Complaints Assessment Committee (CAC) v Ormsby
NZ Disciplinary Tribunal Decision 2017/33

Teacher's registration cancelled for using unreasonable force on a child.

Mr Andrew Ratene Ormsby began teaching in 2000. He taught at primary and intermediate school, Te Kura Akonga o Manurewa. He worked there for approximately six years.

In May 2016, a child (Child A) then aged six years old, was misbehaving while sitting on the mat with other students. Mr Ormsby asked Child A to stop misbehaving. When Child A did not stop, Mr Ormsby said 'haere mai' to Child A and when Child A approached him, Mr Ormsby pushed Child A at the back of the head with his hand. Child A went face first into the partition wall of the classroom causing a nose bleed. The teacher in the room, on the other side of the partition heard a thump and then the child crying.

The matter was referred to police and Child Youth and Family and interviews were completed with Child A and several other children who had witnessed the incident. The matter was referred to the Education Council (now known as the Teaching Council) and the Complaints Assessment Committee (CAC) undertook an investigation. Mr Ormsby signed an 'undertaking not to teach' and in December 2016 Mr Ormsby received a warning from police for assault on a child.

The New Zealand Teachers Disciplinary Tribunal (Tribunal) heard the matter on 18 September 2018. The hearing was required because Mr Ormsby denied the substance of the CAC charge of serious misconduct. Consistent with what he told police, Mr Ormsby asserted that he did not intend to apply force to Child A and that he must have accidentally propelled Child A into the wall when he sneezed. However, Mr Ormsby still accepted that he was guilty of serious misconduct, in that he had failed to keep a child safe.

The Tribunal had concerns about this approach as they were unable to reconcile his admission of misconduct for something that he alleged to have happened accidentally. Mr Ormsby then changed his stance and accepted the CAC's charge.

The Tribunal found that Mr Ormsby intentionally applied force to Child A and the amount of force used was significant. The Tribunal rejected Mr Ormsby's submission that he did not intend to apply force noting that this disregarded the agreed summary of facts.

In deciding penalty, the Tribunal found this was an "extremely clear-cut example of serious misconduct." Mr Ormsby's registration was cancelled and he was censured, and the register was annotated.

NZTDT 2017/33

BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

UNDER	the Education Act 1989
IN THE MATTER	a charge of serious misconduct referred by the Complaints Assessment Committee to the New Zealand Teachers Disciplinary Tribunal
BETWEEN	**THE COMPLAINTS ASSESSMENT COMMITTEE** Referrer
AND	**ANDREW RATENE ORMSBY** Respondent

DECISION OF TRIBUNAL

Tribunal:	Nicholas Chisnall (Deputy Chair), Susan Ngarimu and Patrick Walsh
Hearing:	18 September 2018 and, subsequently, on the papers
Decision:	24 October 2018
Counsel:	C Paterson and N Copeland for the referrer J Andrews for the Respondent

Introduction

[1] The Complaints Assessment Committee (the CAC) referred a charge against the respondent of serious misconduct and/or conduct otherwise entitling the Tribunal to exercise its powers. The CAC's notice of charge alleges that, on 24 May 2016, the respondent:

> Did use unreasonable force against a child [six-year-old Child A] by pushing [redacted] face first into a room partition wall and causing Child A's nose to bleed.

[2] The respondent accepts that he subjected Child A to physical abuse and that his behaviour amounts to serious misconduct. For the reasons outlined in paragraphs [22] to [37], we have concluded that the commensurate penalty is cancellation of Mr Ormsby's registration to teach.

The evidence

[3] The parties filed an agreed summary of facts, which follows:

> Background
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> ANDREW RATENE ORMSBY is a registered teacher, who began teaching in 2000. Mr Ormsby taught at Te Kura Akonga o Manurewa (Kura), a Maori immersion school in Manurewa, Auckland, for approximately six years. Kura is a primary and intermediate school. Mr Ormsby taught students aged between five to 12 years' old.
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> Incident
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> On 24 May 2016, at approximately 1:10pm an incident occurred where Child A, then aged six years' old, was misbehaving while sitting on the mat with other students. Mr Ormsby asked Child A to stop misbehaving.
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> When Child A did not stop misbehaving, Mr Ormsby said "haere mai" to Child A, requesting Child A to approach him. When Child A approached him, Mr Ormsby pushed Child A at the back of Child A's head with his hand and Child A went face first into the partition wall of the classroom. The impact of [redacted] face hitting the partition wall caused Child A's nose to bleed. Child A began to cry as a result of this incident. Mr Ormsby got a tissue for Child A's bleeding nose.
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> The incident was witnessed by other students in the class, including Child B and Child C.
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> At the time of the incident, Tina Colvin, the Tumaki (Principal) at the Kura was in the classroom on the other side of the partition wall. Ms Colvin heard a loud thump, followed by a child crying and went to investigate. Ms Colvin's formal written statement dated 8 September 2016 is produced by consent at Tab One of the bundle of documents.
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> At approximately 1:30pm, Ms Colvin took Child A to the sick bay and asked Hillary Hakaria, the Administrator at the Kura, to clean [redacted] up and ask what happened. In Ms Hakaria's statement to the Police on 26

