EDUCATION COUNCIL
NEW ZEALAND | Matatū Aotearoa

Complaints Assessment Committee (CAC) v Hosking
NZ Disciplinary Tribunal Decision 2017/9

Joanne Maree Hosking, a registered teacher, worked at an early childhood centre in 2015 and 2016. During this time other staff at the centre reported her rough handling with children, issuing instructions in a growling or harsh tone, swearing around the children, and smacking a child. The rough handling included sitting children down on the mat using force, grabbing and dragging a child to move him, holding the same child tightly, and trying to push food into a child's mouth. Ms Hosking denied the allegations.

The Education Council Complaints Assessment Committee (CAC) investigated and referred the matter to the New Zealand Teachers Disciplinary Tribunal (Tribunal).

The Tribunal found the evidence it heard about Ms Hosking smacking and rough handling children, and using inappropriate language met all three of the criteria for serious misconduct per s378 of the Education Act 1989.

The Tribunal found that the act of smacking amounted to physical abuse and said, "there is absolutely no place for smacking a child in today's education system." The Tribunal considered that the rough handling amounted to ill-treatment, and that the inappropriate language used revealed a pattern of behaviour which would bring discredit to the profession.

When considering penalty, the Tribunal noted that the "use of physical force, even at a lower level, is unacceptable in New Zealand schools, and that any teacher who uses physical force contrary to the prohibition in the Act puts his or her status as a teacher in peril".

The Tribunal considered that in this case, Ms Hosking had not taken any steps to address her conduct, nor had she expressed remorse or responsibility for her actions. Her conduct consisted of a pattern of behaviour, rather than a one-off incident, which reflects adversely on her ongoing fitness to practise.

Noting that Ms Hosking did not reflect on her practice, or her behaviour, the Tribunal said there was a "risk of becoming ineffective and closed to opportunities to ongoing professional learning… it is possible that this conduct might not have led to cancellation, had there been a willingness to engage and learn, but in the circumstances where the teacher has not wished to do so and has asked to be de-registered, cancellation is the appropriate penalty".

Ms Hosking's registration was cancelled, and she was ordered to pay costs.

BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

NZTDT 2017-9

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	**JOANNE MAREE HOSKING**
	Respondent

TRIBUNAL DECISION

21 March 2018

HEARING: Held at Ashburton on 10 October 2017 (on the papers)

TRIBUNAL: Theo Baker (Chair)

Nikki Parsons and Stuart King (members)

REPRESENTATION: Mr Simon Waalkens for the CAC

The respondent represented herself

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:

   Between December 2015 and July 2016 physically abused children, and/or used inappropriate force and/or inappropriate language when interacting with children in her care at Best Start Edukids Shirley.

2. At a pre-hearing conference on 4 July 2017 the respondent advised that she denied the charge, and that she disputed the facts. The matter was therefore set down for hearing in Christchurch in September and directions issued for filing evidence.

3. The CAC filed signed briefs of evidence from the following witnesses:

   - Ashley Sewell
   - Sherilyn Brandy
   - Charlotte Sutton

4. Before the respondent's evidence was due, on 15 August 2017 she emailed the Tribunal secretary saying that she had sought legal advice and she wished to be deregistered. Later in the day she emailed advising she would not attend the hearing. The CAC lawyer, Mr Waalkens, was not copied into the email, and a day later he filed a memorandum seeking directions about the way in which one CAC witness was to give her evidence.

5. A teleconference was convened on 17 August 2017. The respondent did not attend. In light of the respondent's indication that she did not intend to appear at the hearing, it was suggested that the matter could be dealt with on the papers, subject to either party advising if they wished to be heard in person.

6. The respondent did then file a statement seeking permanent name suppression and responding to the evidence.

Evidence

7. The Tribunal considered the statements of the CAC witnesses and two statements filed by the respondent.

CAC Statements

8. Ashley Sewell is a provisionally registered teacher at Edukids Centre (the Centre). She

became head teacher there in late 2016. She worked with the respondent at the Centre for the first half of 2016, Ms Sewell usually in the preschool, and the respondent in the nursery.

