volume as she became frustrated attempting to line the

children up.

13. On the basis of the evidence and photos, it was also not disputed that on entering the Centre, the path to the teaching room meant turning to the right and then walking past the changing room on the right. Once in the teaching room, the sleep room was on the right. Although there was a door from the teaching room to the sleep room, we were told that there was a "nest area" in the corner by the entrance to the sleep room. The entrance to the sleep room was therefore via the change room.
14. Looking into the change room, one can see a door to the toilet on the right. On the left is a change table and in the upper left hand part of the room is the door into the sleep room.

CAC evidence

15. The CAC called Korey Te Patu, the parent of a child (Child Z) who attended BestStart Glasgow Street in April 2019.
16. Mr Te Patu said that on 2 April 2019 at around 12.30pm, he arrived at the Centre to collect his daughter. On his way to the teaching area, he went past the toilet area/changing room and noticed the respondent was quite frustrated. There were at least 7 children in the area. Another teacher Sophie Joines was there changing a child.
17. Mr Te Patu said after collecting his daughter and on his way out, he went to say goodbye, and saw the respondent grab the arm of a child (Child A) so tight that her skin changed colour. He clarified that the skin went red, rather than white. The respondent then yanked the child towards her and pointed at her nose while yelling in her face words to the effect of "Don't be silly [Child A]. You are being naughty. Now cut it out". The child started crying and showed Mr Te Patu that it hurt her.
18. Mr Te Patu said that this happened to a blonde boy immediately before it happened to Child A. The respondent was pointing in the boy's face and yelling at him. She quite roughly pushed him back in line.
19. We saw in the photographs provided that there is a doorway into the changing area, with a gate that comes about halfway up. Mr Te Patu was standing at the gate looking into the room, and was about 3 to 4 metres away from the respondent. Ms Joines was at the changing table about an arm's length away, and the respondent was on the other side of her. Looking directly into the room, to the right is a door to a toilet and to the left is the door into the sleeping area.

20. Mr Te Patu immediately reported what he had seen to another teacher and the head teacher. He later removed his daughter from the Centre, partially because of what he had witnessed.
21. The respondent put to Mr Te Patu that she has nerve damage and arthritis and does not have a lot of strength in her arm and so she could not do what he had described. He replied that he had seen it. She also said that she did not see Mr Te Patu. He said that the respondent had seen him, that she had made eye contact with him. He said that she used excessive force and she should not have done so.
22. In answer to questions from the Tribunal, Mr Te Patu said that he thought that the reason he thought respondent was frustrated was because of the tone and volume of her voice. He said that she was not usually loud. He said that he watched for about 20 to 30 seconds.
23. The next oral witness was Sophie Joines who is a teacher in training at the Centre. She told us that on 2 April 2019, at about 12.30 the children were going to bed. The respondent and Ms Joines were in the change room. There were about 6 children. She had a child on the change table.
24. Ms Joines said that she turned her head to greet Mr Te Patu when he arrived to collect his daughter. She noticed his eyes looking towards a group of children in the change room. He then looked back at Ms Joines with what she described as a bit of a shocked look on his face. Ms Joines could also hear the respondent's voice rising. Mr Te Patu left.
25. Ms Joines turned to see what he was looking at and saw the respondent standing asking children to line up on a mat. The volume of her voice increased when the children did not listen to her.
26. Ms Joines saw the respondent grab Child B by her arm and pull her by the wrist, asking her to "line up now" in an angry rough voice. Ms Joines said that the pull was hard and jerked Child B's head. She could not see if Child B was upset after. Child B has white hair and could be mistaken for a boy from behind.
27. Ms Joines said she also saw that Child C and Child D had been grabbed roughly so that they went in line. The children stood there and lined up as told/asked by the respondent. Ms Joines saw Child C being grabbed. Child D was in front of Child C. Based on his facial expression, she believed that Child D was also pulled by the wrists

roughly into line.