September 2016, Ms Hakaria noted that Child A had a bloodied nose, but that it was not currently bleeding, and blood on [redacted] uniform top. She stated "… I cleaned the blood away from [redacted] face with a wet tissue, [redacted] nose appeared to have stopped bleeding. I sponged a bit of the blood off [redacted] uniform at the top, as best I could". Ms Hakaria asked Child A how he got [redacted] blood nose. Child A stated that Mr Ormsby had got Child A by the back of his neck and pushed [redacted] face into a wall. Ms Hakaraia said that she asked Child A what he did and that [redacted] replied, "Some of the kids got cheeky, and I whacked them but not hard."

After Ms Hakaria cleaned the blood away from Child A's face and top, [redacted] remained in the sick bay until 2:30pm, the end of the school day. Ms Hakaria completed an incident report log, which was provided to the Board of Trustees Chairperson, Roberta Morunga when she arrived at the Kura (at the request of Ms Colvin). A copy of the incident report is produced by consent at Tab Two of the bundle of documents.

Ms Morunga and Ms Colvin then met with Mr Orsmby and invited him to take paid leave while the Board of Trustees investigated an allegation that Mr Ormsby had pushed Child A's head into the partition wall, making [redacted] nose bleed. Mr Ormsby accepted this invitation. Mr Ormsby expressed remorse at this time, stating that he was very sorry.

<u>Steps following incident – Mass Allegation Investigation, Police investigation and report to the Education Council</u>

On 30 May 2016, Mr Ormsby and his wife attended a hui with the Board of Trustees sub-committee, comprising of Roberta Morunga, Charlene Harris and Roimata Paoo, and Evana Belich, a representative from NZSTA. The outcome of that hui was that Mr Orsmby was suspended, on full salary, and the incident was to be reported to the New Zealand Police (Police), Child Youth and Family (CYFs), as it was then, and the Education Council.

On 28 June 2016, Ms Morunga and Ms Colvin met with the Police, CYFs and the Ministry of Education at a mass allegation investigation (MAI) meeting. At that meeting, it was determined that a mass allegation investigation would occur. This was led by the Police and CYFs.

On 1 July 2016, Child A was interviewed by Police. The evidential video interview (EVI) and a transcript of that interview are produced by consent at Tab Three of the Bundle of Documents.

On 5 July 2016, the MAI team met with parents of tamariki at the Kura and sought consent to interview their tamariki the following day.

On 6 July 2016, students at the Kura were interviewed by CYFs social workers. Interviews were only conducted with tamariki whose parents had given consent for them to be interviewed.

On 14 July 2016, Ms Morunga, on behalf of the Kura, made a mandatory report to the Education Council.

On 11 August 2016, Mr Ormsby signed an undertaking not to teach.

On 22 August 2016, Child B and Child C were separately interviewed by Police. Copies of their EVIs and transcripts of the interviews are produced by consent at Tab Four and Five of the Bundle of Documents.

On 3 November 2016, Mr Ormsby was interviewed by the Police. A transcript of the interview is produced by consent at Tab Six of the Bundle of Documents.

> On 5 December 2016, Mr Ormsby received a warning from the Police for assault on a child.
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> On 9 March 2017, Mr Ormsby filed his response to the allegations. A copy of the response is produced by consent at Tab Seven of the Bundle of Documents.

The procedural history of this case

[4] The Tribunal convened to hear this matter on 18 September 2018. The hearing was required because the respondent denied the substance of the CAC's charge. Consistent with what he had told police, Mr Ormsby asserted that he had not intended to apply force to Child A. The respondent's version of events was that he must have accidentally propelled Child A into the wall when he sneezed. For this reason Ms Andrews, in her opening statement, submitted:

> It is not accepted that the respondent intended to push Child A's face into the partition, that the Committee needs to prove intention to establish liability or that the evidence establishes that the respondent intended to push Child A's face into the partition.

[5] The respondent accepted that he was guilty of serious misconduct, but on a different basis to that charged by the CAC. Ms Andrews summarised the position to be that:[1]

> The respondent accepts that he used unreasonable force against Child A by pushing [redacted] into a wall partition and causing [redacted] nose to bleed as he considered that it was unreasonable to use any force as there were clearly better options available to him than using a physical intervention.
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> …
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> The respondent accepts liability on the basis that he failed to uphold his duty as a teacher to keep students safe and that he caused the child to be injured and that his conduct amounts to serious misconduct. The respondent was unwell at the time impairing his ability to respond thoughtfully to an unfolding situation.

