

BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

NZTDT 2019-21

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 **KIRSTEN NATASHA KING**
Respondent

TRIBUNAL DECISION

13 MAY 2020

HEARING: Held at Auckland on 8 and 9 October 2019

TRIBUNAL: Theo Baker (Chair)
Aimee Hammond and Stuart King (members)

Representation: Ms Stephanie Bishop for the CAC
Ms Gretchen Stone for the respondent

1. The Complaints Assessment Committee (CAC) has referred to the Tribunal a charge of serious misconduct and/or conduct otherwise entitling the Tribunal to exercise its powers. The charge is that on 13 June 2018 the respondent, while working at First Steps, Onslow Road Papakura (**the Centre**):
 - a) grabbed a four-year-old boy (Child A) by the wrist, raised his arm and pulled him across the room at a fast pace; and/or
 - b) forcibly removed Child A from a room at the Centre by firmly holding his shoulder and arm and pushing him through a door, and either plonked him on the deck or caused him to fall over.
2. The CAC alleged that the conduct separately or cumulatively amounts to serious misconduct under s 378 of the Education Act 1989 (**the Act**) and any or all of the rules 9(1)(a), (j) and/or (k) of the Teaching Council Rules 2016 (post amendments of 18 May 2018). Alternatively it amounts to conduct with otherwise entitles the Disciplinary Tribunal to exercise its powers under s 404 of the Act.

Summary of decision

3. For the reasons set out below, under Findings, we were not satisfied on the balance of probabilities that either particular of the charge was established. The charge is therefore dismissed.
4. We made no order as to costs.
5. The interim non-publication order of the respondent's name continues. We invited further evidence and submissions on the question of non-publication as outlined in paragraph 132. There is a permanent order for non-publication of Child M's name.

Evidence

6. The CAC called 7 witnesses:
 - a) Anna Harland, a teacher at the Centre
 - b) Tracey Hazell, Centre Administrator
 - c) Alisha Hunter, a Primary Teacher, who was employed by the Centre during 2018;
 - d) Kelsi McLennan, a caregiver, employed by the Centre;
 - e) Gino Volante who was working as a relief teacher at the Centre on 13 June 2018.
 - f) Julie Hunter, the Business Manager at the Centre:

g) Tom Eathorne, a Council investigator.

7. We heard from the respondent and from her current employer, Ms Mary McLeod.
8. We received two bundles of documents which included prior statements, photos, room and Centre layouts. We received further exhibits including photographs and rosters.

The CAC's evidence

Anna Harland

9. Anna Harland was teaching at the Centre on 13 June 2018, but spent some time in another centre over the road. She could not remember what times. She did not see any incident on 13 June 2018 involving Child A and the respondent.
10. Ms Harland described Child A as having some challenging behaviours that escalated very quickly if they did not intervene. He could get violent and swipe things off the table, hit, punch the staff and swear.¹ He was on an individual development behaviour plan.
11. Ms Harland said that she has seen the respondent take Child A by his arm in a situation where things could have escalated and also turn him by his shoulders, not forcefully, speaking to him as she does so. She described this as 3 out of 10. Ms Harland explained that she would call touching a shoulder a 1 out of 10. Too much force would be a 5 or 6.
12. Ms Harland said that if Child A was turned, sometimes he would come with them, but at other times he was stuck in the ground, in which case they would give him space to calm down and if that didn't work they would call for help. She described the respondent talking to him, ask him what had caused it and sometimes he would talk about it. She would divert him by getting him to help clear up.
13. Ms Harland also told us about staff ratios, which were usually 1:10. The number of children ranged between 27 and 41. The maximum capacity was 42. The morning tea and afternoon tea were "rolling" with children lining up to get kai. If Child A had been acting up near kai time it is hard to move him if children are lining up. Morning tea was at 10am and afternoon tea at 2pm. There was a 20 minute slot, and occasionally it would last 30 minutes.

Tracey Hazell

14. Tracey Hazell is the Centre Administrator. Her evidence was that on 13 June 2018 at

¹ His challenging behaviours were similarly described by other witnesses

1.25pm she looked up her desk in the office and saw through into the window in another building the respondent and Child A. She saw the respondent take Child A by his wrist and pull him from the right end of the senior kindy room and out of her view. This would have been about 5 metres away. She described this as a forceful gesture which she was not comfortable witnessing. She said that the respondent's grip looked aggressive and she was on a mission, walking fast.

