**NZTDT 2020/45**

**BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL**

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| **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**<br><br>Referrer |
| **AND** | **Teacher S**<br><br>Respondent |

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## Decision of the Tribunal

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| Hearing: | 9 June 2021, on the papers |
| Date of decision: | 1 July 2021 |
| Tribunal: | T J Mackenzie (Deputy Chair)<br>A Hammond<br>W Flavell |
| Counsel: | B Tatham for the CAC<br>C Hainsworth-Powrie<br>for the Respondent |

## Introduction

1. Teacher S is charged with serious misconduct, or misconduct in the alternative. This arises from three incidents in her personal life. Each is an act of assaulting one of her children.

2. Teacher S denies the charge.

3. An agreed summary of facts has been provided along with a further affidavit from Teacher S.

4. In this decision we will address liability, penalty and publication.

## Facts

5. The agreed facts read as follows:

**Introduction**

1) Teacher S (**the respondent**) was first provisionally registered on 14 September 2005 and moved to full registration in April 2014. Her practising certificate expired on 16 December 2020.

2) The respondent has three children with her ex-partner, now aged 14, 11, and 8 years old.

3) In October 2017 the respondent adopted her then 6-month-old nephew and then 8 year-old niece through Oranga Tamariki.

4) The respondent and her ex-partner separated in October 2017. The respondent took out a protection order against her ex-partner in November 2018.

5) The respondent worked full-time as a Centre Manager at an ECE Centre licensed for 84 children, from January 2016. The respondent was the sole provider for her five children at this time.

**Self-report to Teaching Council**

6) The respondent was not required to do a mandatory self report under section 397 of the Education Act 1989 (mandatory reporting of convictions).

7) In any event by a self-report dated 2 August 2019, the Teaching Council of Aotearoa New Zealand (**Teaching Council**) was notified by the respondent that she had received a verbal warning from NZ Police on 27 June 2019 (followed up upon the respondent's request with a letter from NZ Police on the same date confirming that they were not charging her with any criminal offence) for, "as you (the respondent) acknowledge in your statement to Investigation Support Officer on 11 June 2019, the Police investigation found that you had on occasion used slapping or kicking as means of disciplining your children, in circumstances that were unacceptable".

8) On 3 separate and unspecified occasions between October 2017 and 18 March 2019, the respondent physically disciplined her biological children when she:

   a) Slapped Child A (then aged 12) by back handing her in the face when Child A repeatedly tried to argue with her;

   b) Pushed Child B (then aged 10 years old) into her room; and

   c) Kicked Child A (then aged 12) on the bottom when Child A did not go to her bedroom when asked.

**Investigation – Police**

9) On 18 March 2019, Child A, then aged 12 years old, contacted 'Kidsline' (Kidsline reported the matter to the Police) and disclosed that the respondent had hit her and her siblings when the respondent was stressed out.

10) On 30 April 2019 Child A completed an evidential interview with NZ Police, and Child A disclosed that her mother (the respondent) hits them [the respondent's biological (only) children] when she is stressed out.

11) On 11 June 2019 the respondent was interviewed by an Investigation Support Officer at NZ Police and the respondent admitted to some of the assaults on Child A but denied punching her. The respondent acknowledged that her conduct was not okay and stated that she feels terrible about Child A not feeling safe and as a result having to make a report of concern.

12) NZ Police determined that the respondent's disciplining of her children did not warrant any charges being laid.

13) On 27 June 2019 NZ Police verbally warned the respondent for assault on Child A, in person at her place of employment. The respondent requested a letter confirming the warning.

14) On 22 August 2019 Teaching council requested NZ Police Vetting Report in respect of the respondent. The Police Vetting Report is attached as Appendix A.

15) It was incorrectly noted on the request by the Teaching Council that the check reason was "new children's worker".

16) NZ Police reported to the Teaching Council that "... An admission to pushing, slapping or kicking the children (now aged 10 and 12) on occasion as a means of disciplining when under pressure or stress. The applicant [referring to the respondent in this matter] has voluntarily sought assistance from external agencies to implement better strategies to avoid stress in her family environment."

**Investigation - Oranga Tamariki**

17) In March 2019 and July 2019 Oranga Tamariki received reports from NZ Police in relation to the above.

18) Oranga Tamariki undertook their own investigation.

19) By letter dated 2 August 2019 to the Teaching Council the respondent stated that during the Oranga Tamariki investigation she admitted to, on three occasions, regrettably using physical punishment as a way of dealing with undesirable behaviours.