[6] At the commencement of the hearing, we outlined a series of concerns that we held in relation to the respondent's approach. First, as Mr Ormsby maintained that he accidentally hurt Child A, we were unable to discern a

[1] Later in her submissions Ms Andrews said, "His lack of awareness of what happened points to an accident".

principled basis for the respondent's concession that he had committed misconduct.

[7] Second, we raised a concern about the way the respondent invited the Tribunal to resolve the stark factual dispute. What Mr Ormsby proposed was that we watch the evidential interviews undertaken by police with Children A, B and C, and hear from [redacted]. However, while Ms Andrews' submissions developed a wide-ranging challenge to the credibility and reliability of Children A, B and C, Mr Ormsby did not seek to cross-examine them.

[8] We invited the respondent to consider the duty contained in s 92(1) of the Evidence Act 2006, which relevantly provides that:[2]

> In any proceeding, a party must cross-examine a witness on significant matters that are relevant and in issue and that contradicts the evidence of the witness, if the witness could reasonably be expected to be in a position to give admissible evidence on those matters.

[9] For completeness, we record that where the duty in s 92 has been breached, the Evidence Act relevantly confers discretion upon the fact-finder to:[3]

> (a) Grant permission for the witness to be recalled and questioned about contradictory evidence;
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> (b) Admit the contradictory evidence on the basis that the weight given to it may be affected by the fact that a witness for the other party may have been able to explain the contradiction, and was not questioned about the evidence in dispute; or
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> (c) Exclude the evidence.

[10] We had in mind (b), above, when we invited the respondent to consider the risk associated with declining to test the CAC's evidence.

[11] We adjourned to enable Ms Andrews to take instructions and to confer with counsel for the CAC. As a consequence, Mr Ormsby changed his stance by accepting the CAC's charge as framed. The agreed summary of

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[2] Which codified the common law duty described in *Browne v Dunn* (1893(6) R67, HL).
[3] Section 92(2)(a) to (c), which are those we consider are relevant here.

facts was amended to reflect that concession, which we set out again for convenience:

> When Child A approached him, Mr Ormsby pushed Child A at the back of Child A's head with his hand and Child A went face first into the partition wall of the classroom. The impact of [redacted] face hitting the partition wall caused Child A's nose to bleed.

[12] With the basis of the respondent's acceptance of responsibility to the charge settled, we adjourned the hearing to enable the parties to address penalty.

Our findings

[13] Section 378 of the Education Act 1989 defines "serious misconduct" as behaviour by a teacher that has one or more of three outcomes.[4] As was affirmed by the District Court, the test under s 378 is conjunctive.[5] As such, as well as having one or more of three adverse professional effects or consequences, the conduct concerned must also be of a character and severity that meets the Education Council's criteria for reporting serious misconduct.

[14] The Education Council Rules 2016 (the Rules) describe the types of behaviour that are of a prima facie character and severity to constitute serious misconduct.[6]

[15] The parties are agreed that the respondent's behaviour constitutes serious misconduct. While the Tribunal is required to reach its own view, we have no hesitation accepting that their assessment is correct.[7]

[16] Starting with the first limb of the definition of serious misconduct, we accept that the respondent's behaviour fulfils each of the three criteria in s 378 of the Education Act. First, the respondent's actions physically harmed Child A. Also, while we were not provided with an impact statement, it is a

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[4] Conduct that adversely affects, or is likely to adversely affect, the well-being or learning of one or more children; or reflects adversely on the teacher's fitness to be a teacher; or which may bring the teaching profession into disrepute.
[5] *Teacher Y v Education Council of Aotearoa New Zealand* [2018] NZDC 3141, 27 February 2018, at [64].
[6] Rule 9 was amended on 18 May 2018, but this decision refers to the criteria that applied before that amendment.
[7] Notwithstanding the parties' agreed position, we have reminded ourselves the burden rests on the CAC to prove the charge, on the balance of probabilities.

logical inference that this must have been a distressing experience for Child A, and that its effects persisted for some time after 24 May.

[17] Second, the respondent's use of force adversely reflects on his fitness to teach. As we said in *CAC v Rangihau*,[8] it is incumbent on all in the teaching profession to have a clear appreciation of the prohibition on the use of corrective and disciplinary force contained in s 139A of the Education 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…

[18] Third, we accept that the respondent's conduct is of a nature that brings the teaching profession into disrepute. On this criterion, the High Court in *Collie v Nursing Council of New Zealand*[9] said there 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. We consider there can be no doubt that Mr Ormsby's behaviour towards Child A risks lowering the profession's standing in the eyes of the public.