15. Ms Hazell said that the boy's arm was being held up in a 90° angle. He was being pulled and was leaning with the pull. She could see his wrist. From her desk she can see children if they are standing up, not sitting down. If they are by the window, she can see them from the sternum up.
16. Ms Hazell could see the respondent's face and she looked frustrated. She said the respondent must have been facing her. Ms Hazel said the boy was beside the respondent, who was not walking particularly fast. It was a determined walk. She described the force as a 7 out of 10. She could not recall Child A's reaction.
17. Ms Hazell made a note of the time as she knew she was going to report the incident.
18. In the bundle of documents was a photo of the view from Ms Hazell's desk through the two windows. This had been taken by Mr Eathorne. We received a colour version as page 88A. Ms Hazell said that the window seems closer with her eye than the appearance in the photo. Similarly she could see more detail in person than in the photo.
19. Ms Hazell told the Centre Manager about the incident the next day as she was off-site that day.
20. Under cross-examination Ms Hazell confirmed that she had been in the role about 12 weeks at this time. She said she had a good relationship with the respondent and did not recall making earlier allegations that were referred to in the notes of her meeting with management on 14 June 2018. She recalled raising one issue that did not involve physical force but she did not remember the details.
21. Ms Hazell did not report the incident earlier as she had no immediate concerns for Child A's safety and wellbeing. She wanted to speak with Katrina to gauge where it sat (in terms of acceptability).
22. We received an A3 version of page 194 of the bundle, which we labelled 194A. It is an Auckland Council plan for a proposed sub-division. It shows the layout of the buildings

for the centre. Some measurements had since been added along with some handwriting. Ms Hazel did not dispute that the distance between the office building and the classroom was 5.8 metres,² and the window height of the classroom was 1.17 metres. Ms Hazell accepted that her desk was at the back of the room away from the window and the room was about 3 metres wide. On that basis she accepted that she was more than 5 metres away. She did not accept that her view was limited and she knew it was Child A because she could see his face.

23. Diagram 193D was a hand-drawn layout³ of the classroom and the office with a colour-coded timeline of movements. It shows two bookshelves in an L-shape by the window. Ms Hazell confirmed that her evidence was that the respondent was close to the window when seen and she acknowledged that the distance of pulling the child across the room would “possibly” have been short if the shelves were perpendicular to the window. Ms Hazell was not detracted from her evidence of what she saw. Ms Hazell did not accept that the black blob in the window was the shelf. She said that her view of the boy’s wrist being gripped was for 3 or 4 seconds.
24. Ms Hazell said that it was the fact that Child A’s wrist was being held up would indicate he was being pulled. She agreed that there were three other teachers in the class at the time. She did not accept that she could not tell where the respondent’s body was in relation to the child. She accepted that the size of a child’s wrist was small but not so small that she could not see. When asked how she could assess the degree of force used, Ms Hazell said it was the nature of the grip that was of concern. She was confident with what she saw.
25. Ms Hazell agreed that she had no view of the tea trolley (represented by a blue number 1 on 193D) or another area to the right of that represented by two number fours on that document.
26. In answer to questions from the Tribunal, Ms Hazel was not aware if the afternoon tea trolley had gone and was not sure what time afternoon tea happened at that time. She did not remember the shelves being as shown on 193D.

²² The respondent confirmed in cross-examination that this was her rough estimate

³ The respondent confirmed in cross-examination that she had drawn this with the help of Mary McLeod. She had also drawn 192A, 192B, 192C, 193B

Alisha Hunter

27. Alisha Hunter is a primary school teacher who worked at the Centre for three months, May to July. On 13 June 2018 she was working at the Centre but she was not in the Senior Room from about 10.45 to 2pm as she was covering other rooms and was on her lunch break.
28. Ms Hunter saw the respondent firmly telling Child A off and moving him to the other side of the room by the bag area, out of her sight from where she was on the deck. She heard the respondent say, "Don't hurt my children" in a firm, loud voice, which she described as a 7 out of 10. Ms Hunter said it was too much and not required. The respondent looked a bit angry and frustrated and she was more firm than usual. She said the respondent was quite close and in Child A's face a bit. She described it as a little bit aggressive and a bit alarming. Ms Hunter did not know what time the incident with Child A occurred, whether it was before 10:45 or after 2pm.
29. Photo 2 in the bundle of photographs is of a covered deck. Part of a table is visible in the lower left foreground. In the middle is a table with 6 chairs. On either side of the table are open doors into the classroom area. Ms Hunter said that she stood to the right of the table on the deck and moved further along the deck to the left and looked in the door where she saw a small group of children and the respondent and Child A. The respondent removed Child A out of Ms Hunter's sight towards the other end of the classroom.
30. Ms Hunter could not recall how Child A was moved but it happened at a moderate pace and was dealt with quite quickly.
31. Ms Hunter thought that there were shelves in an L-shape along the edge of the carpet when she started. She described a set of shelves being perpendicular jutting out from the wall.
32. Ms Hunter was asked about an earlier statement dated 14 June 2018 in which she had said that she did not witness any mishandling of Child A on 13 June 2018 and that she was not in the Senior room from about 10.45 to 2pm as she was covering in other rooms and on her lunch break. She said that she guessed that she must have been asked if she witnessed any mishandling of Child A, whereas the statement which formed the basis of her evidence before the Tribunal was in response to questions that Mr Eathorne had asked her.