9. Ms Sewell described the respondent's general behaviour and said that she could hear the respondent yelling at children in the nursery through the window box to the kitchen or through a door separating the pre-school and nursery. The respondent would tell Ms Sewell if she did not like a child, and one of those was Child A, whom Ms Sewell acknowledged was "a bit of an aggressive kid". Ms Sewell said that the respondent took Child A's dummy and cuddle from her on her first day.

10. Ms Sewell recounted a specific incident when the respondent yelled at Child A. She said that this was "the worst incident of her yelling" and it happened "around two weeks before she had the complaints made against her". Ms Sewell said that Child A wanted a pram that another child had and so tried to take it away and was hitting the other child and crying. According to Ms Sewell, the respondent yelled at Child A to stop and leave the other child alone. Child A listened and left but later when the pram was unattended, came back. The other child then came back and tried to take the pram from Child A, who started crying. The respondent yelled, "For god's sake" and threw the pram away. Ms Sewell said that the respondent then saw her and changed her demeanour.

11. Ms Sewell described another incident when she was in the kitchen and saw the respondent putting a crying child to sleep in a cot in the sleep room. In answer to a question from Ms Sewell the respondent said that she was giving the child "time out".

12. Ms Sewell did not see the respondent handle any children in a rough manner.

13. Ms Brandy is a casual relieving teacher. She said that on or about 29 June 2016 when she was working at the Centre she observed the respondent in the sleep room. The door to the sleep room had swung open and she could see the respondent standing inside by the closest cot to the door. Ms Brandy said in her statement:

I saw Joanne's hand go up in the air at a 45 degree angle. I then heard a sound of a hand hitting a nappy. I could not see what Joanne had hit, but it did not sound like a hand hitting wood or a pillow or mattress. It sounded like a hand hitting a nappy. I instantly heard a kid, a girl I think, yelling out and crying. The kid very quickly went quiet.

Whilst I cannot be 100% sure, given what I saw and heard I believe Joanne smacked the kid.

14. Ms Brandy said that the next day she phoned the reliever coordinator at Beststart to discuss what had happened and following that she sent an email to Justine Keys, setting out some of her concerns.

15. Ms Brandy described some other conduct that had caused her concern. She said that the respondent would sometimes put the children down onto the mat a bit harshly and hard on their bottoms. She did not "push" them, but she put them down with a bit of force.

16. Ms Brandy also said that sometimes the respondent would get grumpy and would say things that were mean and would use a harsh tone. In particular Ms Brandy heard:

    - On at least four occasions the respondent said "Go to sleep" and "Be quiet" in a harsh tone through "gritting" teeth
    - Daily calling children, "You little tart"
    - Growling [at] the children by saying, "Walking feet" when they start running using a harsh and mean voice.

17. Ms Sutton is a caregiver who works at the Centre as a reliever. Ms Sutton said that there were three children (Child A, Child B, Child C) the respondent seemed to treat unfairly. On a number of occasions Ms Sutton saw the respondent handle children in a rough manner, including grabbing a child by the arm and pulling the child along at her pace.

18. Ms Sutton said that after her knee operation, the respondent would react angrily when the children touched her knee. Child B would touch her knee a lot accidentally and the respondent did not like this.

19. On at least one occasion Ms Sutton saw the respondent grab Child B by the arm and drag him from inside the nursery to the sleep room when he would not stop crying. Ms Sutton said that the respondent grabbed Child B quite tightly under his arms, not far from his elbows, crouched down quite slowly on to one knee, which she assumes was her good knee, and almost throw Child B onto the stretcher bed on the floor. He was almost two at the time. He would cry more when she did this. Ms Sutton said that from the nursery play area, she had a clear view of the sleep room. She offered to take over to help get Child B to sleep, but the respondent said that she was fine.

20. Ms Sutton also remembers the respondent trying to push food into the child's mouth with a spoon, even though the child was trying to refuse.

21. Ms Sutton said that with these three children, the respondent often spoke to them right in front of their faces. Child Y had difficulty swallowing and chewing her food sometimes and the respondent would call her “disgusting” and “foul” to her face.