28. Ms Joines could not remember if the other two children were upset. She said that the respondent was yelling at the children, "I've asked you to stand in line" in a very loud, stern, robotic voice. Ms Joines thinks that she also said, "Stop being silly", which is something she often says, along with "Stop being a scamp".
29. Ms Joines did not say anything to the respondent at the time because it happened so quickly, and she could see that Mr Te Patu had already gone to speak to Ms Campbell about it.
30. In cross-examination the respondent said to Ms Joines that after the respondent came out of the sleep room Ms Joines asked her if she was ok, and the respondent had said "no". Ms Joines did not accept that had happened.
31. In answer to questions from the Tribunal, Ms Joines did not know where the other staff were. She confirmed that it was typical to go through the changing room.
32. Ms Joines was asked how she knew Mr Te Patu had reported the matter. She replied that she went to speak to Ms Campbell and asked if Mr Te Patu had spoken to her about what had happened.
33. We also received statements from Ms Campbell (teacher) and Ms Mallinder, (Head teacher) confirming that Mr Te Patu had spoken to them about the respondent's behaviour. Ms Campbell made no mention of Ms Joines speaking with her, and because she was not called to give oral evidence, she could not be asked about this.
34. Ms Mallinder also said that at about 2.30pm she brought the respondent into the office and told her what Mr Te Patu had said. The respondent became upset and quite angry that someone had accused her of this. She denied it and said she would never hurt a child, let alone mark a child's arm. Ms Mallinder invited the respondent to write down what happened. This statement was produced by the Council Investigator, Mr Rakic as **exhibit DR-6** and is outlined below.
35. Ms Hilary Bourke who was the business manager of the Centre at the time of these events made a statement. She made notes of a disciplinary meeting with the respondent on 17 April 2019, which were produced by Mr Rakic as exhibit "**DR10**".
36. Daniel Rakic is an investigator at the Teaching Council (**the Council**). In an affidavit, he produced documents gathered during the investigation. In particular, he produced:

- a. A letter from the respondent headed 2 April 2019 (**exhibit DR6**)
 - b. Signed notes of Hilary Bourke from the disciplinary meeting with the respondent on 11 April 2019 (**exhibit DR10**)
 - c. Letter dated 14 April 2019 from the respondent (**exhibit DR17**).
37. In her first statement, the respondent said that she had started to get children ready for sleeping. This included checking and changing nappies. By 12.20 she was in the sleep room with one child in bed and one in her cot. She returned to the changing room where Sophie was changing a child and there were several children on the mat. She asked the children to stand up and form a line. She said, "I helped one child up by placing my palm under her elbow, I then led five children into the sleep room helping them into their beds." She denied grabbing the arm of a child or poking her finger at the child. She denied that any children were crying or upset. She denied saying, "Don't be naughty", "Don't be silly", or "Cut it out", saying those were his words not hers.
38. In her response to the Centre investigation (**exhibit DR17**), the respondent pointed out the inconsistencies in the statements made against her and talked about her working relationship with Ms Joines. She also provided a possible explanation for a slightest touch of a child's skin leaving a mark, based on their blood vessels being closer to the skin.

Respondent evidence

39. The respondent had not filed a brief of evidence but at a pre-hearing conference held on 2 July 2020, the Chairperson had directed that given she had made earlier statements, the hearing could proceed.
40. We considered those statements (set out above) and a further statement dated 8 January 2020 made in response to the Council in which she talked about the unrealistic expectations, stress and lack of support while teaching.
41. The respondent disputed that she grabbed Child A's arm so tight that it changed colour, and then yanked Child A's arm. She did not accept that she pointed her finger at Child A's nose or said, "Don't be silly [Child A]. You are being naughty. Now cut it out", or words to that effect. She did not accept that Child A cried.
42. At the hearing, the respondent told us that she had been teaching for about 20 years, having been fully registered in 2000. She said that this was the first time she had faced

anything like this. She said that she had been suffering from burnout and stress and she should not have been working that day. At the beginning of 2019 she had suffered from panic attacks and anxiety and had been diagnosed with post-traumatic disorder. Her panic attacks had twice led her to believe she was having a heart attack and she had been taken to A and E. On the second occasion it was at work and the Centre Manager had taken her. She had had a week off in about March and in hindsight, she feels she should have taken more time off.