33. Under cross-examination, Ms Hunter thought that the depiction of the layout found in picture 193D could be accurate. She said that the shelves were moved around a bit as they were on wheels, but that they were like that for the most part, as shown in Photo 7.
34. Photo 7 is taken from inside the classroom looking towards a sliding door with the office in the distance. There is a window further along to the left, facing out to the office which is opposite. Between the window and the sliding doors are some cubby hole type shelves in a U-shape, meaning that there are shelves which are perpendicular to the wall. They are not on wheels. Ms Hunter thought that for the most part they were positioned like that.
35. Ms Hunter also remembered one set of shelves parallel to the window, like the one in photo 3. The height of shelf on wheels was above her knee at thigh height. Photo 3 is a photo taken inside the classroom, from one end. On the left is a low piece of furniture on wheels. There is also a series of cubby holes. Between those two items is a window. After the cubby holes is a double door and then there is a further set of cubby holes. All of these are against the wall, running parallel. Past that is another low piece of furniture on wheels, this time placed perpendicular to the wall. Ms Hunter thought that the furniture was positioned as in this photo some of the time that she worked at the Centre. She did not remember the cubby holes being in that position and thought that the cubby hole jutted out into the room. You would have to walk around it.
36. Ms Hunter could not recall if afternoon tea was occurring at the time of the incident she described. She did not see the lead-up to the incident. She accepted that the respondent could have held Child A's hand and had her other hand on his back, but she did not recall. In re-examination, Ms Hunter said that she did not check on Child A afterwards as there were other teachers and she was supervising other children. She could not remember which other teachers were present.
37. In answer to the questions from the Tribunal, Ms Hunter said that she could not hear the respondent once out of Ms Hunter's line of sight.

Kelsi McLennan

38. Kelsi McLennan worked at the Centre as a caregiver for 4½ years, finishing in December 2018. On 13 June 2018 she was working at the Centre and she went to lunch between 1.05 and 1.35pm. When she returned she was inside until 2.50pm cleaning up in the family play area.

39. At around 2.45pm Ms McLennan heard Child A crying, screaming and tipping chairs and toys. He was in the lino area. She then put her head out the door onto the deck (the one closest to the carpet area) and turned her head to the left towards the other door that goes on to the deck. She heard Child A crying from inside to outside. She saw the respondent forcibly remove Child A and plonk him on the deck. The respondent had her hands on the bicep/shoulder area.
40. Ms McLennan was 2 to 3 metres away. She would describe the level of force as 8 out of 10. The respondent's voice was raised, to a level of 7 out of 10. She saw the respondent push Child A. The respondent's arms went from bent to straight.
41. The respondent said to Ms McLennan, "Just ignore him. He is tipping toys," and walked back inside. According to Ms McLennan, Child A was crying and screaming.
42. Ms McLennan could not recall what else was going on in the class at the time. She did not recall what she did after this. She was scared to report what she saw because the respondent had previously told her that she should not go to the Complex Manager because she had too much on her plate and that she should only go to the respondent or the Centre Administrator.
43. When asked some more questions about where the respondent and Child A were when Ms McLennan looked out the door, she said, "From what I can recall, he was down the other end of the classroom, somewhere behind this line here where the bathroom is". She was asked if Child A was in the lino area, and replied that he was somewhere in that end of the classroom. When asked if it would assist to look at photo 5, Ms McLennan's evidence was, "Because I was down the end and couldn't see down past that dividing wall, I am not sure where he was. I just knew he was in this area of the classroom". She could not remember what was going on around him or in that area at the time. She could not remember if she said anything to the respondent before or after the incident.
44. Ms McLennan said the afternoon tea trolley would be brought from the kitchen outside the classroom onto the deck. It would stay there or it would come in the door ⁴ and remain on the lino inside the door⁵ which is beside the food service area. Afternoon tea happened between 2 and 2.30pm. It could vary by half an hour and as late as 3.15pm at

⁴ To the right in photo 2

⁵ See photo 5

the maximum.

45. Ms McLennan was asked about a document that was produced by Ms King, called "Seniors Daily Routine". She said that the time for afternoon tea stipulated in that document (1:30 to 2pm) was not consistent with her experience: most of the time it would be about 2pm. If it started at 2.30pm it could go to 3.15pm. Ms McLennan said that it varied a lot.
46. Looking at Photo 3, Ms McLennan agreed that between the lino and the carpet there was a shelf at some stage. She also agreed that most of the time there was a shelf-formation in an L-shape as shown in 193D. She added that the children moved the ones on rollers.
47. Under cross-examination, Ms McLennan was asked about her relationship with the respondent. She described herself as being anxious and overthinking things, struggling to build relationships. When she was asked about a previous statement that she was very unhappy with many incidents that she had witnessed and that the respondent has "hissy fits", Ms McLennan said that this was the straw that broke the camel's back. She was unsure what to do or who to talk to, and could not recall if she spoke or tried to speak to someone.
48. Ms McLennan said it was such a long time ago that she could not recall details. She could not recall who else was present. She agreed that there were maybe one or two parents around.
49. Ms McLennan agreed that if a child won't respond to verbal suggestions to be redirected, she might guide the child by the shoulder or elbow if a verbal approach does not work.