22. Although Ms Sutton does not recall the respondent swearing directly at the children, the respondent would swear under her breath in front of the children. On one occasion a child heard her swear once and tried to repeat the swear word.

23. Ms Sutton said that the worst incident was when the respondent smacked Child A. Ms Sutton was in the kitchen which was next to and looked out into the nursery and the sleep room. The sleep room is within the nursery and there are two big glass doors from the nursery into the sleep room. She said that there is a cut out window box in the wall from the kitchen to the nursery. At the time the one glass door was open and she had a clear view of the sleep room and the cots inside. The respondent was in the sleep room putting children to sleep.

24. According to Ms Sutton, Child A was lying in her cot on her stomach and was crying. Ms Sutton saw the respondent give a hard smack on the bottom with her open hand. It was not extremely hard, but it was still a smack. Child A cried a bit more. The respondent picked her up and put her on the ground and made her walk out of the sleep room. Ms Sutton moved away where the respondent could not see her. She complained to her manager a few days later.

Evidence for the respondent

25. Included in the documents before the tribunal were two statements filed by the respondent. There was an unsigned letter dated 27 July 2017 addressed “To whom it may concern”. This document is dated before the evidence for the CAC was filed. The purpose of it is unclear. In a minute of a pre-hearing conference dated 4 July 2017 timetabling directions were issued for the CAC to file evidence on 4 August and for the respondent on 21 August (although this latter date was meant to be 25 August). The respondent was told that her statement should be signed.

26. Presumably, the respondent was replying to information she had seen in the documents disclosed by the CAC as they are obliged to do in the ordinary course of prosecuting a disciplinary charge. That disclosure is not before the Tribunal. The CAC has appropriately filed its evidence in accordance with the Tribunal’s directions.

27. It is clear from the submissions filed by counsel for the CAC that this document was filed

and served on the CAC on 27 July 2017. In this document, the respondent says that she has never smacked and would never smack a child, and that there was no smack to any child in the sleep room on Wednesday 29 June or any other time or date. She says that there are a number of reasons for her to have raised her hand. She says that the heat pump controller is on the wall above Child A's cot, as is the light switch and there is a cupboard there too.

28. The respondent says that the only time children were put into the sleep room was for sleep. Sometimes there had been a discussion with parents that a child had had a bad night and might need an early sleep, or on one or two occasions she had put a child to bed because they were beside themselves. She never threw a child.

29. The respondent acknowledges using a harsh tone occasionally but not aggressive. She loved Child B. She called Child A a "tart" only once, as her mother called her this too. She stopped using this term when she thought about it and decided it was not a good thing to do.

30. The respondent says that the sleep room door was always closed as it is off the playroom and can't be left open. She says that there is no way she could crouch on her knees and throw a child onto or into a bed. Her knee operation was done at the end of November and by the time Charlotte started working with her, her knee was not an issue and so she never reacted angrily when any of the children touched her knee.

31. The respondent says that from the kitchen you cannot see into the sleep room because there is paper and stickers all over the sleep room door to make it a bit darker.

32. The respondent did not call Child Y disgusting or foul to her face. It was not at her, but more just stating a fact.

33. She does not remember kicking out at children, but might have moved fast away if she was touched. This was done in a joking/funny way.

34. There is another document dated 23 August 2017 seeking permanent name suppression. This has no name or signature at the bottom, but is evidently from the respondent. This was filed after she had advised that she did not intend to appear at the hearing and she wanted to have her registration cancelled.

35. In this document the respondent says that the CAC evidence is hearsay. She queries why these concerns were not brought to her attention earlier if staff were concerned with

her teaching. The respondent vehemently denies smacking and says this is just hearsay, because no-one saw it.

36. The respondent says that on the day Ms Brandy was relieving, Ms Hosking was not her "usual happy self and did indeed use a grumpy and harsh tone of voice with the children". She accepts that this was not an appropriate way to handle or speak to the children.