[19] Having fulfilled the first step in the test for serious misconduct, we must next be satisfied that the respondent's conduct is of a character and severity that meets one or more of the reporting criteria in 9(1) of the Rules. Again, of this there can be no doubt. We are satisfied that the respondent's behaviour engaged four of r 9(1)'s criteria. First and foremost, Mr Ormsby's use of force against Child A constituted "physical abuse", in contravention of r 9(1)(a) of the Rules. Second, it comprised "ill-treatment" of a child in the respondent's care under r 9(1)(f). Third, this was an assault that "could" have been prosecuted. As such, the behaviour falls within r 9(1)(n), which describes "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". Fourth, the respondent's behaviour is of a nature that

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[8] *CAC v Rangihau* NZTDT 2016/18, at [58].
[9] *Collie v Nursing Council of New Zealand* [2001] NZAR 74, at [28].

"brings, or is likely to bring, discredit to the teaching profession", thus in breach of r 9(1)(o).

[20] We have focused on r 9(1)(a) and therefore undertaken the context-specific assessment we described in earlier cases to determine whether the respondent's behaviour reaches the threshold for "physical abuse".[10] We are satisfied that:

(a) Mr Ormsby intentionally applied force to Child A; thus this was an assault.[11]

(b) The amount of force used was significant, as evidenced by the fact that Child A's impact with the wall, which caused [redacted] injury,[12] was audible to a teacher in the adjacent room. As we said in *CAC v Emile*,[13] a single push can undoubtedly amount to physical abuse when the teacher either intends to cause harm or is reckless about the likelihood of doing so. Also, in *CAC v Davies*[14] we emphasised that the application of force to the most vulnerable part of a person's body - the head – is inherently serious.

(c) The respondent intentionally applied force to Child A for a purpose prohibited by s 139A of the Education Act. This is despite Ms Andrews' submission that the evidence did not disclose why force was used. She submitted that:

> Because of the uncertainty around where the parties were located at the crucial moment [which was a submission focusing on whether the respondent went to Child A, or vice versa, before the assault happened] there is uncertainty around what the purpose of the force was. The Tribunal is cautioned about inferring that there has been a breach of s

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[10] *CAC v Teacher* NZTDT 2016/50, *CAC v Mackey* NZTDT 2016/60 and *CAC v Whelch* NZTDT 2018/4.
[11] Which is defined in the Crimes Act 1961 as the act of intentionally applying force to the person of another.
[12] We adopt the meaning of "to injure" in the Crimes Act 1961, which is to cause "actual bodily harm". This need not be an injury of a permanent character; nor need it amount to what would be considered grievous bodily harm. However, it must be more than merely transitory and trifling. We consider that Child A's blood-nose clearly meets this definition.
[13] *CAC v Emile* NZTDT 2016/51.
[14] *CAC v Davies* NZTDT 2016/28.

> 139A, just because there has been a breach of rule 9(1)(a) unless there is clear evidence of it, which is not the case here.

We reject this submission. Ms Andrews' argument disregards both the agreed summary of facts and what the respondent told police, as well as what he said in his brief of evidence prepared for this proceeding. This is that Child A was hitting another student, and he told [redacted] to stop. When Child A continued to hit the [redacted], the respondent asked [redacted] to "come to me and make [redacted] way to the wall",[15] which [redacted] did. We draw the logical and inevitable inference that Mr Ormsby intentionally applied force to correct or punish Child A's preceding behaviour towards another member of class. We conclude that the respondent's act was triggered by a loss of composure when faced with Child A's challenging behaviour.

[21] In summary, this is an extremely clear-cut example of serious misconduct.

Penalty

[22] The primary motivation regarding the establishment of penalty in professional disciplinary proceedings is to ensure that three overlapping purposes are met. These are to protect the public through the provision of a safe learning environment for students, and to maintain both professional standards and the public's confidence in the profession.[16] We are required to arrive at an outcome that is fair, reasonable and proportionate in the circumstances in discharging our responsibilities to the public and profession.[17]

[23] Ms Andrews invited us to establish guidelines for the assessment of penalty in future cases. Ms Andrews submitted that:

> A framework where penalty is accessed on the basis of aggravating and mitigating factors would be helpful for all counsel so as to

[15] Police statement, at p 3 and Mr Ormsby's brief of evidence at p 6-7.
[16] The primary considerations regarding penalty were discussed in *CAC v McMillan* NZTDT 2016/52.
[17] See *Roberts v Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354, at [51].

> streamline cases and give a framework for constructive discussions between the parties.

[24] We decline to take up Ms Andrews' invitation. First, we do not accept that there is a lack of transparency about the factors relevant to the establishment of penalty. Second, we are mindful that s 9(1)(a) of the Rules was recently amended. It would not be sensible to create guidelines in respect to a rule that has been superseded. Nor has the CAC had the opportunity to address Ms Andrews' submissions and we are not prepared to consider the creation of guidelines without its input. We have also kept in mind Ms Andrews' final submission that, "This case has been hanging over the respondent since May 2016 … It is time to draw this case to a close". Undertaking the procedure required to create penalty guidelines would not be conducive to achieving that end.