Gino Volante

50. Gino Volante was working as a relief teacher at the Centre on 13 June 2018, having worked 3 or 4 shifts there during the previous few weeks. Between 1.15 and 1.45pm he was outside about 7 metres from the door observing children when he heard crying. He walked towards the noise and saw Child A sitting on the deck, crying to the respondent. Mr Volante did not see tears, but said Child A had an "appealing" face, and inferred he was protesting "it's not fair". That is why he described what he saw as crying "to" the respondent.
51. Mr Volante did not think much of the incident as Child A had been taking things from

children earlier in the day and had been playing up. Mr Volante thought it was a tantrum. The respondent looked calm and firm but had a fair face. Mr Volante did not hear any shouting. In cross-examination he said he did not see or hear the respondent speaking. He felt the situation was under control and did not need any intervention.

52. Mr Volante did not recall whether there were other teachers present. He did not recall if it was afternoon tea-time, which he confirmed varied.

Julie Hunter

53. Julie Hunter was the Business Manager at the Centre. On 14 June 2018 she received a complaint from Tracey Hazel about the respondent, who was the Assistant Manager. During the course of the investigation, she heard of Kelsi McLennan's allegation outlined above.
54. Ms Hunter received two written responses from the respondent which she produced. In the first ("JH1") which is headed "Wednesday 13th June Inside Senior Kindy, Time: between 1.00pm – 1.45pm". In this the respondent said that just before afternoon tea on 13 June 2018 Child A became aggressive with several of the children who were building with the zoob blocks, smashing their creation and snatching the zoob and throwing it. The respondent said that she went and sat with the respondent on the mat area and talked about what had happened. After a conversation, which she set out in her letter, the respondent suggested they went and found where his friends had gone. She waited and he threw some more zoob toys and she said, "I can wait until you are ready. Will you let me know?" He nodded. The respondent said that she did not ask him to pick the toys up as she wanted him to focus on the positive which was finding his friends. He did this and continued to play really well.
55. The second statement⁶ is headed "Inside Seniors – 1.45ish – 2.30ish: Afternoon tea time". The respondent said that during afternoon tea-time Child A had 3 servings of food and then came up to the table for more. The respondent said that she gently explained to Child A that they had to share the afternoon tea around with all their other friends first and that if there was any more food, she would call him. Child A kept coming up to the trolley, kicking and banging the trolley in front of parents. She encouraged him to find something to play with and asked him if there was anything she could set up for him to play with. Child A kept coming up to the trolley and so the respondent led him outside on

⁶ Also part of "JH2"

to the deck area. Child A sat down by the door on the deck crying/pretending to cry. She kept an eye on Child A as he sat. He then moved to the blocks that were outside on the deck area and began to throw them. There were no children around him. The respondent spoke with Child A and said, "I know you are angry with me, [Child A], and I am sorry that just at the moment I am unable to serve you more food, however, if there is any food left, I will save it for you." She patted him on the back and said, "Ok, [Child A]" then continued supporting the children with afternoon tea.

56. The respondent said it was a busy time as most of the parents were picking up their children. She said that after [Child A] had finished throwing the blocks he picked them up and came and said sorry.
57. In a further statement ("JH2") made in response to the statements gathered in the course of the Centre's investigation, she said she that held Child A's hand, which he was ok with, talking to him while doing this, explaining and promising that if there was any food left over, the respondent would save him some. Child A was not crying at this point and didn't seem upset. At the door the respondent asked him if he would like to find something to play with outside. As she turned to go back, Child A "plonked" himself down on the floor just outside the door on the deck. The respondent acknowledged him by saying, "I know you are angry with me, [Child A]" and again said that if there was any food left over she would save him some and that she was going to help the other children.
58. The respondent accepted that she guided Child A to the door due to the congestion of the children coming inside the other door. She said she was holding his hand and that her other hand was on his chest, reassuring him.
59. The respondent said that she checked on him no longer than 2 minutes later and he had stopped crying and was playing with the blocks. Alisha was on the deck wiping the tables. Child A then began to look at her and throw some of the blocks.
60. The respondent continued to support the other children and Child A came up to her, gave her a cuddle and said sorry. Later when the children had finished eating she gave him a piece of cake that was left over.
61. The respondent also talked about what she had learned on the Incredible Years Course. She said that she is too old to have "hissy fits". She holds teachers to account.
62. Ms Hunter also produced a copy of the notes of a disciplinary meeting held on 21 June

2018 with the respondent, who again described walking with Child A from the kitchen to the art sink bending down, holding his hand and encouraging him to find something to play with outside. She said she let go of his hand and he plonked himself down.

