NZTDT 2020/49

BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

UNDER	the Education Act 1989
IN THE MATTER	of a Notice of Charge under Part 32 of the Education Act 1989
BETWEEN	**THE COMPLAINTS ASSESSMENT COMMITTEE** Referrer
AND	**Makelesi Hopoi** Respondent

Decision of the Tribunal

Tribunal:	T J Mackenzie (Deputy Chair) M Cassidy A Hammond
Counsel:	Ms Scott for the CAC Respondent in person
Hearing:	On the papers, 26 May 2021

Introduction

1. This is the Tribunal's decision on charge liability, penalty, costs and publication.

2. The CAC charges the respondent with serious misconduct, or in the alternative, conduct entitling the Tribunal to exercise disciplinary powers.

3. The parties have produced an agreed statement of facts. We also have a video of the incident, submissions from the CAC, and several letters in support for the respondent.

Facts

4. The agreed facts are as follows:

1. Ms Makalesi Hopoi (the respondent) is a fully registered early childhood education teacher, having gained provisional certification in 2013, and becoming fully certified on 10 June 2016. Her practising certificate is due to expire on 1 July 2022.

2. The respondent had been employed as an early childhood education teacher at Choice Kids, Manukau (the Centre) from the time she first became registered. In December 2020, the respondent advised the Centre that she was going to retire from teaching. She was re-employed as a reliever until March 2021.

3. On 14 November 2019, two Ministry of Education personnel were conducting a full licensing visit to the Centre. They were sitting in the Centre office, watching the CCTV cameras of the Centre rooms in real time.

4. One of the Ministry of Education personnel witnessed the respondent roughly grabbing a child when she was reading to a group of children on the mat.

5. The Ministry of Education personnel raised his concern to the then Centre Manager, who also viewed the CCTV footage. **Annexed** marked "**A**" is the CCTV footage.

6. The footage shows the respondent sitting on a chair with approximately six other children in front of her on the mat. She is holding a child on her lap who was aged approximately six months old. Another staff member can be seen in the camera frame

near the children and the respondent. Child A, who was approximately one year old at the time, and who was to the right of the respondent, is seen standing up. The respondent grabs him by his left arm and sharply drags him across to a seated position in front of her.

7. On 15 November 2019 the respondent was stood down by the Centre and an employment investigation was commenced. The Centre also notified Oranga Tamariki of the incident, and the Manukau Police.

8. On 3 December 2019, the Centre sent a letter to the respondent advising her of the conclusion of their employment investigation and that the outcome was that she had been issued with a final written warning.

9. On 24 March 2020, the Teaching Council of Aotearoa New Zealand (the Teaching Council) received a mandatory report from Susan Milne, Quality Assurance Manager at the Centre. The mandatory report alleged that the respondent pulled an approximately one year old child "*roughly and sharply"* to sit on the mat by the upper part of his left arm, and with the bunching of his t-shirt at the child's shoulder sleeve.

10. The matter was referred to a Complaints Assessment Committee (CAC) for investigation.

11. The respondent submitted a written response to the Teaching Council on 8 May 2020 and stated the following:

> "*I didn't mean to hurt him, but he wants me to hold him too, while I hold the little baby. I grabbed him and put him in front of me and he was happy.*
>
> *…*
>
> *At last I was apologized to the parents and they accepted and we had a hug and all happy"* [referring to a meeting with Child A's parents arranged by the Centre].

12. The respondent viewed the CCTV footage as part of the Centre's disciplinary investigation. She advised that she was very remorseful and accepted that what she did was inappropriate. During a disciplinary meeting with the Centre, the respondent said:

> "*On that day I am happy with them. We were sitting and I called them to come sing a song. I heard one of the kids argue to take off the toys. Then* [Child A] *is really good with me. … I asked them to come and he didn't respond to me. I don't know that I grabbed him hard. We kept doing what we're doing. I don't mean to hurt him. On that time we are happy playing with them. We have to sit down to sing a song or watch a movie. I said 'Ben come – I'm sitting with the baby'. I don't know what is come into me. I'm not angry at that time. 'Why did I do that I'm not thinking to hurt him' … I feel sorry for the boy and the parents – they know me very well. I feel ashamed to the parents because I know them very much"*.

13. The respondent was asked whether she would usually handle children that way and she said:

> "*I never do that. Every time I carry them with both my hands. As in this case I hold the six month old. I don't know it looks sharp. It's my mistake. I'm very sorry for what I did. … Is the first time for me to make a mistake with kids"*.

14. The respondent was asked by the Centre whether it was perhaps how she handled children but did not realise it. The respondent said:

> "*No that's the first time I would do that. On that day I hold the baby. I don't know what is coming to my mind to bring* [Child A] *like that"*.