43. On the day in question, she had put one child to bed and there two infants in the sleep room. When the respondent came into the change room, Ms Joines was in the change area and there were 3 to 4 children² sitting behind her on the mat. The respondent got them up and in line because she was worried that Ms Joines would have stood on them. She remembers it was Child X, Child A, Child D and one more. She had already taken another 3 children into the sleep room. She wanted the children in some sort of order before going into the sleep room as she did not want the other children who were in there disturbed.
44. The respondent accepted that she touched the children (to get them up) but denied grabbing them. She said it was her weak arm. She admitted to feeling stressed and her voice was louder than it should have been.
45. The respondent said that she used her left hand because her right hand was sore. She put her hand under the elbows and tried to lift them up. She put her hand on a child's wrist.
46. Under cross-examination the respondent confirmed that she was more stressed than usual, burnt out and she should not have been at work. She accepted that her voice was loud and that she might have been yelling. She said, "I might have been. I know I was louder than usual." When asked if she used a harsh tone, she said that looking back, it may have been.
47. The respondent re-iterated that the words, "Stop being silly/naughty" are not her words. She acknowledged that she may have used the word "scamp" in a playful sense. She said it means a bit goofy or tricky. She added that it is not a word she would have used there. She would use it on the mat or in a game.

² It is an agreed fact that there were about 6 children there

48. In summary, the respondent did not accept that she grabbed or yanked a child or that she used unreasonable force. She also denied that she used unjustified force and she added that she should not have touched the children. The respondent said that she had Child C's elbow when she got up off the mat, but there was no jerking.
49. When asked how the weakness in her arm affected her work, the respondent said that she would pick a child up on her left side. In response to questions from the Tribunal, she elaborated that she would sit next to a child, slide her left arm under and pull them toward her body. The right arm would go under the child's bottom. When getting a child out of a cot, she would lean over the cot and put her left hand under the child and pull them up. Her employer was not aware of this.
50. The respondent did not know how the children had come into the changing room. There was a half door/gate across the entrance into the room, and so the children would not have come in unaccompanied. The respondent assumed that Ms Joines had brought them in. The respondent agreed with the suggestion that Ms Joines was therefore responsible for the children.
51. The respondent acknowledged that, knowing she was not coping well, she could have left and got the head teacher.
52. The Tribunal asked the respondent to demonstrate how she got the children up from the floor. As she was doing this, it appeared that a degree of force was used. She said, "I see what you are getting at". When it was suggested that she could have pulled, she said, "Yes. I see what you mean." She was asked when it is ok to pull and hold a child's wrist. She said it was not (ok).
53. The Tribunal asked the respondent about a performance expectation that was in the Bundle of Documents. There was a goal about voice tone. She explained that her voice was too loud and harsh. She had attended some sessions of the Incredible Years programme.
54. The respondent said that normally she would have got a child up from the floor by putting her arms around them in a cuddle and getting them to their feet or she would have asked them to stand up.

Findings

55. We had some sympathy for the respondent for several reasons. We acknowledge that she was probably not fit to be at work at the time due to her mental wellbeing. Her

resilience was evidently low, and we wondered how clear her recollection was.

56. There was another matter that concerned us. Someone else brought children into the changing area. Therefore, the situation of them all waiting on the floor was not of the respondent's making. We felt that teamwork was lacking, and communication was poor.
57. The CAC is required to prove the allegations on the balance of probabilities. That means for the charge to be proved, we must find the allegations "more likely than not" to have occurred.
58. We decided that it was likely the respondent handled children more roughly than she had realised. We found Mr Te Patu a credible witness. He was sufficiently concerned by what he had seen to report it straight away. As a parent of another child not involved at all, he was unlikely to have any emotional bias. There was no history of disagreement between the respondent and him, and he said that her voice was not usually loud. We also took into account the fact that when demonstrating to the Tribunal how she had got children to their feet, the respondent acknowledged that her actions involved pulling the children up. She agreed that pulling is not acceptable.