63. Under cross-examination, Ms Hunter confirmed that the staff on the roster on 13 June 2018 were the respondent Kelsi, Alisha, Gino and Tracey. Ritu was the reliever. Ms Hunter did not recall whether she spoke to Ritu, but accepted that there were no notes of such a conversation, and that in her original statement, Kelsi had said that Ritu was on the stairs or steps.
64. Ms Hunter confirmed that she did not recall any evidence of harm to Child A, that he was settled. There was no physical check on the child, and he was not questioned. There were no complaints from the family.
65. Ms Hunter was referred to the photograph 88A. She said that in person, the view is a lot clearer and closer.

Thomas Eathorne

66. Thomas Eathorne is an investigator with the Council. He was appointed by the CAC to collate information on the mandatory report from BestStart on the respondent. He advised that the respondent was first registered in 2006 and gained full registration in December 2010.
67. Mr Eathorne described the steps taken in his investigation and produced a number of documents including the photograph on p 88 A. He explained that he was sitting in Ms Hazell's seat when he took it. He said that on the day he took it, he could see children waving, but you cannot make them out in the photograph.

The respondent's evidence

Mary McLeod

68. The respondent called Mary McLeod who owns Kids Count Early Childhood Education Group who has employed the respondent since June 2018 as lead teacher. She spoke highly of the respondent.
69. Ms McLeod also wanted to give her opinion on the respondent's conduct and the Centre's investigation of her conduct. It was explained that it is the Tribunal's role to decide what happened and to assess the respondent's conduct.
70. Ms McLeod had engaged an engineering expert and referred to a document in the

bundle (195A) which was a diagram with some calculations and comments. It was explained that without hearing from the engineer this evidence was hearsay. That diagram has not been considered in our deliberations.

71. Ms McLeod said that she had visited the office and had sat next to where the administrator sits and she could not see into the office.

The respondent

72. The respondent told us that she has over 17 years' teaching experience with children aged 0 to 6 years old. She first began working at First Steps Onslow Road (Best Start) in 2011 as a Nursery Teacher and she was appointed a Head Teacher in 2012 in the Senior Kindy Room (for the children aged 3 to 5).
73. The respondent attended a 12-week future leaders course in April 2016, following which she was promoted to 2IC/Assistant manager. She continued as Head Teacher. The Centre is licensed for 76 children including 25 under 2 years. She then managed the Centre for 6 months in 2016 and was the Administrator for 3 months. She described a very busy time trying to keep up with her non-teaching duties and spending time on the floor. The respondent detailed further responsibilities she had with the Centre.
74. The respondent told us about some earlier issues when an unsubstantiated complaint had been made against her and she had raised concerns of bullying against Ms Hunter. She believed this led to an employer investigation that was not fair or impartial.
75. The respondent said Child A's attendance was erratic and she felt that compromised his ability to form and make friendships. She provided a description of him which included that he was eager to come to Kindy, had a beautiful smile on his face and had strong verbal skills. The respondent said that when Child A felt he was not being heard or he didn't get his own way, he would lash out, have tantrums, plonk himself down, scream and pretend to cry in order to get attention. The respondent had approached his mother to discuss ways to redirect and engage him.
76. The respondent wanted Child A to know that she respected, trusted and believed in him. The respondent provided some detail of her engagement with Child A, including her efforts to identifying behaviours to ignore and behaviours to acknowledge and praise.
77. The respondent said that the most important thing for every child in her care is to keep them safe, by listening, understanding and reassuring each child throughout the day.

78. The respondent's evidence about events on 13 June 2018 was that Child A was served 3 pieces of cake, for each of which he had to go to the table and sit down and eat it. While Child A was eating his third serving 7 to 9 children came in from the deck and lined up to get their food. Child A lined up for a fourth piece of cake and in doing so he knocked 3 children to the floor. She also said in her oral evidence that Child A started rattling the trolley. Gino came inside while that happened. The respondent asked him to sit at the table inside with the children and their kai.
79. The respondent spoke to Child A but he continued to push and the situation was escalating so she said in a firm voice, "Don't hurt my children". She redirected him to the deck area via the door on the opposite side of the toilet area (the left door in Photo 2), as children were coming from the deck via the other door. The respondent said that as she redirected Child A, she was holding his hand and was bent down to his height explaining to him he had to wait for the other children to eat and she would save him a piece of cake if there was enough. The respondent was crouched on one knee.
80. The respondent's evidence was that she then returned to the tea trolley and completed the afternoon tea routine. Gino brought the remaining children in from outside. The respondent returned to check on Child A on the deck about 3 minutes later. He was on the mat occupied with the blocks. Alysha's back was to him, but she was talking to him.
81. On returning from the deck to the tea trolley she noted Kelsi at the window in the family room pulling faces at Tracey in the office, the respondent commented that it was not appropriate. The respondent went back inside to finish clearing away afternoon tea. Soon after Child A came in to say sorry and she gave him a piece of cake that was left over after the other children had each had 2 pieces.
82. The respondent said that Marie was on the right-hand side of the carpet, close to the door in Photo 3 and she would have seen the redirection of Child A at afternoon tea-time. Ritu was on the deck. Alisha was on the deck and Gino was outside coming inside, Kelsi came back late from lunch. Marie was inside covering her. Marie was sitting down by the family play shelf. Looking at photo 4 the shelf was to the right hand side back on the mat.
83. The respondent said that the ECE building and ECE window combined are both elevated by approximately 2 metres from the floor level of the office building, and so anyone has their view directed upward. She said that the direct line of sight is impeded