15. The respondent apologised to the parents of the child in person as arranged with the Centre.14

16. The respondent was fully cooperative with the Centre investigation, Police investigation, and CAC investigation.

17. The Centre confirmed there have been no other previous disciplinary issues while the respondent was employed at the Centre.

Determination made by the CAC

18. On 28 August 2020 the CAC provided the draft investigation report to the respondent and invited her to comment and provide any further information to them. A reminder email was sent to her on 11 September 2020 and 16 September 2020. On 25 September 2020 the respondent advised via telephone that she did not wish to make any further submissions and had no objection to the report. The respondent did not attend the CAC meeting on 17 October 2020.

19. The CAC resolved that the respondent's pulling a one year old child roughly to the mat, may possibly constitute serious misconduct as defined under the Education Act 1989, and referred the conduct through to the New Zealand Teachers Disciplinary Tribunal.

Discussion - charge

5. This aspect can be dealt with fairly swiftly. Although charged with serious misconduct, both parties suggest that simple misconduct is the appropriate finding. Whilst the Tribunal must still make its own decision, the Tribunal takes the same view, albeit for slightly different reasons.

6. We agree that the second limb of the test, found at s 378(1)(b) of the Education Act 1989 is not met (in that the incident was not a *serious* breach of the Code of Professional Responsibility). Had we been required to determine the first limb however, we are doubtful whether s 378(1)(a)(i),(ii) or (iii) are met on the full context of the conduct before us.

7. The CAC relied on s 378(1)(a)(i), submitting that the respondent's actions "could

have resulted in an injury" and therefore were likely to adversely affect the child's well-being.

8. We take a different view. We have no evidence before us that this act could have resulted in an injury. We cannot speculate that it would have. Whilst we could come to our own view on the risk of injury in a more obvious case, this is not one. Here the physical act, which we have seen on video, is not sufficiently forceful enough for us to be confident that it could result in an injury. Whilst the summary describes the act as a grabbing of the arm, that is only part of the evidence. The other part is the video itself. We cannot be sure from the video whether it is the child's t-shirt or arm that is grabbed. It may be both, although the act appears to end with the respondent just holding (almost pinching) the t-shirt. This is not to say that a charge of serious misconduct could not have been made out by a teacher pulling on a t-shirt alone. An injury could still be caused in that way. But in this case, the low force involved and that it at least in part appears to be a pulling of a t-shirt with a pinched hand leaves us uncertain whether an injury could have been caused.

9. For the same reasons we are also doubtful whether the charge could be proved based on the balance of s 378(1) (fitness, or disrepute). However as already mentioned given s 378(1)(b) is not met we ultimately do not need to determine that.

10. As noted above then, the Tribunal has determined that the charge of misconduct has been made out. We will now move to consider penalty and ancillary matters.

Penalty

11. We have considered the material from both parties, and reviewed decisions based on similar situations.[1] We have also considered the general approach to penalty in this jurisdiction.[2]

12. Firstly, we consider this was on its face at the lower end of the scale. We accept that it was a one off incident. We note and accept the genuine remorse of the respondent. We note the very positive references provided by the respondent,

[1] *CAC v Mitchell* NZTDT 2020/25, 15 March 2021; *CAC v Emile* NZTDT 2016/51, 14 December 2016; *CAC v Carmen* NZTDT 2018/21, 5 February 2019; *CAC v Williams* NZTDT 2019/24, 19 October 2019.
[2] *CAC v McMillan* NZTDT 2016/52, 23 January 2017.

including from the subject-child's parents.

13. Taking all of that into account, we consider that this prosecution process, and the finding of misconduct, are themselves ample to serve the purposes of this disciplinary process. We therefore decline to impose a censure on the respondent.

14. We do however impose a condition that the respondent must show this decision to her current employer and any future Early Childhood Education employer for a period of two years from the date of this decision.

Publication

15. The respondent seeks a permanent non publication order. The respondent cites concerns for future employment difficulties if her name were published.

16. The default position under s 405 of the Act is that Tribunal hearings are to be conducted in public. Consequently the names of teachers who are the subject of these proceedings are to be published. The Tribunal can only make one or more of the orders for non-publication specified in the section if we are of the opinion that it is proper to do so, having regard to the interest of any person (including, without limitation, the privacy of the complainant, if any) and to the public interest.