Particular a) Grabbed Child A by her hand and/or arm and pulled Child A using unjustified or unreasonable physical force;

Particular b) Yelled at Child A;

59. We accept Mr Te Patu's evidence that the respondent:
- grabbed the arm of Child A and that it was so tight that the child's skin change colour;
 - yanked Child A, pulling her in towards her;
60. We also find that Child A was upset and cried.
61. Although the respondent denies saying, "Don't be silly. You are being naughty. Now cut it out," we find it likely that she said something like this. She says she would more likely have said, "Don't be a scamp". On her own definition, that is the equivalent of saying, "don't be silly". In any event, the respondent is charged with yelling at Child A. She accepted that she used a raised voice and that she might have been yelling, which is consistent with Mr Te Patu's evidence that she yelled at Child A.
62. Particulars a) and b) are therefore established.

Particular c) Grabbed Child B by her hand and/or arm and pulled Child B using unjustified or unreasonable physical force;

Particular d) Spoke in an angry and/or rough voice to Child B;

63. Ms Joines says that she saw the respondent grab Child B by her arm or wrist and asking her to line up now in an angry, rough voice. The pull of her arm was hard and jerked Child B's head. This was when she turned around to see what Mr Te Patu had been looking at.
64. Mr Te Patu says that respondent was pointing in a blond boy's face and yelling at him. She quite roughly pushed him back in line, and that this happened before the incident with Child A. Ms Joines makes no mention of Child A. The CAC case is that it is likely that Mr Te Patu saw Child B, which is a girl, who may look like a boy because of her haircut. However, given that Mr Te Patu witnessed an incident before the one with Child A, and he thought it was a girl, we are not satisfied that Mr Te Patu witnessed the incident with Child B. It is possible that the boy that Mr Te Patu described was yet another child. Ms Joines has named the child she saw (and the CAC has referred to as Child B). We have therefore considered only Ms Joines' evidence in support of the allegations against Child B.
65. We are satisfied that the respondent grabbed Child B by her hand or arm and pulled her, and that this was unjustified and unreasonable force and that she used a rough, angry voice.
66. Particulars c) and d) are therefore established.

Particular e) Grabbed Child C by her hand and/or arm and pulled Child C using unjustified or unreasonable physical force;

67. According to Ms Joines, the respondent grabbed Child C and pulled her roughly into line. She said that Child C was one of two other children she could see "who had also had their hand grabbed and pulled roughly so that they went in line".
68. We therefore find that the respondent grabbed Child C by her hand and roughly pulled her in line. We find that this was an unjustified use of physical force and was unreasonable. Particular e) is therefore established.

Particular f) Grabbed Child D by his³ hand and/or arm and pulled Child D using unjustified or unreasonable physical force.

69. There is no direct evidence of Child D having his hand or arm pulled. Ms Joines inferred from the look on his face that this had also happened to him. Although it is possible that he had also been pulled into line, we are not satisfied on the balance of probabilities that this occurred. Particular f) is therefore not established.

Serious misconduct

70. We have found that the respondent has used unjustified or unreasonable physical force by pulling Child A, Child B and Child C into line and has yelled at Child A and Child B.

(t) The CAC contends first that the conduct amounts to serious misconduct under section 378 of the Education Act 1989 (**the Act**) and rules 9(1)(a) and/or (b) and/or (j) and/or (k) of the Teaching Council Rules 2016 (**the Rules**).

71. Section 378 of the Act is an interpretation section. Serious misconduct is defined as follows:

serious misconduct means conduct by a teacher –

(a) *that –*

(i) *adversely affects, or is likely to adversely affect, the well-being or learning of one or more students;*

(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.*

72. The criteria for reporting serious misconduct referred to in section 378 (b) are found in rule 9 of the Rules and the CAC relies on rules 9(1)(a), (b), (j) and/or (k):

9 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*

³ The charge originally referred to “her” hand, but this was amended to “his” hand before the commencement of the evidence.

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:

...