20) On 30 April 2020 the respondent attended a Family Group Conference with Oranga Tamariki and was congratulated on completing the Chaos to Calm Programme, and Building Awesome Whanau Parenting Programme. The Oranga Tamariki Social Worker "was very happy with the progress and effort that (the respondent) had been made". The file was closed.

**The respondent's response**

21) On 2 August 2019 the respondent stated to the Teaching Council that she had completed a safety programme with Barnardos and Women's Refuge and had also attended counselling. The respondent acknowledged that her actions were an unacceptable way of dealing with things and she was deeply remorseful for her actions.

22) In December 2019 the respondent took a break from working and teaching to focus on herself and whanau.

23) On 7 August 2020 the respondent provided a further response to the Complaints Assessment Committee and stated that she and her family had continued to make changes to improve their whanaunatanga, manaakitanga, kotahitanga and mental health and well-being.

24) The respondent completed 8 counselling sessions with [redacted] in between June - December 2019 and completed the Building Awesome Whanau programme at [redacted] from 24 October- 28 November 2019.

25) Throughout late 2019 and 2020 the respondent continued to focus on herself and her whanau- whom she has continued to retain sole care of, and has not worked during that time.

26) The respondent was due for a renewal of her practicing certificate in December 2020, however did not seek to renew it at that time.

27) The respondent is not currently working in a teaching role.

28) The respondent submits she is now ready to return to a teaching role and will be applying for a renewal of her practicing certificate.

**Summary**

29) The respondent states that she has never had any incidents or allegations of concern occur during her teaching employment or at her place of employment. This Notice of Charge is the only matter the CAC has had with the respondent. There has been no prior, nor subsequent, CAC involvement with the respondent. The CAC is not aware of any other incidents or allegations.

30) The respondent states she was an excellent teacher in her role and always conducted herself well. The respondent has been described by [redacted] on 31 July 2019 as "Teacher S has worked hard to earn a professional living in Early Childcare and I have known her in this role personally for a very long time, she has played a role in caring for my own mokopuna at the Centre and I would have no hesitation in recommending her to other mothers, grandparents and parents who are looking for a good ECE with a high standard of management".

31) CAC accept that the respondent was "experiencing a stressful time at the time of the conduct". The CAC recorded in its decision that it "was pleased to see that Teacher S (the respondent) had engaged with various services to assist her.... (and) the CAC was also pleased to note that Teacher S (the respondent) was making good decisions moving forward."

32) The respondent states that, subsequent to her actions, programmes and the like she has engaged in include: 8 counselling sessions with [redacted], attendances with Horizons, assistance from Barnados, attending Chaos to Calm Programme, attending Building Awesome Whanau Programme; [redacted]; weekly home visits for a period with a Social Worker; attendance at Youth Horizons; and as recent as the 20th and 21st of February 2021 she completed a 2 day Wananga on Prevention of Family Violence as a community at her local Marae [redacted].

33) The respondent has been co-operative, remorseful, taken personal responsibility for her conduct, and has productively engaged in betterment through this process.

## Discussion of charge liability

*Legal principles*

6. The liability tests are well known. Section s 378(1)(a) of the Act provides three initial gateways into a conduct finding, being behaviour by a teacher that:

   i) Adversely affects, or is likely to adversely affect, the well-being or learning of one or more children; and/or
   ii) Reflects adversely on the teacher's fitness to be a teacher; and/or
   iii) May bring the teaching profession into disrepute.

7. Regarding the first of these provisions (adverse effect on children). In *CAC v Marsom* this Tribunal said that the risk or possibility is one that must not be

fanciful and cannot be discounted.[1] The consideration of adverse effects requires an assessment taking into account the entire context of the situation found proven. Direct evidence from the child as to affects is not mandatory and indeed is rare. Nor does the ambit of s 378(1)(a)(i) call for direct evidence. The use of the term "likely" permits the Tribunal to draw reasonable inferences as to affects or likely affects, based on the proven evidence in a case and its own knowledge.

8. The second provision (fitness) has been described by the Tribunal as follows:[2]

> We think that the distinction between paragraphs (b) and (c) is that whereas (c) focuses on reputation and community expectation, paragraph (b) concerns whether the teacher's conduct departs from the standards expected of a teacher. Those standards might include pedagogical, professional, ethical and legal. The departure from those standards might be viewed with disapproval by a teacher's peers or by the community. The views of the teachers on the panel inform the view taken by the Tribunal.

