



EDUCATION COUNCIL
NEW ZEALAND | Matatū Aotearoa

Complaints Assessment Committee (CAC) v Duval-Smith

NZ Disciplinary Tribunal Decision 2017/31

A remorseful teacher has been censured with conditions for using physical force on five-year-old who spat on him.

Nicholas Duval-Smith was a registered teacher working at a kindergarten. It was his responsibility to supervise five-year-old child A for a large part of the time. Child A demonstrated challenging behaviour from time to time. In the incident, during circle time Child A was repeatedly lunging into the centre despite Mr Duval-Smith asking him to stay in his place. Mr Duval-Smith reached forward to move the child back and put his hand on the child's hand, the child then spat on Mr Duval-Smith.

Mr Duval-Smith took the child to the bathroom and asked him to wash the spit off his hand. When the child said no, Mr Duval-Smith admitted that he lost control and became frustrated, hitting the child firmly on the back of the head with an "open handed hit." Child A cried as a result.

Mr Duval-Smith immediately apologised to the child and comforted him, he reported the incident to his colleague, employer and the child's mother. He also self-reported to the Education Council and a few days later he resigned from the kindergarten.

The Complaints Assessment Committee of the Education Council (CAC) investigated and referred a charge of serious misconduct to the New Zealand Teachers Disciplinary Tribunal (Tribunal).

At the Tribunal, Mr Duval-Smith accepted responsibility, and he explained that he found working at the kindergarten stressful partly due to child A's challenging behaviour around 'boundaries'. He confirmed that he worried a lot about keeping child A safe. He acknowledged the action he took "was not an acceptable way for a professional person to respond" and he was remorseful that he had failed the child's trust, himself, and the teaching profession.

The Tribunal agreed with the CAC that the conduct amounted to serious misconduct. In considering penalty, the Tribunal noted that the use of physical force, even at a lower level, is unacceptable in New Zealand schools, and use of it by teachers would bring discredit to the profession.

The Tribunal considered the seriousness of the conduct, being force against the head of the child, and the age of the child. The Tribunal balanced this against Mr Duval-Smith's steps after the incident: immediately self-reporting to his colleague, employer and the child's parents, and then reporting to the Education Council. The Tribunal noted that although Mr Duval-Smith was not currently teaching, he indicated he wished to return to the profession.

The Tribunal noted that his “conduct and attitude following this incident, persuades us that cancellation is not necessary in this instance.” The Tribunal was satisfied that a rehabilitative penalty short of cancellation would be appropriate.

Mr Duval-Smith was censured, with conditions to show any prospective employer the decision. Prior to starting a new teaching role, he is required to have in place mentoring and provide reflective reports to the Education Council once he has started a teaching role. Mr Duval-Smith was also ordered to pay 40% costs and the register was annotated.

BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

NZTDT 2017-31

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 **NICHOLAS DUVAL-SMITH**

Respondent

TRIBUNAL DECISION

18 April 2018

HEARING: Held at Auckland on 17 January 2018 (on the papers)

TRIBUNAL: Theo Baker (Chair)
Kiri Turteko and Simon Williams (members)

REPRESENTATION: Ms Dawson
The respondent represented himself

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 the respondent, at approximately 11 May 2017 used his open hand to hit a 5 year old child (Child A) firmly on the back of the head, causing the child to cry.
2. It is alleged that the conduct amounts to serious misconduct pursuant to s 378 of the Education Act 1989 (the Act) and rr 9(1)(a) and/or (n) and/or (o) of the Education Rules 2016 or conduct otherwise entitling the Disciplinary Tribunal to exercise its powers under s 404 of the Act.
3. The parties conferred and agreed on the facts, that the conduct amounts to serious misconduct, and agreed on an appropriate penalty. We must still consider the evidence and satisfy ourselves of those matters.