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

73. As for the first part of the definition of serious misconduct, we accept the CAC submission that all three definitions in section 378(a) are met. The respondent's conduct in using unjustified and unreasonable force and yelling was likely to adversely affect the wellbeing or learning of all the children, regardless of whether the behaviour was directed at them. It was conduct that was likely to make them feel upset, scared or insecure.
74. We also accept the CAC submission that a teacher should be able to conduct and maintain a degree of composure. It is not acceptable for a teacher to behave in this way. The respondent's reaction reflects adversely on her fitness to be a teacher.
75. The CAC submitted that Mr Te Patu's reaction of "shock and outrage" was evidence of how a reasonable member of the public, informed of the facts and circumstances would view the respondent's conduct. We agree that is a reasonable link to make. We have already found that the respondent was impartial. He was sufficiently concerned to make an immediate complaint. We agree that the conduct may bring the teaching profession into disrepute.
76. Turning to the second part of the definition, we must be satisfied that the established conduct is of a character or severity to meet one of the cited criteria in rule 9. We have found that the respondent used unreasonable and unjustified force. In particular, we found that the respondent's grip on Child A was so tight that the child's skin change colour, and that she yanked Child A towards her.

77. We do not find that the act of pulling a child amounts to “emotional abuse that causes harm or is likely to cause harm” under rule 9(1)(b). The fact that a child is upset by an action does not make the action one of emotional abuse. In *CAC v Driver-Burgess* NZTDT 2019/69,⁴ we said,

The fact that students were upset by this physical act does not mean that the conduct amounts to emotional abuse. There is merit in Ms Andrews’ submission that emotional abuse is designed to humiliate, degrade, undermine and control, which is absent in this case. In our view, the reason for the inclusion of rule (1)(b) is to cover situations that do not involve physical force. In many cases the conduct will be verbal, or it may involve a student being singled out in some way.

78. Although we agree that technically the conduct amounts to assault and could therefore fit within rule 9(1)(j), we think it fits better into rules 9(1)(a) and (k). We find it is likely to bring the teaching profession into disrepute. Reasonable members of the community, fully informed of the facts and circumstances would consider the reputation of the teaching profession was lowered by the respondent’s conduct. In particular, her grip left a mark on Child A, and an unrelated parent was very concerned at what he saw and reported her actions.

79. We are satisfied that this conduct in particular 1(a) amounts to serious misconduct.

80. Turning to particular 1(b), an individual act of yelling at a child might not automatically reach the threshold of serious misconduct. However, yelling at a toddler when close to them and handling roughly has no place in any setting. Even if not accompanied by the physical contact, this conduct was likely to adversely affect the wellbeing or learning of Child A and the other children around her. It reflects adversely on the respondent’s fitness to be a teacher and is likely to bring the profession into disrepute.

81. We do not find that words such as “Don’t be silly” amount to emotional abuse under rule 9(1)(b). On its own, an incident of yelling would not likely be of a sufficient severity or character to meet any of the criteria in rule 9, but the two actions towards Child A, that is physically pulling and yelling at her amounts to conduct likely to bring the profession into disrepute.

82. For the same reasons as we found in particular 1 (a) we agree that the physical conduct towards Child B amounts to serious misconduct.

⁴ *CAC v Driver-Burgess* NZTDT 2019/69, 8 September 2020

83. Again, we do not find that using an angry voice amounts to serious misconduct, but it makes the physical aspect worse. The combination of the respondent's behaviour towards Child B (particulars 1 c) and d) amounts to serious misconduct)
84. We have found that Child C was roughly pulled into line by the wrist. The evidence of the respondent's treatment of Child C is not as serious and on its own may not be of a character or severity to reach the threshold of serious misconduct., but as part of a course of action over a few minutes involving several children, it does so.
85. In conclusion, when the established incidents are considered in their totality we are satisfied that cumulatively they amount to serious misconduct. Roughly handling three small children and yelling and speaking angrily reaches that threshold meets all three definitions under paragraph (a) of the definition in section 378 and rule 9(1)(k).