9. The third provision (disrepute) is assisted by reference to the High Court decision in *Collie v Nursing Council of New Zealand*.[3] The Court held that a disrepute test is an objective standard for deciding whether certain behaviour brings discredit to a profession. The question that must be addressed is whether reasonable members of the public, informed of the facts and circumstances, could reasonably conclude that the reputation and good standing of the profession is lowered by the conduct of the practitioner.

10. A finding of misconduct (or, misconduct "simpliciter") can lie if one of the above tests is established.[4]

11. Elevation to serious misconduct requires s 378(1)(b) to also be established, as the serious misconduct test is conjunctive. This requires the conduct to be "of a character or severity that meets the Teaching Council's criteria for reporting serious misconduct" (reporting rules).

12. We note that the date range of the conduct at issue here covers two sets of reporting rules, being both pre and post May 2018 (old rules and new rules). The CAC relies on several rules from each set. Below we will set out the slightly different formula that each issue of the rules provides, and for convenience each rule that the CAC relies on respectively.

13. The old rules provided for reporting on the following basis:

> The criterion for reporting serious misconduct is that an employer suspects on reasonable grounds that a teacher has engaged in any of the following:
>
> Rule 9(1)(a) – physical abuse of a child or young person; and/or
>
> Rule 9(1)(n) - 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; and/or

[1] *CAC v Marsom* NZTDT 2018/25, referring to *R v W* [1998] 1 NZLR 35.
[2] *CAC v Crump* NZTDT 2019-12, 9 April 2020.
[3] *Collie v Nursing Council of New Zealand* [2001] NZAR 74, at [28].
[4] *Evans v New Zealand Teachers Disciplinary Tribunal* [2020] NZDC 20062; leave declined in *Evans v Complaints Assessment Committee* [2021] NZCA 66.

> Rule 9(1)(o) - an act or omission that brings, or is likely to bring, discredit to the teaching profession.

14. The new rules provide:

> A teacher's employer must immediately report to the Teaching Council in accordance with section 394 of the Act if the employer has reason to believe that the teacher has committed a serious breach of the Code of Professional Responsibility, including (but not limited to) 1 or more of the following:
>
> Rule 9(1)(a) – unjustified or unreasonable physical force on a child; and/or
>
> Rule 9(1)(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); and/or
>
> Rule 9(1)(k) - an act or omission that brings, or is likely to bring, the teaching profession into disrepute.

15. We note the inclusion of "a serious breach" into the new rules. Such an assessment is not called for when utilising the old rules. We will comment on that again below.

16. There have been many past cases that arise from similar circumstances to the present – an act of violence toward a child, outside of the teaching environment.[5] In near all cases a finding of misconduct or serious misconduct has been made.

17. Ultimately each case must be determined on its own facts as against the statutory tests.

*Findings*

18. Beginning with s 378(1)(a). The CAC relies on the second and third limbs – adverse affect on fitness to teach, and/or bringing the profession into disrepute.

19. We consider that the test at s 378(1)(a)(ii) (reflecting adversely on fitness to teach) is made out. There are three distinct acts of violence, one involving "back-handing" a child's face. Cumulatively, this behaviour cannot be said to be minimal. Although the children were not students of the teachers, there comes a point where matters external to teaching will intrude on fitness to teach. Teachers are reposed with the trust of children. A teacher who has been violent to children, at a particular degree, will come under the fitness microscope. We consider that the facts of the present matter reach the level as set out in *Collier* above.

20. That being the case we do not need to go on to consider the disrepute test, however if we were to do so, for the same reasons we would have considered it to be made out.

[5] *CAC v Teacher Z NZTDT 2020-19; CAC v Techer D NZTDT 2019-51; CAC v Teacher X NZTDT 2020-9; CAC v Teacher NZTDT 2017-16; CAC v Teacher A NZTDT 2018-53; CAC v Maurangi NZTDT 2018-97; CAC v Teacher Z NZTDT 2020-7; CAC v Teacher NZTDT 2019-101.*

21. At this point then, the test for misconduct has been made out.

22. Turning to whether serious misconduct has been made out. Each set of Rules provides for the same reporting requirement, as follows:

> 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; and/or

23. We note however the imposition of the "serious breach" test for the new rules. In some matters, the Tribunal might consider that a rule has technically been breached but that the breach is not serious. It will follow that a serious misconduct charge is not made out. On the present facts however, we cannot conclude that the breach of this rule is less than serious (for the "new rules" version).