[25] We do, however, acknowledge Ms Andrews' point that we must seek to ensure that any penalty we institute is comparable to those imposed upon teachers in similar circumstances, as consistency is the bedrock of fairness. We observe that in NZTDT 2017/1 we undertook a review of the facts and outcomes in a number of Tribunal decisions involving the use of physical force. We have considered those cases, as well as the decisions relied upon by the parties that were not reviewed in NZTDT 2017/1.

[26] Our assessment of penalty must bear in mind relatively recent legislative developments that represent Parliament's commitment to reducing the harm to children posed by those employed or engaged in work that involves regular contact with them.[18] It must also take into account the obligation on the Education Council to "ensure" that students are provided with a safe learning environment.[19] The specific focus of the Vulnerable Children's Act 2014 (the VCA) is on safety, which mirrors a key factor the Tribunal must consider whenever it decides if a teacher who has engaged in behaviour prohibited by the Rules – whether it took place inside or outside the work environment, and whether or not it attracted a criminal conviction –

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[18] Specifically, s 139A of the Education Act and the Vulnerable Children's Act 2014. We addressed these developments in *CAC v Teacher* NZTDT 2016/50 and *CAC v Mackey* NZTDT 2016/60.

[19] Section 377 of Part 32 of the Education Act, which came into effect on 1 July 2015, which requires the Education Council to "ensure" that students are provided with a safe learning environment.

is fit to remain a member of the profession. As we said in *Mackey*, and more recently in *Whelch*, we accept that the VCA's introduction reinforces the importance of our obligation to closely scrutinise the fitness to teach of any practitioner who faces a disciplinary charge for behaviour of a type that may pose an ongoing risk to students.

[27] With this statutory framework in mind, the question is whether we can be satisfied that the respondent will not pose a risk to students if we allow him to continue to teach?

[28] In *CAC v Fuli-Makaua*[20] we recently endorsed the point that cancellation is required in two overlapping situations, which are:

(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;[21] 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.[22]

[29] We regrettably hold the view that this is a paradigm "clear-cut example" of the worst kind of misconduct by a practitioner for which the maximum penalty of cancellation is reserved; thus falling into the first category described in *Fuli-Makaua.* The reasons for this conclusion will be self-evident. in the circumstances that Mr Ormsby faced - where Child A had complied with his direction to move away from the other child - the use of force – which most certainly contravened s 139A of the Education Act – was a gratuitous, rather than spontaneous, loss of self-control. We cannot condone the respondent's act of applying force to the head of an inherently vulnerable six-year-old child sufficient to cause injury. Such an act is

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[20] *CAC v Fuli-Makaua* NZTDT 2017/40, at [54], citing *CAC v Campbell* NZDT 2016/35 at [27].
[21] Referring to the sixth of eight penalty factors described by the High Court in *Roberts v Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354, at [50].
[22] See *CAC v Teacher* NZTDT2013/46, 19 September 2013 at [36].

anathema to tikanga Māori. Behaviour of this gravity has an adverse effect on the respondent's fitness to teach and inevitably lowers the reputation of the profession to a degree where cancellation of his registration is virtually inevitable.

[30] Despite our finding regarding the seriousness of Mr Ormsby's behaviour, we have considered the mitigating factors relied upon to determine whether his "reflection and remedial steps taken since the event" enable the disciplinary purposes behind the Tribunal's powers to be met by a penalty short of cancellation.[23]

[31] Our assessment of the applicable mitigating factors and their relative weight follows:

(a) Mr Ormsby belatedly accepted responsibility for his behaviour by accepting the CAC's charge as framed. However, the value of this is strongly tempered by the fact that the respondent persevered, up to hearing, with the far-fetched explanation that his behaviour was entirely accidental. Also, we have a strong residual doubt whether Mr Ormsby genuinely takes responsibility for his behaviour. This is because in his affidavit, under the heading "The Children", he said:

> I chose this pathway [to accept the charge as framed] when it was pointed out to both myself and my representative, that if our case was to continue, then the students had to be present for cross examination. I did not want this to happen. A tribunal is not a safe environment for small children. I do not want to have the children go through any further ordeals as they should be able to put this incident behind them and not have to relive it.

(b) We accept that the respondent is genuinely contrite for having caused injury to Child A.

(c) Mr Ormsby has no record of prior misconduct. However, the CAC submitted the police statement of Mr Ormsby's Tumuaki, which said that the respondent has, "an old style of teaching, very stern, growls, prefers his order within the class and with the students". While we acknowledge that the contents of this

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[23] *CAC v Davies*, above n 14, at [54]. See, too, *CAC v White* NZTDT 2017/29, at [26] and [27].

statement were not tested in cross-examination, and that there is no evidence that Mr Ormsby "growled" at Child A on 24 May 2016, we have taken into account Ms Andrews' realistic concession that he has "a touch of the old school about him", which supports the proposition that his pedogeological style does not conform with modern standards.