Penalty

86. Section 404 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, preserved.*

87. In considering the appropriate penalty to impose in the present case, we have been guided by the principles traversed in *Roberts v Professional Conduct Committee of the Nursing Council of New Zealand*⁵ and further considered in the context of the Teachers Disciplinary Tribunal *CAC v Cook* NZTDT 2018-50.⁶

1. *Protecting the public.* As noted in *CAC v Teacher S* NZTDT 2016-69,⁷ unlike some other professional regulatory statutes,⁸ the protection of the public or consumers is not an explicit purpose in the (Education) Act. There is no doubt that the public protection is nonetheless a fundamental purpose of professional disciplinary proceedings.⁹ Part of the function of protecting the public involves the Tribunal setting penalties that will deter others from offending in a similar way.¹⁰
2. *Setting standards for the profession.* Setting standards for the profession is the special role of the profession's regulator and the disciplinary bodies. Our examination of a teacher's behaviour, and imposition of a penalty under section 404 involves a consideration of the expectation of the conduct of teachers in light of the important role and position they hold in society.
3. *Punishment.* The superior courts have emphasised that the purpose of professional disciplinary proceedings for various occupations is not to punish the practitioner for misbehaviour, although it may have that effect.¹¹ The High Court has previously noted that the punitive aspect of disciplinary proceedings under the Dental Act 1988 was reflected in the fact that the Dentists Disciplinary Tribunal had the power under to fine and censure.¹² Lang J further noted that

⁵ *Roberts v Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354 at [51]

⁶ *CAC v Cook* NZTDT 2018-50, 11 April 2019

⁷ *CAC v Teacher S* NZTDT 2016-69, 14 June 2017

⁸ For example, Lawyers and Conveyancers Act 2006 and Health Practitioners Competence Assurance Act 2003

⁹ See for example, *Dentice v Valuers Registration Board* [1992] 1 NZLR 720; *Young v PCC* Wellington HC, CIV 2006-485-1002, 1 June 2007, Young J; *CAC v McMillan* 2016/52, 23 January 2017

¹⁰ *Roberts*, above noet 5 at [44]

¹¹ *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);

¹² *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818; 13 August 2007. This case was decided before the Supreme Court issued *Z v Dental Complaints Assessment Committee* in 2008 but was not referred to in that latter decision. The punitive aspects of the penalty provisions of the

“such penalties inevitably involve issues of deterrence. They are designed in part to deter both the offender and others.”¹³

4. *Rehabilitation*,¹⁴ in particular the need to retain experienced members of the profession and ensure the investments into the training and development are not lost.
 5. *Consistency*. Although each case will require a careful assessment of its own facts and circumstances and rarely will two cases be identical,¹⁵ but we should try to treat like cases alike to maintain the credibility of the Tribunal as well as the confidence of the profession and the public.¹⁶
 6. *The range of sentencing options*. We must assess the teacher’s behaviour against the spectrum of sentencing options that are available, and try to ensure that the maximum penalties are reserved for the worst offenders.
 7. *Least restrictive*. In particular we should carefully balance the nature and gravity of the offences against the need for removal from the register and the impact on the individual.¹⁷
 8. *Fair, reasonable and proportionate*. The Tribunal must assess whether or not the penalty it is proposing to impose is fair, reasonable and proportionate in the circumstances presented to the Tribunal.
88. Ms Watts also referred to the guidance found in Tribunal cases on cancellation. In *CAC v Adams NZTDT 2018/11*¹⁸ we said that whether it is necessary to cancel a teacher’s registration in order to discharge the Tribunal’s disciplinary obligations will often turn on the teacher’s rehabilitative prospects and the degree of insight he or she has demonstrated into the causes of the behaviour.
89. Cancellation is generally required in two overlapping situations:
- a. Where the seriousness of the conduct is such that no outcome short of deregistration will sufficiently reflect its adverse effect on the teacher’s fitness to

HPCA Act was further acknowledged by Collins J in *Roberts v Professional Conduct Committee* (above note 14)

¹³ Above note 5 at [27]

¹⁴ Above, note 5

¹⁵ Above note 5 at [48]

¹⁶ *Patel v The Dentists Disciplinary Tribunal* HC AK AP 77/02 8 October 2002.