24. The test we must apply in considering this rule is not a high one. It does not require a prosecution to actually be brought, and does not require that prosecution to be successful. The respondent places weight on the fact that Police did not prosecute. We do not. Our role as a professional disciplinary body is different to that of Police in making a charging decision. There are many vagaries involves in those decisions, which we are not privy to. The high point of a Police decision on criminal liability is that it is simply an opinion of a third party. Whilst a reasoned decision that we can consider might hold some weight (for instance a Judge's sentencing decision, particularly a fully reasoned discharge without conviction decision), simply being told that Police did not prosecute does not influence the statutory test that we must apply.

25. Likewise reliance on the statutory defences at s 59 Crimes Act does not displace the application of this reporting rule. That is because the rule is met simply by the possibility of the prosecution. It is not for us to forecast the eventual outcome of the possible prosecution via that defence or any other defence.

26. All of that being said, there may be cases however where although a charge could technically be said to be made out, a matter might be so trivial or *de minimis* that the Tribunal will find it difficult to conclude that the conduct may be the subject of a prosecution. That is another way of saying that a "serious" breach of the rule might not be found in some circumstances. But that is not the case here.

27. It follows then that the agreed conduct must fall foul of this rule. Section 194 Crimes Act 1961 provides for a maximum penalty of two years imprisonment for assault on a child. The conduct may have been the subject of a prosecution.

28. We therefore have found that s 378(1)(a) and (b) are made out. The charge of serious misconduct is proven. We will now turn to penalty.

**Penalty – general principles**

29. 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.

30. In *CAC v McMillan* this Tribunal summarised the role of disciplinary proceedings in this profession as: [6]

> … to maintain standards so that the public is protected from poor practice and from people unfit to teach. This is done by holding teachers to account, imposing rehabilitative penalties where appropriate, and removing them from the teaching environment when required. This process informs the public and the profession of the standards which teachers are expected to meet, and the consequences of failure to do so when the departure from expected standards is such that a finding of misconduct or serious misconduct is made. Not only do the public and profession know what is expected of teachers, but the status of the profession is preserved.

31. The primary motivation is to ensure that three overlapping purposes are met. These are:

I. to protect the public through the provision of a safe learning environment for students;

II. to maintain professional standards; and

[6] NZTDT 2016/52, 23 January 2017, (at [23]).

III. to maintain the public's confidence in the profession.[7]

32. The Tribunal is required to arrive at an outcome that is fair, reasonable and proportionate in the circumstances in discharging our responsibilities to the public and profession.[8]

33. The Act provides for a range of different penalty options, giving this Tribunal the ability to tailor an outcome to meet the requirements that each case presents. Penalties can range from taking no steps, to cancellation of a teachers registration.

34. In *CAC v Fuli-Makaua* this Tribunal has noted that cancellation may be required in two overlapping situations, which are:[9]

> a) Where the conduct is sufficiently serious that no outcome short of deregistration will sufficiently reflect its adverse effect on the teacher's fitness to 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. Therefore, there is an apparent ongoing risk that leaves no option but to deregister.

35. The summary of facts, the respondent's affidavit and the submissions clearly set out that the respondent acted out of character. She has been in a very stressful situation of domestic violence, full time work, and continuous care of five children. She is otherwise well regarded and this has been a one off blight for her. She wishes to return to teaching and should feel encouraged to do so.

36. We also note that the respondent has acted remorsefully and responsibly in the steps she has taken to redeem herself.

37. Taking all of that into account, we consider that the appropriate penalties are:

- The respondent will be censured.
- The respondent will provide a copy of this decision to any future education employer within 12 months from the date of this decision.

[7] The primary considerations regarding penalty were discussed in *CAC v McMillan* NZTDT 2016/52.
[8] See *Roberts v Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354, at [51].
[9] *CAC v Fuli-Makaua* NZTDT 2017/40, at [54], citing *CAC v Campbell* NZDT 2016/35 (at [27]).

**Publication**

38. Wide non-publication orders are sought. The CAC consents to these.

39. We agree they are appropriate. Naming the respondent would lead to identification of her children.

40. We make orders prohibiting from publication the name of the respondent and any identifying information, including but not limited to the town she lived in or lives in, her age and the age of her children, any school she has worked at, and any school that her children have attended.

**Costs**

41. Costs are not sought and in any event the respondent was legally aided.

**Dated 1 July 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).