- by an assortment of fixtures and shelves. The respondent did not understand how a child of less than one metre in height could be seen from anyone sitting at the office desk. The respondent put forward other similar arguments that verged on submission.
84. The respondent did not recall any incident with Child A at 2.45pm. She denied that there was any tantrum, screaming, manhandling or shouting.
 85. The respondent said that she has never held a child's arm above their head. If redirecting, she would hold the child's hand.
 86. The respondent explained the context of the earlier statement she made to Julie Hunter on 14 June 2018 ("JH2"). She had been asked to document her interactions with Child A.
 87. The respondent that Child A could be loud and disruptive and would lash out, could be aggressive and challenging at times. The respondent was reluctant to agree that she would become frustrated. She replied "He is who he is...I am a teacher. I need to be as patient as possible and support that child." The respondent said that if a child was not doing what she wanted, "You reflect on your practice as a teacher. You are the adult".
 88. The respondent accepted that on 13 June 2018 Child A was disruptive with the zoob track, but that there are other challenging behaviours. She had to redirect another child. When asked if she found the zoob block incident frustrating, the respondent said that throughout the day you can get several incidents like that in ECE.
 89. The respondent denied grabbing Child A's wrist and holding it up. She did not accept that she would have had a frustrated look on her face, but that it would have been a thinking look. She was talking to Child A.
 90. The respondent could not see on reflection that she could have been walking fast with him. This contrasted with a statement she made in her interview on 15 June 2018 that it might have looked like a pull. The respondent said she could not say how others saw it. For her it didn't feel like a pull.
 91. The respondent accepted that, depending on the time of day, you could see facial expressions in the classroom from the office, given that she had told Kelsi not to pull a face at Tracey.
 92. The respondent agreed that the shelving units could be moved around during the day.
 93. The respondent did not accept that afternoon would begin after 2pm. She said that the

latest it would begin was 1.45pm and the latest it would be over was 2.25 or 2.30pm, adding that 2.30pm would be “pushing it.”

94. The respondent was asked about her reaction to events when some children were falling over and she was dealing with afternoon tea on her own. She did not accept it was stressful, she was concerned for the children falling over and parents were coming in to collect children. She clarified that the ratio of 1:10 was manageable.
95. The respondent was challenged about her memory of which staff were present, and it was noted that in an interview on 15 June 2018 she had not been sure if Marie had been present. The respondent said that she remembers her interactions with Child A.
96. Exhibits 10 and 11 are paper copies of an electronic rostering system called APT. They show Staff hours across a calendar format. The respondent said that entries can be changed retrospectively. The roster showed Kelsi’s contact hours as 1.05 to 1.35 and then 12.45 to 1.30. The respondent did not agree it was accurate, but needed to refer to her notes to ascertain when Kelsi was there. The respondent did not accept that Kelsi could have been there during afternoon tea. When asked if she was certain, the respondent could not recall. She wanted to refer to her notes to see what she said originally.
97. The respondent said that 2.45pm was usually mat-time.
98. The respondent recalled Gino being present when she redirected Child A outside. She did not agree with Gino’s evidence. The respondent was asked about her previous statement made in her interview on 21 June 2018 in which she said that it was after her incident with Child A that Gino came in. She had also said, “The only thing and I keep reflecting in my head – I should have yelled out for help. That is I feel what I could have done. Had I had the behaviour plan in place or done the tag team then this would have helped.”
99. The respondent’s evidence to the Tribunal was that the situation was not out of her control, but in hindsight, she should have asked someone to come and help with afternoon tea. She added that she should not have had to ask for help. The respondent was adamant that she did not hurt Child A and she did not hold his wrist. She said she would not deal with a child’s behaviour alone again. The respondent said if the staff had seen something so disturbing, they should have rung (the manager) or written something.

100. The respondent did not accept that it was stressful or she was getting emotional or that she was not in control. He came happily and he was not crying. There were no tears; he was a child who vocalised loudly.

Findings

101. We must decide if the CAC has established, on the balance of probabilities, that on 13 June 2018 the respondent:
- (a) grabbed Child A by the wrist, raised his arm and pulled him across the room at a fast pace; and/or
 - (b) forcibly removed Child A from a room at the Centre by firmly holding his shoulder and arm and pushing him through a door, and either plonked him on the deck or caused him to fall over.