(d) Mr Ormsby completed two one-day professional courses subsequent to his suspension - "Working With Challenging Behaviour: What to do when class-room wide interventions are not succeeding" and "Mindfulness Practices". While he states that he is prepared to be mentored and to undertake any programme recommended by the Council, the explanation proffered by Ms Andrews for why a more intensive course was not selected troubles us - that, "It is not reasonable to expect a teacher to invest heavily in training for the teaching profession when there is a risk he might be expelled from it". Ms Andrews also submitted that "there is little point in directing him to take anger management training" because the Mindful Practices programme is "directed at becoming self-aware of your own feelings, both in body and mind, so addresses the root issues". Given what we have found to have led to the assault on Child A, we do not accept the validity of this submission.

(e) The behaviour happened two years ago, although we cannot treat that as a strong mitigating factor, as Mr Ormsby has not been teaching during that time and therefore cannot point to a positive post-conduct track record.

[32] We are left with considerable disquiet regarding the degree of insight Mr Ormsby has into the cause of his behaviour. While he denies that he reacted to Child A out of anger,[24] we do not, for the reasons outlined earlier, accept that. It begs the question – if not anger or frustration, then what motivated Mr Ormsby's assault?

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[24] He said in his brief, "I was not feeling any anger towards Child A but I was feeling very unwell at the time with flu like symptoms. My nose was very thick with mucus and I think that I sneezed at about that time".

[33] Mr Ormsby persisted with the explanation that the genesis of his behaviour - what Ms Andrews' describes as an "impairment" – was the flu. Mr Ormsby deposed that:

> Dragging my body out of bed, preparing myself for work, wrapping many clothes around my body to keep me warm, I never imagined that this day would turn my whole world upside down. I am still struggling with the idea that a child was hurt by me under my care. Parents do not send their children to school to be hurt by another child let alone the teacher.

[34] In the brief of evidence filed for the hearing, under the heading "Hindsight", Mr Ormsby said:

> I should not have been at school on the day of the incident. I was very sick with the flu, snotty nose and running eyes, aching body, coughing and sneezing. My ability to teach at 100 percent was not there. My ability to react to anything was very low, and, I was a danger not only to myself but to any student, teacher that was around me. In hindsight I should have been at home and not at school.

[35] What we take Mr Ormsby to be saying is that the fact he was sick reduced his power of self-control. However, something as ordinary as a transitory illness cannot operate as a justification or excuse for Mr Ormsby's actions towards Child A. After all, managing challenging behaviour of the type said to have been exhibited by Child A, which is an unavoidable feature of teaching practice, is necessarily a critical professional obligation.

[36] Given that Mr Ormsby does not accept that anger played any part in his behaviour, or that he used force for a disciplinary purpose, we are unsure what value he realistically derived from the two courses that he has undertaken. Indeed, we are unsure what insight either course can provide that he does not already possess – or ought to possess - from having taught for about two decades.

[37] The primary disciplinary purpose engaged in this case is the need to ensure a safe learning environment for those Mr Ormsby will teach if he remains part of the profession. In the absence of a candid acknowledgement by Mr Ormsby of the reason why he assaulted Child A, and recognition that he breached s 139A of the Education Act, we are not satisfied that a penalty short of cancellation will ensure that purpose is met. For this reason, we order that Mr Ormsby's registration be cancelled.

Non-publication

[38] We make an order under s 405(6) of the Education Act for the permanent suppression of the names and identifying particulars of Child A, Child B and Child C.

Costs

[39] The final determination regarding costs is delegated to the Deputy Chair.

[40] We direct that a schedule of the Tribunal's costs be prepared and provided to the respondent. The CAC is to file and serve a schedule of its costs on the respondent within 10 working days. The respondent then has 10 working days to file a memorandum, and any supporting evidence, in respect to costs.

Orders

[41] The Tribunal's formal orders under the Education Act are as follows:

(a) The respondent is censured for his serious misconduct pursuant to s 404(1)(b).

(b) The respondent's registration is cancelled under s 404(1)(g).

(c) The register is annotated under s 404(1)(e).

(d) There is an order pursuant to s 405(6)(c) permanently suppressing the names and any details that might identify Child A, Child B and Child C.

Nicholas Chisnall
Deputy Chair

NOTICE

1 A person who is dissatisfied with all or any part of a decision of the Disciplinary Tribunal under sections 402(2) or 404 of the Education Act 1989 may appeal to a District Court.

2 An appeal must be made within 28 days of receipt of written notice of the decision, or within such further time as the District Court allows.