37. The respondent repeats much of the information contained in her earlier statement. In addition, she denies swearing in front of children, but acknowledges she may have mumbled something under her breath, not loud enough for children to hear. She denies force feeding children; she encouraged them to eat their healthy food before dessert.

38. The respondent denies taking Child A's dummy. Rather she and the child's mother had a plan for weaning her off the dummy, and this plan is described.

39. The respondent does not remember yelling at the children. She did raise her voice a few times, but she never thought of it as yelling. She does not accept that she treated children differently.

40. The respondent denies pushing a child from her knee, saying that her knee operation was in late November, two weeks before she started working at the Centre, and by the time she started work, it was fine. She had a little difficulty getting up and down from the floor, and sometimes hurt at the end of the day, but it certainly never hurt when the children touched it and she did not ever push or move a child away from her knee.

41. The respondent says she didn't call Child C disgusting or foul to her face. She remembers saying, "[Child C], that's disgusting," but it wasn't to her face.

42. The sleep room had rectangle shaped glass in both doors and they were covered, three quarters of the way up with card and stickers, so to have a clear view of the sleep room, where the doors are closed, you would have to be right outside the doors. There is no clear view from the cut out window in the kitchen to the sleep room.

Findings of fact

43. The Tribunal must be satisfied of the following matters:

    a) Has the CAC proved on the balance of probabilities that between December 2015 and July 2016 the respondent:

        - physically abused children, and/or

- used inappropriate force and/or
- inappropriate language?

b) If so, does that conduct amount to serious misconduct, or conduct otherwise entitling the Tribunal to exercise its powers under s 404?

Preliminary comments

44. The respondent said she did not want to appear at a hearing, but she also disputed the evidence. The best way to test evidence is to hear from witnesses in person (including the respondent) and have them available for questioning.

45. We disagree with the respondent's statement that the CAC evidence is hearsay. A witness's testimony of what they saw or heard is primary evidence.

46. In submissions on behalf of the CAC, Mr Waalkens submitted that there is no evidence before the Tribunal to suggest that the evidence of Ms Sutton, Ms Brandy or Ms Sewell is not reliable or credible. He submitted that the evidence of the witnesses is corroborative to the extent that they demonstrate a general course of conduct, in particular handling the children in a rough and/or somewhat aggressive manner. The Tribunal accepts those submissions.

47. We do not entirely agree with the submission that the respondent has not directly responded to the two smacking incidents recorded in Ms Sutton's and Ms Brandy's briefs. The respondent has countered some issues in her response, but could have provided a more detailed narrative of her recollection of the events of 29 June. We agree that the respondent had the opportunity to challenge the CAC's evidence at a hearing in person and chose not to do so.

Physical abuse/inappropriate force

48. The evidence of smacking is found in the statements of Ms Brandy and Ms Sutton, as outlined above in paragraphs 13, 23 and 24.

49. Ms Brandy did not see the respondent smack a child. She saw the respondent raise her hand to a 45˚angle. She heard a sound of a hand hitting a nappy. Ms Sutton saw the respondent smack a child on the bottom. It is likely that these are two different incidents as the description of the child's behaviour following the alleged slap is different.

50. We accept that the door to the sleep room was usually closed, but that does not mean it was never open. Ms Brandy described it as having "swung open". It is therefore possible for others to have observed the respondent in the sleep room.

51. From the evidence of Ms Brandy it is reasonable to draw the inference from the combination of what she saw and heard that the respondent smacked a child. Ms Sutton's evidence is unequivocal. We are not aware of any issue that would lead two colleagues each to make up this evidence. Whereas it is in the respondent's interest to deny the allegation, there does not seem to be any benefit to these witnesses to fabricate a story against her. We are satisfied on the balance of probabilities that on two occasions she smacked a child who was wearing nappies on the bottom.