Preliminary matters

102. At the end of the evidence we invited written submissions on the facts from the parties. The respondent took this opportunity to provide a further statement. We have not considered that in our deliberations. Ms Stone has also attached a form which is her client's response to the CAC submissions. The respondent has legal representation and we expect cogent, relevant submissions from her lawyer, not a series of comments or notes from the respondent. We have considered Ms Stone's submissions.
103. We recognise that it is difficult to recall which staff were in what location for every minute of the day in a busy early childhood education centre, particularly some 16 months after an event. Statements from all staff who were on duty that day might have helped us piece events together.
104. We heard evidence that the respondent had previously raised a bullying claim against Ms Hunter. It was therefore submitted that Ms Hunter could not fairly undertake the Centre's investigation into the allegation that Tracey Hazell had raised. The role of this Tribunal is not to consider the fairness or quality of any investigations that have been undertaken. An exception would be if it is alleged that some statements or documents that are being relied on were unfairly or illegally obtained. Our role is to consider the evidence of the witnesses before us. We hear the evidence, make findings of fact and then decide if the established facts amount to serious misconduct as described by the CAC in the Notice of Charge. If either party is concerned that an employer's or CAC investigation was deficient, there is nothing preventing other potential witnesses being

spoken with and/or called to give evidence.

105. Similarly, we do not need to examine the quality of the mandatory report that an employer has sent to the Council under ss 392 to 395 of the Act, which also prescribe the requirements of that report.

Particular 1(a) - grabbed Child A by the wrist, raised his arm and pulled him across the room at a fast pace;

106. The evidence to support the first allegation is from Tracey Hazell. We reject the CAC submission that Alisha Hunter's evidence of speaking loudly to Child A is relevant to this particular. Tracey Hazell had recorded the time of what she saw at 1.25pm. Alisha Hunter's evidence was that she could not recall what time she heard the interaction. She was not in the Senior Kindy Room at 1.25. She was absent between 10.45am and 2pm. Therefore the only evidence in support of this particular is from Tracey Hazell.
107. The photograph taken by Mr Eathorne demonstrates that you can see from the office through to the classroom. He said that he was sitting at the desk when he took the photo. We do not accept the respondent's submission that the height differential of the two buildings would have made it physically impossible to see what she claimed. A suitably qualified expert would be able to explain the height, distance and angles required to enable or impede sightlines. Another way of demonstrating it would be to take photographs of a child standing at different parts of the room, so that one could see how much of their body was visible.
108. We accept that Ms Hazell's visibility would have been better than that shown in the photo 88A. We recognise that photographs do not always provide the same view that the human eye interprets. We also acknowledge that time of day can have an impact on the clarity of a view through a window into a building, depending on the position and angle of the sun. We do not know whether those factors would have made Ms Hazell's view better or worse than that shown in photo 88A.
109. That said, there are aspects of Ms Hazell's account that we have difficulty reconciling. She said that she saw the event for 3 to 4 seconds. The respondent is charged with walking at a fast pace. In her signed statement which formed the basis of her evidence, Ms Hazell said that the respondent was on a mission walking fast. In answer to further questions from Ms Bishop, Ms Hazell said, "I don't think it was particularly fast per se but it was a determined walk, if you like." If the respondent was walking fast, she would have been in her view for less than 3 seconds.

110. There was some discussion about the position of furniture in the classroom. We find that the shelves on wheels were moved regularly and often throughout the day and so it is possible that one was jutting out, but that is not certain. Ms Alisha Hunter recalled the formation of the cubby hole shelves being in a U-shape as shown in Photo 7 for the most part while she was there. That would mean that if the respondent walked at a fast pace, she would have been further away from the window in order to avoid the shelving.
111. Whatever the configuration of the room, we found it hard to believe that Ms Hazell could see clearly that the child was being held by the wrist rather than the hand, or that the force applied was 7 out of 10. She accepted that the distance between the two buildings was 5.8 metres and that her desk was at the back of the room, which was about 3 metres wide. We find that she was at least 7 metres away from the child she saw in the window. We do not accept that she was able to accurately assess the strength of a grip on a hand that was viewed through two windows and was about 7 metres away. We do not consider that Ms Hazell had enough information or context to assess the grip as “aggressive”.
112. We place no significance on the evidence that Child A’s arm was at right angles as we would expect that to be the case if an adult was holding a small child’s hand.
113. We also do not attach significance to Ms Hazell’s interpretation of the respondent’s facial expression. She was not in the same room to see or hear the context of the brief interaction that she witnessed.
114. It is also relevant that no-one else who was actually in the classroom witnessed this. As noted above, we do not accept that Alisha Hunter was present at this time.
115. We are not satisfied on the balance of probability that the respondent grabbed Child A by the wrist, raised his arm and pulled him across the room at a fast pace.