3 Section 356(3) to (6) apply to every appeal as if it were an appeal under section 356(1).

NZTDT 2017/33C

BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

UNDER	the Education Act 1989
IN THE MATTER	of an application for costs pursuant to section 404(1)(h)
BETWEEN	**THE COMPLAINTS ASSESSMENT COMMITTEE** Applicant
AND	**ANDREW RATENE ORMSBY** Respondent

DECISION OF TRIBUNAL REGARDING COSTS

Tribunal:	Nicholas Chisnall (Deputy Chair)
Decision:	10 December 2018
Representation:	C Paterson and N Copeland for the applicant J Andrews for the respondent

[1] The Tribunal disposed of this matter in a substantive decision dated 24 October 2018. We found that the Complaints Assessment Committee (the CAC) had made out its charge of serious misconduct against the respondent and made penalty orders. We invited the CAC and Secretary to provide schedules of costs to the respondent and made a timetabling order for the filing of memoranda and evidence, should the making of a costs order be opposed.[1]

[2] I duly received memoranda from both counsel.

[3] The CAC's total costs are in the amount of $35,995.95 exclusive of GST.

[4] The Tribunal's costs come to $6,934, which accounts for members' fees, travel disbursements, venue costs and registrar's fees.

[5] The CAC submits that its costs are reasonable in the circumstances of the case, and that the respondent should be ordered to make a 50 per cent contribution. In contrast, while Ms Andrews does not dispute that a 50 per cent contribution should be made to the Tribunal's costs under s 404(1)(i) of the Education Act 1989, she submits that the CAC's costs are not reasonable.

[6] I turn now to the respective positions of the parties. The CAC submitted that:

a. Mr Ormsby pursued a "far-fetched" explanation that his behaviour was accidental, "Instead of accepting responsibility for his actions at an early stage, particularly in light of a strong Committee case"; and

b. The respondent, "Having decided to defend the charges, acted in such a way as to contribute unnecessarily to the time and expense incurred by the Committee".

[7] Ms Andrews submitted that:

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[1] The question of costs was delegated to me as Deputy Chair.

a. Mr Ormsby, “Had a right to defend himself as many teachers have done before, sometimes with far-fetched explanations. This typically results in a one-day defended hearing bearing costs of less than $13,000. This submission does not explain how the Committee’s bill arrived at over $20,000 more than the norm”; and

b. Further, “The Committee overstates the strength of their case. While it was clear in the file that the respondent had pushed student X [Child A in our decision], the evidence around an "intentional push" was much less certain. If the case was so strong, it would have been unlikely that they would have looked beyond the file to the children's EVI evidence. Questions of plausibility were not confined to the respondent's explanation, which is significant in light of the Committee's burden to prove intention”.

[8] The Tribunal’s power to order costs is found in s 404(1)(h) of the Education Act, which confers a discretion. It states:

> 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:
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> …
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> (h) require any party to the hearing to pay costs to any other party.
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> …

[9] The Tribunal issued a Practice Note on costs in 2010 (the Practice Note). It sought to achieve an “objective and predictable” approach to costs applications. However, we emphasised that costs must be considered on a case-by-case basis to ensure that a fair result is achieved, but:

> That said, the purpose of this Practice Note is to signal – so that it does not come as a surprise to anyone – that, in the future, the Tribunal’s starting point will be to consider in each case whether it is fair and appropriate, having regard to the circumstances, that it make an award in favour of the successful party reflecting 50% of all three categories of costs.

[10] The Practice Note reflects the general principle that the burden of costs of disciplinary proceedings ought to fall on the practitioner found to be at fault, rather than on his or her professional body.

[11] As we have previously said, there is no applicable formula or scale when assessing the reasonableness or otherwise of costs.[2] This is a fact-specific assessment and a fair balance must be struck. As such, I was not aided by Ms Andrews' submission that the CAC's legal expenses for a one-day defended hearing do not "typically" exceed $13,000. That being said, I acknowledge that the sum involved here is significant. However, I do not accept that this means the CAC's costs are, prima facie, unreasonable.[3]

[12] Parties are afforded a degree of latitude regarding how the case is conducted and the enquiry regarding reasonableness should not unduly dwell on whether, with the benefit of hindsight, certain decisions or tasks might have been made or approached differently. In simple terms, the respondent was entitled to put the CAC to proof. As such, I accept Ms Andrews' point that costs are not meant to be punitive, as a practitioner has the right to defend him or herself and should not be deterred from doing so by the risk of a costs order.[4] This is a reason why the presumption in ordinary civil proceedings - that properly incurred costs should follow the "event" and be paid by the unsuccessful party - has no direct application to disciplinary proceedings.

[13] I agree with Ms Andrews that it would have been helpful had the CAC provided a breakdown of the costs associated with the particular tasks identified in its memorandum. However, that has not prevented me from concluding that its costs are reasonable. There is an explanation why the CAC's costs are significantly higher than what might otherwise be expected for a proceeding of this nature. This is that a novel issue arose around the admissibility in this forum of the evidential interviews (EVIs) held with the three child witnesses, which were recorded by police as part of its investigation of whether Mr Ormsby had assaulted Child A. The Tribunal determined the issue on 16 January 2018 and made an order that police release the EVIs to the CAC.[5] Ancillary orders were subsequently made on

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[2] In *CAC v Teacher C* NZTDT 2016/40C, at [6].
[3] We ordered a 50 per cent contribution to costs in the following cases: *CAC v Northwood* NZTDT 2016/32C, where the CAC's costs were $33,000 and the Tribunal's $23,000; and *CAC v Teacher C* NZTDT 2016/40C, where the CAC's costs were $36,492.34 and the Tribunal's $10,340.
[4] *Vatsyayann v PCC* [2012] NZHC 1138.
[5] The order was made in reliance on ss 119A and 119B of the Evidence Act 2006.