17. The purposes underlying the principle of open justice are well settled. As the Tribunal said in *CAC v McMillan*, the presumption of open reporting "exists regardless of any need to protect the public".[3] Nonetheless, that is an important purpose behind open publication in disciplinary proceedings in respect to practitioners whose profession brings them into close contact with the public. In *NZTDT v Teacher* the Tribunal described the fact that the transparent administration of the law also serves the important purpose of maintaining the public's confidence in the profession.[4]

18. In *CAC v Finch* the Tribunal noted that the "exceptional" threshold that must be met in the criminal jurisdiction for suppression of a defendant's name is set at a higher level to that applying in the disciplinary context. As such, the Tribunal confirmed that

[3] *CAC v McMillan* NZTDT 2016/52.
[4] *NZTDT v Teacher* 2016/27,26.

while a teacher faces a high threshold to displace the presumption of open publication in order to obtain permanent name suppression, it is wrong to place a gloss on the term "proper" that imports the standard that must be met in the criminal context.[5]

19. In *Finch,* the Tribunal described a two-step approach to name suppression that mirrors that used in other disciplinary contexts. The first step, which is a threshold question, requires deliberative judgment on the part of the Tribunal whether it is satisfied that the consequence(s) relied upon would be "likely" to follow if no order was made. In the context of s 405(6), this simply means that there must be an "appreciable" or "real" risk.[6] In deciding whether there is a real risk, the Tribunal must come to a judicial decision on the evidence before it. This does not impose a persuasive burden on the party seeking suppression. If so satisfied, the Tribunal must determine whether it is proper for the presumption to be displaced. This requires the Tribunal to consider, "the more general need to strike a balance between open justice considerations and the interests of the party who seeks suppression".[7]

20. In NZTDT 2016/27, we acknowledged what the Court of Appeal said in *Y v Attorney-General*.[8] While a balance must be struck between open justice considerations and the interests of a party who seeks suppression, "[A] professional person facing a disciplinary charge is likely to find it difficult to advance anything that displaces the presumption in favour of disclosure".[9]

21. The Court of Appeal in *Y* referred to its decision *X v Standards Committee (No 1) of the New Zealand Law Society*, where the Court had stated:[10]

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[5] *CAC v Finch* NZTDT 2016/11, at [14] to [18].
[6] Consistent with the approach we took in *CAC v Teacher* NZTDT 2016/68, at [46], we have adopted the meaning of "likely" described by the Court of Appeal in *R v W* [1998] 1 NZLR 35 (CA). It 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.
[7] *Hart v Standards Committee (No 1) of the New Zealand Law Society* [2012] NZSC 4, at [3].
[8] *Y v Attorney-General* [2016] NZCA 474, [2016] NZFLR 911, [2016] NZAR 1512, (2016) 23 PRNZ 452.
[9] At [32].
[10] *X v Standards Committee (No 1) of the New Zealand Law Society* [2011] NZCA 676 at [18].

> The public interest and open justice principles generally favour the publication of the names of practitioners facing disciplinary charges so that existing and prospective clients of the practitioner may make informed choices about who is to represent them. That principle is well established in the disciplinary context and has been recently confirmed in *Rowley*.

22. Gwynn J in the High Court recently considered the applicable principles for suppression in professional disciplinary litigation, in a Chartered Accountant's disciplinary decision.[11] Although the specific statutory wording in that legislation used the term "appropriate" (instead of "proper"), we consider little turns on such semantics and the observations of the Court are of application here. Gwynn J stated:

> [85] Publication decisions in disciplinary cases are inevitably fact-specific, requiring the weighing of the public interest with the particular interests of any person in the context of the facts of the case under review. There is not a single universally applicable threshold. The degree of impact on the interests of any person required to make non-publication appropriate will lessen as does the degree of public interest militating in favour of publication (for instance, where a practitioner is unlikely to repeat an isolated error). Nonetheless, because of the public interest factors underpinning publication of professional disciplinary decisions, that standard will generally be high.
>
> [86] I do not consider the use of the word "appropriate" in r 13.62 adds content to the test usually applied in the civil jurisdiction or sets a threshold lower than that applying in the civil jurisdiction. The rule is broad and sets out neither a specific threshold nor mandatory specific considerations. The question will simply be, having regard to the public interest and the interests of the affected parties, what is appropriate in the particular circumstances.
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> (citations omitted).

23. Applying all of that here, there is no evidence to displace the presumption of open justice. The respondent's concerns are common with nearly all teachers being subjected to disciplinary proceedings.

[11] *J v New Zealand Institute of Chartered Accountants Appeals Council* [2020] NZHC 1566.

24. There will then be no orders for non-publication of the respondent's name.

25. There will however be a non-publication order of the name of the child involved, as there is obviously no public interest in the child's name being publicised and he should be protected from that occurring.

Costs

26. As to costs, the CAC seeks costs on a 25% basis, but notes that in some cases costs have not been ordered.[12]

27. We have decided to take a similar approach and not make a costs award in this case.

Dated 8 June 2021

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T J Mackenzie

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).

[12] *CAC v Teacher S* NZTDT 2018/5, 21 August 2018 at [29]; *CAC v Mitchell* NZTDT 2020/25, 15 March 2021 at [54].