Evidence

4. Before the hearing the parties conferred and filed an Agreed Statement of Facts, and Ms Dawson for the CAC advised that the respondent agreed that the conduct amounts to serious misconduct. The ASF was signed by Ms Dawson and the respondent and is set out in full:

Background

1. *The respondent, **NICHOLAS DUVAL-SMITH** is a registered teacher. Mr Duval-Smith was employed at Motueka Rudolf Steiner Kindergarten for approximately 3 months.*
2. *Child A was five (5) years old at the time of the incident. He demonstrated challenging behaviour from time to time.*

Incident on 11 May 2017

3. *On 11 May 2017, at about 11.00 a.m., when the class was having circle time, child A was repeatedly lunging into the centre despite Mr Duval-Smith asking him to stay in his place. Mr Duval-Smith reached forward to move child A back and put his hand on child A's hand. Child A then spat on Mr Duval-Smith.*
4. *Mr Duval-Smith took child A out of the circle and to the bathroom. He told child A to wash the spit off. Child A said "No".*
5. *Mr Duval-Smith reports at that point he lost control of himself and hit child A firmly on the back of his head with an 'open handed hit'. Child A cried as a result.*
6. *Mr Duval-Smith said his intention had been to support child A to 'make it right' by helping clean away the spit. His striking the child was in response to child A refusing*

to do this. “The moment of hitting the child happened with feelings of frustration and anger at his refusal to do as I asked.”

7. A co-worker stated she heard the hit from the circle area in the other room, and that it sounded like a clap of hands.
 8. Mr Duval-Smith acknowledged the action he took was not an acceptable way for a professional person to respond, and he was remorseful that he had failed the child’s trust, himself, and the teaching profession.
 9. Mr Duval-Smith immediately apologised to child A and comforted him. He also promptly reported the incident to his colleague, his employer and child A’s mother. The next day he self-reported his behaviour to the Education Council.
 10. Mr Duval-Smith resigned from the kindergarten on 14 May 2017 as a result of the incident.
 11. Mr Duval-Smith stated that he found the work at the Motueka Steiner Kindergarten stressful partly due to child A’s challenging behaviour around ‘boundaries’. It was Mr Duval-Smith’s responsibility to supervise child A for a large part of the time. He confirmed that he worried a lot about keeping child A safe.
 12. Child A’s mother stated that her son really liked Mr Duval-Smith but “pushed” him and Mr Duval-Smith reacted by becoming authoritarian.
 13. On 19 May 2017, the NZ Police issued Mr Duval-Smith with a formal warning for “Assault”, stating that his “actions amount to an application of force”.
5. Based on this ASF, we are satisfied that the factual allegation contained in the charge is therefore proved. In particular, at paragraph 5 of the ASF, the respondent said that he hit Child A on the back of the head, using an open hand.

Serious misconduct

6. Having found the factual allegations proven, we must now decide whether any of these findings amount to serious misconduct (or conduct otherwise entitling the Tribunal to exercise its powers).
7. Section 378 of the Act provides:

serious misconduct means conduct by a teacher—

(a) that—

- (i) adversely affects, or is likely to adversely affect, the well-being or learning of 1 or more students; or
- (ii) reflects adversely on the teacher’s fitness to be a teacher; or
- (iii) may bring the teaching profession into disrepute; and

(b) *that is of a character or severity that meets the Education Council's criteria for reporting serious misconduct.*

8. The criteria for reporting serious misconduct are found in r 9 of the in the Education Council Rules 2016 (**the Rules**). The CAC relies on the rr (a), (n) and (o):

Criteria for reporting serious misconduct

(1) *The criterion for reporting serious misconduct is that an employer suspects on reasonable grounds that a teacher has engaged in any of the following:*

(a) *the physical abuse of a child or young person (which includes physical abuse carried out under the direction, or with the connivance, of the teacher):*

...

(n): *any other act or omission that could be the subject of a prosecution for an offence punishable by imprisonment for a term of 3 months or more*

...

(o) *any act or omission that brings, or is likely to bring, discredit to the profession.*

9. For the CAC, Ms Dawson also submits that the conduct is a breach of s 139A(1) of the Act, which provides that no teacher is entitled to use force by way of correction or punishment towards any student or child enrolled at or attending the school institution or service.