24 April 2018 to enable Ms Andrews and the respondent to view the EVIs and, on 28 June, for transcripts of the interviews to be prepared for the hearing.

[14] Given the novelty of the CAC's application to receive and rely upon the children's EVIs, I am satisfied that Mr Ormsby should not be required to meet the costs associated with that aspect of the proceeding. Nor would it be right to penalise the respondent for deferring his decision whether to defend the charge until he was in receipt of the EVIs, since they comprised the CAC's primary evidence against him.

[15] I accept Ms Andrews' submission that Mr Ormsby should not be penalised for defending the charge. For that reason, I do not consider it necessary to gauge the strength of the evidence that Mr Ormsby faced. Further, it would be wrong to pedantically scrutinise the way in which Mr Ormsby, and Ms Andrews on his behalf, performed at, and up to, the hearing. This reflects the reality that legal representatives make decisions before and during hearings, exercising their best judgement in the circumstances. With the benefit of hindsight, it is always possible to identify certain decisions that might have been approached differently.

[16] That being said, the approach that Mr Ormsby took when the Tribunal convened on 18 September invites criticism and must have a bearing on my assessment of costs. The nub of the charge was that Mr Ormsby intentionally applied force to Child A. That was the only issue of consequence to be determined at the hearing. Yet, as we said in our substantive decision:

> [6] At the commencement of the hearing, we outlined a series of concerns that we held in relation to the respondent's approach. First, as Mr Ormsby maintained that he accidentally hurt Child A, we were unable to discern a principled basis for the respondent's concession that he had committed misconduct.
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> [7] Second, we raised a concern about the way the respondent invited the Tribunal to resolve the stark factual dispute. What Mr Ormsby proposed was that we watch the evidential interviews undertaken by police with Children A, B and C, and hear from him. However, while Ms Andrews' submissions developed a wide-ranging challenge to the credibility and reliability of Children A, B and C, Mr Ormsby did not seek to cross-examine them.
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> [8] We invited the respondent to consider the duty contained in s 92(1) of the Evidence Act 2006, which relevantly provides that:

> In any proceeding, a party must cross-examine a witness on significant matters that are relevant and in issue and that contradicts the evidence of the witness, if the witness could reasonably be expected to be in a position to give admissible evidence on those matters.

[17] As our substantive decision explains, the Tribunal adjourned to enable Ms Andrews to take instructions after we outlined the risk that Mr Ormsby's approach carried. Having conferred with Ms Andrews, Mr Ormsby chose to accept that he had intentionally applied force to Child A and the agreed summary of facts was amended to reflect that concession. It then read:

> When Child A approached him, Mr Ormsby pushed Child A at the back of Child A's head with his hand and Child A went face first into the partition wall of the classroom. The impact of [redacted] face hitting the partition wall caused Child A's nose to bleed.

[18] I consider that it represented a fundamental error on the respondent's part to expect the Tribunal to make reliability and credibility findings in respect to the CAC's witnesses without cross-examination. The Tribunal and CAC incurred wasted costs as a consequence of the respondent's approach. Therefore, I accept the CAC's submission that Mr Ormsby:

> Having decided to defend the charge, acted in such a way as to contribute unnecessarily to the time and expense incurred by the Committee.

[19] Whilst somewhat arbitrary, I reduce the sum to which my order will apply by $15,000 to reflect my finding at [14]. The modified sum against which the order will be made is therefore $20,995.95, exclusive of GST. I order the respondent to pay $10,497,97 to the CAC pursuant to s 404(1)(h) of the Education Act.

[20] I order the respondent to make a 50 per cent contribution towards the Tribunal's full costs. Mr Ormsby is therefore ordered to pay $3,467 to the Council pursuant to s 404(1)(i) of the Education Act.

[21] For completeness, I observe that in previous cases we have reduced awards of costs from 50 per cent to one-third where the Tribunal has been provided with evidence by a respondent that he or she is impecunious.[6] However, Mr Ormsby did not make available any information addressing his financial position. I have therefore proceeded on the basis that Mr Ormsby

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[6] See, for example, *CAC v Rangihau* NZTDT 2016/18C and *CAC v Tuaputa* NZTDT 2016/13C.

can meet an order for costs, although, as the CAC acknowledged, it may be necessary for him to pay in instalments. He can make arrangements with the Council to do so.

Nicholas Chisnall
Deputy Chair