Particular 1(b) - forcibly removed Child A from a room at the Centre by firmly holding his shoulder and arm and pushing him through a door, and either plonked him on the deck or caused him to fall over

116. The key witness to this allegation is Kelsi McLennan, who said that around 2.45pm she heard Child A crying, screaming and tipping chairs and toys. She heard Child A crying from inside to outside. She looked out on to the deck and saw the respondent forcibly remove Child A and plonk him on the deck. The respondent had her hands on the bicep/shoulder area.
117. In contrast the respondent said that earlier than this, at about 1.45 pm she redirected Child A, holding his hand and bent down to his height explaining to him he had to wait for the other children to eat and she would save him a piece of cake if there was enough. The respondent was crouched on one knee.
118. Some time was spent in the hearing trying to pinpoint times of afternoon tea and ascertain who was present at different times. The respondent said that Ms McLennan was not present during this redirection. That she was still at lunch. She also said alternatively that Mr Volante came in after the afternoon tea, and that he was present during it.
119. The CAC submits that either the afternoon tea went later than 1.45, and that it was still underway at 2.45pm. Alternatively, Ms McLennan may be mistaken about the time of the incident. It was further submitted that Mr Volante's evidence supports Ms McLennan's account. He was outside when he heard crying. He thought it was between 1.15pm and 1.45pm. Ms Bishop submitted that he could be mistaken about the time this occurred and it could have been later.
120. We were asked to exercise caution in considering Mr Volante's evidence as he was 7 metres away when he heard crying and that could have affected his ability to hear the respondent, and he arrived after the redirection, so the child could have calmed somewhat. Ms Bishop also submitted that this CAC witness clearly had a personal agenda in these proceedings and was interested in framing his statement in a "neutral manner".
121. It was also submitted that the respondent's evidence that Ms McLennan was not present is not credible. In any event, Ms Bishop submitted that there is no cogent evidence that there were any other teachers or parents around at the time of the redirection.
122. Ms McLennan said that the respondent brought Child A out of the door near to the steps

of the deck. The respondent initially said that she used this door, but then said it was the other door, as the children were lining up for afternoon tea.

Discussion

123. We understand that this allegation arose as a result of the Centre's investigation into Ms Hazell's allegation. We found the CAC evidence to support this particular difficult to reconcile. The CAC case rests largely on Ms McLennan's testimony, who had difficulty recalling any details outside the events outlined in the notes of her interview with Julie Hunter on 14 June 2018. Overall we did not find her a compelling witness.
124. We found it difficult to believe that Ms McLennan spent from 1.35 to 2.50pm tidying up the Family area. Her explanation for not raising a complaint on the day of the event did not make sense. She said that the respondent had previously told her that she should not go to the Complex Manager because she had too much on her plate and that she should only go to the respondent or the Centre Administrator. Clearly if her complaint was about the respondent, she needed to raise it with management.
125. Ms McLennan said that Child A was down the other end of the classroom, but that she was not sure where he was. She also said that he was tipping over chairs, but she could not remember what was going on around him or in that area at the time. We would have thought that she would remember if afternoon tea was going on at that time. The next thing she did was look out on to the deck, in response to Child A's crying. Ms McLennan could not remember if she said anything to the respondent before or after the incident.
126. We found Mr Volante a reasonable witness. We disagree with the CAC submission that because of his efforts to remain neutral, we should approach his evidence with caution. He did not witness any manhandling, which was what he had been asked about. He could not hear the respondent. While it is possible that by the time he arrived, the respondent was no longer talking, it was the child's crying that attracted his attention, and so if the respondent had been shouting, we would have expected him to have heard that. He said this happened between 1.15 and 1.45pm.
127. The respondent denied handling Child A in the way described by Ms McLennan. When first asked on 14 June 2018 about her interactions with Child A the day before, she described an incident that happened at about 1.45pm during afternoon tea. Mr Volante's observation of the Child A "crying to" the respondent as he sat on the deck is consistent with her evidence.

128. Although there are some similarities between this 1.45pm event and that described by Ms McLennan as occurring at about 2.45pm, we are not sure that the two accounts are related at all.
129. We formed an opinion of the respondent as a competent, compassionate early childhood teacher. Her descriptions of her practices reflected favourably on her ability and attitude. Although she had undergone some stressful times in her time at the Centre, there was nothing about this day that was out of the ordinary. There was no particular circumstance that might have led her to behave in a way that was out of character.
130. Having heard from all the witnesses, we are not satisfied on the balance of probabilities that the CAC has established that the respondent forcibly removed Child A by firmly holding his shoulder and arm and pushing him through a door, and either plonked him on the deck or caused him to fall over.

Non-publication

131. There is a permanent order for non-publication of the name of Child A.
132. The respondent reserved the right to apply for permanent name suppression. We therefore make the following directions:
- a) The respondent is to file any evidence on the question of non-publication and submissions in support by 3 June 2020.
 - b) The CAC is to respond by 21 June 2020.
 - c) Any other applications for non-publication are to be made by 3 June 2020, with a response from either party to be made by 21 June 2020.

Costs

133. We make no orders for contributions to costs. They will lie where they fall.



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).