10. We accept the CAC's submissions that:

- the conduct adversely affected the child, who was upset at the time
- the respondent's loss of self-control reflects adversely on his fitness to teach
- reasonable members of the public could reasonably conclude that the reputation and good standing of the teaching profession is lowered by the respondent's behaviour.¹

11. Therefore any and all of the grounds under s 378(1)(a) are met.

12. Turning to the second limb of the definition of serious misconduct, we also agree that the respondent's behaviour amounts to physical abuse under r 9(1)(a). We view the intentional application of force to the head a very serious matter. As we have said in

¹ The test in *Collie v Nursing Council of New Zealand* [2001] NZAR 74, for discredit to the profession under the former Nurses Act 1977, and adopted by this tribunal.

previous cases, it carries a risk of serious harm.²

13. We also agree that the conduct amounted to an assault on a child and could have been the subject of a prosecution for an offence punishable by imprisonment of 3 months or more, as contemplated by r 9(1)(n) of the Education Rules 2016.
14. Finally, for the same reasons that we find it met the requirements of s 378(1)(a)(iii), conduct that may bring the teaching profession into disrepute, we find that it is conduct likely to bring discredit to the profession under r 9(1)(o).
15. In summary, this is a clear case of serious misconduct, and we acknowledge the respondent's recognition of this.

Penalty

16. In *CAC v McMillan*³ we summarised the role of disciplinary proceedings as:

... 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.

17. We have previously said that the use of physical force, even at a lower level, is unacceptable in New Zealand schools,⁴ and that any teacher who uses physical force contrary to the prohibition in the Act⁵ puts his or her status as a teacher in peril.
18. However, the parties have agreed that cancellation is not required in the present case. The proposed penalty is:
 - Supervision or mentoring for 12 months
 - Professional development around behaviour management within 12 months
 - Advise a new employer of this decision

² *CAC v Teacher* NZTDT2016-50, 19 September 2016; *CAC v Davies* NZTDT2016-28, 6 September 2017

³ NZTDT 2016/52, 23 January 2017, paragraph 23.

⁴ NZTDT 2014-49, 20 May 2016

⁵ The decision refers to s 149, but we take it to mean s139A

- Annotation of the register.
19. Ms Dawson appropriately summarised some cases for us. They covered a range of penalties, including no disciplinary penalty in *CAC v Haycock*,⁶ which involved a smack on the bottom and others involving censure, annotation of the register, and conditions.⁷
 20. There are two which involved the application of force to the head:
 21. *CAC v Teacher*⁸ involved the use of an empty soft-shelled computer case. The teacher struck a student on the head three or four times and with each clip, said, “Don’t leave your computer case on the floor”. The parties agreed that a penalty short of cancellation was appropriate, and the Tribunal ordered censure, and a condition that she was to be subject to supervision for 12 months. The register was annotated.
 22. In *CAC v Davies*,⁹ a teacher “*put pressure on the student’s head and he pushed back against her hand. She then realised what she had done and removed her hand.*” This was in the context of trying to stop two students from banging each other’s heads on the desks. The Tribunal imposed the penalty agreed to by the parties: censure, coupled with conditions requiring her to undertake professional development relating to classroom management.
 23. Ms Dawson submitted that the present case aligns closely with *CAC v Mackey*,¹⁰ where a teacher became angry with a 14-year-old student, pinning her to the wall by her arm and swearing at her. In that case, the Tribunal ordered censure, conditions requiring supervision and professional development and annotation.
 24. In our view, there are two matters which make the present case worse than *Mackey*. First, we view slapping a student on the head worse than pinning an arm to the wall; second, unlike *Mackey*, *Davies* or NZTDT 2016-26, this child was not a teenager, but a 5-year-old. We consider the risk of actual physical harm to a small child’s brain from a slap to the head places this case in a more serious category than those three cases.
 25. In *CAC v Neronha*¹¹ the Tribunal cancelled a teacher’s registration following a finding

⁶ NZTDT 2016/2

⁷ *CAC v Haycock* NZTDT 2016-2; *CAC v Rowlingson* NZTDT 2015-24; *CAC v Mackey* NZTDT 2016-90; *CAC v Davies* 2016-28; *CAC v Teacher* NZTDT 2016-26; *CAC v Papuni* 2016-30

⁸ NZTDT 2016-26

⁹ NZTDT 2016-28. The parties agreed that the conduct amounted to “misconduct”, but the Tribunal found serious misconduct.