52. There are several allegations of what might be termed "rough handling" of the children. These were:

- Sitting the children down on the mat with a bit of force[1]
- Grabbing a child by the arm and pulling the child along at her [adult] pace[2]
- Grabbing Child B by the arm and dragging him from inside the nursery to the sleep room[3]
- Grabbing Child B quite tightly under his arms, and almost throwing Child B onto the stretcher bed on the floor.[4]
- Trying to push food into child's mouth with a spoon, even though the child was trying to refuse.[5]

53. The respondent has not provided a response to the first three of these allegations. We are satisfied that it is more likely than not that the respondent sat children on the mat using some force, pulled a child along at her pace and "dragged" Child B by the arm, to the sleep room. We are conscious that the term "dragging" has connotations of a child's soles of the feet not making contact with the floor. We are not sure if the CAC is alleging that or whether they mean there was a degree of force used in pulling him against his will, while his feet were walking. This is more in line with the allegation contained in paragraph b) above. We give the respondent the benefit of the doubt. Had a staff member witnessed a child's feet or legs being dragged along the ground, we would have expected that matter to be reported immediately.

[1] Ms Brandy, see para 15 above
[2] Ms Sutton, see para 17 above
[3] Ms Sutton, see para 19 above
[4] Ms Sutton, see para 19 above
[5] Ms Sutton, see para 20 above

54. The respondent denies throwing a child onto a bed, saying that her knee would not have allowed her to crouch and do this, as described by Ms Sutton. The respondent's evidence about her knee is confusing because she also says that her knee operation was in late November, two weeks before she started working at the Centre, and by the time she started work, it was fine and she had a little difficulty getting up and down from the floor. The CAC evidence is not that she actually threw a child, but that she "almost threw". This implies that she was placing the child on the bed with some force. We are satisfied on the balance of probabilities that she used some force in placing the child on the bed.

55. The respondent denies force feeding children. Again, this is not the actual allegation. Ms Sutton's evidence is that the respondent would try to push food into the child's mouth with a spoon, even though the child was trying to refuse.

56. It is not clear when or if Ms Sutton spoke to the respondent about these matters. A conversation at the time might have helped highlight the issues. We gained the impression that generally she was a bit rougher in her manner, whether physically or verbally, than she appreciated. We think it is likely that she used more force than was necessary when putting a child to bed, and when feeding a child.

Inappropriate language

57. Although the respondent denies swearing in front of children, she admits that she may have mumbled something under her breath, not loud enough for children to hear. The evidence of Ms Sutton is that on one occasion a child did repeat a swear word after the respondent had sworn under her breath.

58. We are satisfied that the respondent would mutter swear words under her breath, but apart from one occasion, there is insufficient evidence to show that the children heard or understood her.

59. The respondent admits saying to Child C, "[Child C], that's disgusting," but that it wasn't to her face. Perhaps the respondent is confusing the expressions, "in her face" and "to her face". Most people would understand that if a comment is directed to another person, it is said "to their face", rather than "behind their back". Therefore we are satisfied that the respondent told Child C to her face that her eating was disgusting, and that is an example of inappropriate language.

60. The respondent admits calling Child A a "tart" once only. She said that it was a term that

her mother used. Ms Sutton's evidence was that the respondent used this term daily.

61. The respondent said that she stopped "using" this term when she reflected on it and decided it was inappropriate. The use of the word "using" implies to us that she used it on more than one occasion. We think it more likely than not that it was used more than once. Even though the child's family might have used this term, it is not appropriate language for a teacher to use. There is a risk of the language being modelled and used inappropriately and disrespectfully. We are satisfied that it is an example of inappropriate language.

Other allegations

62. The respondent also denied speaking to any child "in their face". Ms Sutton described her speaking right up in front of the faces of Child A, Child B and Child C. She has not provided any more detail about how this interaction occurred, and so there is insufficient evidence as to how this might amount to inappropriate language (or physical force or inappropriate force).

63. The respondent admits that on one day she used a grumpy and harsh tone of voice with the children and that this is not acceptable. She also agrees that she used a harsh tone some of the time, but she never thought it was aggressive. That is not necessarily "inappropriate language", which is the allegation of the charge.

64. There was also evidence that the respondent reacted angrily if one of the children touched her knee. Without further detail of this, we are not prepared to find it was inappropriate language

65. The circumstances surrounding the removal of the dummy are not clear to us. Evidence from the child's mother might have helped, but we do not think that this allegation fits within physical abuse, inappropriate force or inappropriate language.