¹⁷ Above, note 5

¹⁸ *CAC v Adams NZTDT 2018/11*, 13 September 2018 at [25]

teach and/or its tendency to lower the reputation of the profession; and

- b. Where the teacher has insufficient insight into the cause of the behaviour and lacks meaningful rehabilitative prospects. In this scenario, there is an apparent ongoing risk that leaves no alternative to deregistration.¹⁹
90. The respondent is now working as caregiver of adults. She does not intend to return to teaching. She does not oppose the cancellation of her registration.
91. Ms Watts appropriately set out some cases involving the use of force with young children.²⁰ There are many more, and we have not discussed them here. We are satisfied in considering this case against the other early childhood “rough handling” cases that this type of offending would not usually attract a penalty of cancellation. It does not reflect either of the situations outlined above in paragraph 89. It is not so serious that no outcome short of deregistration will sufficiently reflect its adverse effect on the fitness to be a teacher and/or its tendency to lower the reputation of the profession. Although the respondent had denied that she behaved in the manner described by the CAC witnesses, she did not hesitate to say that pulling a child is not acceptable.
92. In some cases we have cancelled a teacher’s registration for less serious conduct where the teacher has not participated in the disciplinary process and we have been unable to assess their insight or suitability for rehabilitation. That is not the case here, and we would prefer not to mark the close of an otherwise unblemished career with cancellation of the respondent’s registration. The respondent’s current practising certificate expires on 13 August 2021. She could take up a teaching position again in the meantime. We therefore impose the following penalty:
- c. Censure under section 404(1)(b);
 - d. Under section 404(1)(c) we impose conditions on the respondent’s practising certificate for a period of 2 years from the date of this decision that if the respondent applies for or commences any future teaching role, she must:

¹⁹ *CAC v Campbell* NZTD 2016/35 at [27] as cited in *CAC v White* NZTDT2017/29, 28 November 2017 at [23]; *CAC v Fuli-makaua* NZTDT 2017/40, 5 June 2018

²⁰ *CAC v Teacher* NZTD 2014/49, 20 May 2014; *CAC v Risuleo* NZTDT 2018-8, 17 September 2018; *CAC v Sullivan* NZTDT 2018-91, 1 August 2019; *CAC v Kaufusi* NZTDT 2019-58, 15 October 2019; *CAC v Teacher E* NZTDT 2018-84, 26 August 2019.

- i. Show any prospective employer a copy of this decision;
 - ii. Appoint a mentor (to be approved by the Teaching Council) for a period of one year from the time the respondent commences a teaching position. The mentor will support the respondent to reflect and undertake professional development and/or counselling to address how the respondent manages her stress and the impacts of her teaching style and behaviours on children. The mentor will provide quarterly reports;
- e. The register will be annotated accordingly for a period of three years from the date of this decision.

Non-publication

93. The interim order for non-publication of the name of the respondent continues. Based on the information before us, we would not consider that the public interest in publication is outweighed by the respondent's interests, but we will consider any further evidence and/or submissions on this matter.
94. The respondent may apply for permanent suppression of any name or detail must be filed, along with evidence and submissions in support by **30 October 2020**.
95. The CAC may reply by **13 November 2020**. The Tribunal will then make a decision.
96. Any application for non-publication on behalf of any other person or entity must be made by **30 October 2020**. The parties may reply by **13 November 2020**.

Costs

97. We also invite submissions and evidence on costs. Where there has been a defended hearing the usual contribution towards the CAC costs and the Tribunal costs is 50%. We make the following directions:
- a) The CAC and the Tribunal secretary are each to file a schedule of costs along with any submissions by **16 October 2020**.
 - b) The respondent is to reply by **30 October 2020**. That may include an affidavit of financial means.
 - c) The CAC may reply by **13 November 2020**.

98. The Tribunal will then issue a costs decision.



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).