¹⁰ NZTDT 2016-60

¹¹ NZTDT 2016-49

that she had hit a 9-year-old child on the back of the head and had squirted liquid soap into his mouth. The boy was on the autism spectrum and was in a school for children with moderate, severe or profound disability. In that case, as a result of hearing the teacher give evidence the Tribunal expressed concerns about her fitness to teach and did not observe evidence of remorse or insight.

26. The conduct in the present case has echoes of *Neronha*. We consider that the respondent was lucky not to have been charged with assault. However, we are encouraged by his response to this event. Ms Dawson outlined the following matters. The respondent:
- Immediately apologised to the child
 - Told another teacher
 - Told the child's mother and apologised to her
 - Self-reported to the Council
 - Accepted responsibility and fully co-operated with the investigation.
27. Ms Dawson advises that the respondent is currently working outside the teaching profession, but would like to return to teaching.
28. The respondent's conduct and attitude following this incident persuades us that cancellation is not necessary in this instance, and a rehabilitative approach is required. We appreciate that Child A displayed some challenging behaviours. The respondent will need to implement appropriate strategies for dealing with such events. We note that the respondent's practising certificate expires in March 2019.
29. We make the following orders:
- 29.1 The respondent is censured under s 404(1)(b) of the Act
- 29.2 Under s 404(1)(c), it is a condition of his practising certificate that he:
- a. shows any prospective employer a copy of this decision, and prior to commencing a teaching role he provides evidence to the Education Council that the employer has seen it.
 - b. prior to commencing a teaching role has in place a mentor, such person to be approved by the Manager, Professional Responsibility, Education Council.
 - c. meets in person with the mentor at least 5 times during the 12 months of this condition.

- d. works with the mentor on behaviour management, including identification of his own stressors and anger management
- e. provides the Manager, Professional Responsibility two reports, the first at the end of 5 months (but before 6 months) of starting a teaching role, and the second at the end of 10 months (but before 11 months). Each report should include:
 - a reflection on what he has learned and how he is implementing those lessons
 - a statement from the mentor confirming the contact, either in person or by phone, the matters covered, and an opinion on the respondent's progress.

29.3 The register will be annotated accordingly under s 404(1)(e).

Costs

- 30. The CAC did not seek costs.
- 31. The Tribunal orders the respondent to pay 40% of the costs of conducting the hearing, under section 404(1) (i), that is 40% of the Tribunal's costs. The Tribunal delegates to the Chairperson authority to determine the quantum of those costs and issues the following directions:
 - i. Within 10 working days of the date of this decision, the Secretary is to provide the Chairperson and the parties a schedule of the Tribunal's costs
 - ii. Within a further 10 working days the respondent is to file with the Tribunal and any submissions he wishes to make in relation to the costs of the Tribunal.
- 32. The Chairperson will then determine the total costs to be paid.

Non-publication

33. After this matter had been notified on the Council's website, the CAC advised that the respondent wished to apply for name suppression. Although the CAC did not object to interim name suppression, the reality is that the respondent was too late.
34. In an email dated 19 December 2017, he stated that the grounds were that this is a one-off event; he felt it was unfair and unnecessary to permanently affect his ability to work with children. He stated that he had no evidence to offer to support his position, but he invited the Tribunal to talk with teachers he had worked alongside.
35. Because of the lateness of the application, full discussion is not required. We do note however, that cancellation would have permanently affected his ability to work with children. The orders we have made, along with publication of name, are made for the protection of children, and to "ensure safe and high quality leadership, teaching, and learning for children and young people in early childhood, primary, secondary, and senior secondary schooling in English medium and Māori medium settings through raising the status of the profession" as contemplated by s 377 of the Act.
36. The name of the child is not included in any of the papers before the Tribunal.



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).