66. In summary, our findings on matters alleged in the charge are that the respondent:

- smacked a child on the bottom (where the child was wearing nappies) on two occasions
- sat children down on the mat with a bit of force[6]
- grabbed a child by the arm and pulled the child along at her [adult] pace[7]

[6] Ms Brandy, see para 15 above

- grabbed Child B by the arm and pulled him with some force from inside the nursery to the sleep room[8]
- she used more force than was necessary when putting a child to bed, and when feeding a child
- used inappropriate language under her breath in the presence of children
- told Child C that her eating was "disgusting"
- called Child A "a tart".

Serious misconduct

67. Having made some findings of fact, we must now decide whether any of these findings amount to serious misconduct (or conduct otherwise entitling the Tribunal to exercise its powers).

68. For the CAC, Mr Waalkens submitted that if the Tribunal found that the respondent had smacked a child on at least one occasion, we should have no hesitation in finding serious misconduct. He refers to:

- s 378 of the Act
- rr 9(1) (a), (f) and (o) of the Education Rules 2016.
- the decisions in *CAC v Ngapo*, *CAC v Mackey*, *CAC v Papuni* and *CAC v Hayward*
- s 139A of the Act, and the Tribunal's comments in *CAC v Rangihau*[9] and *NZTDT 2014/49*:[10]
- The importance of ensuring the protection and safety of children in educational settings has been reinforced by the enactment of the Vulnerable Children Act 2014 (VC Act), and the amendments to the Act in 2015, and the Tribunal's comments in *CAC v Mackey*.
- The Tribunal stated in *NZTDT 2014/18* that any breaches of the Education Council's Code of Ethics for Certificated Teachers (which has now been replaced

[7] Ms Sutton, see para 17 above
[8] Ms Sutton, see para 19 above
[9] *CAC v Haycock* NZTDT 2016/2, 22 July 2016; *CAC v Papuni* NZTDT 2016/30, 20 October 2016; *CAC v Ngapo* NZTDT 2014/46 & 47, 3 September 2014; *CAC v Mackey* NZTDT 2016/60, 24 February 2017.
[10] At p 5.

by the Code of Professional Responsibility) will be a highly relevant consideration to whether there has been serious misconduct.[11]

69. We were assisted by Mr Waalkens' helpful summaries of relevant cases referred to.

70. Mr Waalkens submitted that the evidence demonstrated that:

- the respondent's actions formed part of an ongoing pattern of behaviour, as opposed to a one-off incident.
- her application of force appears to have been prompted by anger and a loss of temper for a corrective disciplinary purpose and/or to punish the children for misbehaving. The use of force was not "merely technical".[12]
- the affected children were highly vulnerable to harm and defenceless to physical abuse because they were of a particularly young age.
- the respondent's conduct took place in a professional setting and involved children entrusted to her care.

Discussion

71. We accept the CAC's submissions.

72. 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*.

73. In our findings of fact, we divided the conduct into three categories:

- Smacking
- Rough handling

[11] NZTDT 2014/18, 5 June 2016 at pp 5–6. The new Code states at p 10 that teachers "will work in the best interests of learners by promoting the wellbeing of learners and protecting them from harm". Further, at p 20, teachers shall "manage the learning setting…to maximise learners' physical…and emotional safety".

[12] See *CAC v Mackey* NZTDT 2016/60, 24 February 2017 at [32].

- Inappropriate language

74. We find that all three categories meet all three criteria in s 378 (1)(a).

75. 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), (f) 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):

…

…

(f) the neglect or ill-treatment of any child or young person in the teacher's care:

…

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

Physical force

76. We are satisfied that the acts of smacking a child amount to physical abuse. In *CAC v Haycock* NZTDT 2016-2[13] this Tribunal found that smacking a child's bottom in an act of playful pretend anger was physical abuse. This was on the basis that it was covered by s 139A. The Tribunal rejected the respondent's argument that physical abuse must involve some degree of aggression or violence, saying:

> *[13] Without foreclosing this argument for the future, in the context of this case, we think it is difficult to see how an act of force for the purposes of coercion or punishment which is unlawful behaviour on a teacher's part can otherwise than be regarded as abusive."*
>
> *…*
>
> *[15]… It needs to be emphasised that in order for any technical assault to constitute an offence under s 139A it must involve 'force' and be administered for the purposes of correction or punishment.*
>
> *[16] Moreover, once the application of force reaches the point of constituting a breach of s 139A and attracts disciplinary attention, it seems to the Tribunal that*

[13] *CAC v Haycock* NZTDT 2016-2, 22 July 2016

it is better to deal with the gradations as a matter of penalty.

77. This position was modified in NZTDT 2016-50,[14] where we said:

> *[26]* Haycock *appears to suggest that any use of force contrary to s 139A of the Education Act will automatically comprise serious misconduct, with the assessment to be made by the tribunal solely focusing on where on the seriousness spectrum the matter concerned sits. That impression, to our minds, is wrong. This is because, to be serious misconduct, the behaviour concerned must satisfy the character and severity threshold established in the Rules. This is an assessment that must be undertaken on a case by case basis to determine if the charge is provide – thus it is not merely a question of dealing with gradations at the penalty stage.*

78. In *CAC v Rowlingson*,[15] where a teacher had "made contact with the inside of his boot against the student's bottom, the Tribunal said:[16]

> *Context is everything…if the Respondent's action involved gentle contact in order to get the student's attention for instruction purposes, then it may not have been the most appropriate way to gain the student's attention but it would not be abusive. If, however, it was a forceful kick then in our opinion it is certainly capable of constituting physical abuse.*

79. In *CAC v Maeva* NZTDT 2016-37 we found that the respondent's "tapping" of a student on his leg was done as a disciplinary response and followed the failure of a student to respond to the previous efforts to make him comply or toe the line, and tapping of his back when he was running in the classroom. Because of the surrounding circumstances, it was found to constitute "hitting" and amounted to "physical abuse". In the present case, it is difficult to understand what the purpose of the respondent's smack was. It appears to be done as some sort of means of "correction" and so s 139A might be breached. Whatever the motivation, there is absolutely no place for smacking a child in today's education system.

80. The rough handling also brings s 139A into consideration because in each of these cases the force was used to "correct" behaviour in the sense that the respondent was able to use her physically stronger position to make the child comply. The degree of

[14] NZTDT 2016-50, 6 October 2016
[15] NZTDT 2015-54, 9 May 2016
[16] At paragraph 40

force was at the lower end of the scale and we are reluctant to term it abuse; it sits more comfortably in the term "ill-treatment", and without more detail and specificity of the events, we find it still sits at the lower end of the scale.

81. The CAC did not refer to psychological abuse as the grounds for finding serious misconduct. In our view some of the rough handling might fall into that category because of the risk of fear, rather than physical harm.

82. The examples of inappropriate language might not individually meet the any of the criteria in r 9, but the pattern of behaviour in using inappropriate language under her breath in the presence of children, telling Child C that her eating was "disgusting" and calling Child A "a tart" is behaviour that brings discredit to the profession.

83. In conclusion, the CAC has proved the charge of serious misconduct.

Penalty

84. In *CAC v McMillan*[17] 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.*

85. We have previously said that the use of physical force, even at a lower level, is unacceptable in New Zealand schools,[18] and that any teacher who uses physical force contrary to the prohibition in the Act[19] puts his or her status as a teacher in peril.

86. For the CAC, Mr Waalkens submits that unlike in the cases referred to above, the respondent has not conceded her conduct amounts to serious misconduct or taken steps to address her conduct, expressed remorse or accepted responsibility for her

[17] NZTDT 2016/52, 23 January 2017, paragraph 23.
[18] NZTDT 2014-49, 20 May 2016
[19] The decision refers to s 149, but we take it to mean s139A

actions. Further, the respondent's course of conduct represents a pattern of concerning behaviour, and was not isolated to a one-off incident, which reflects adversely on her ongoing fitness to practise.

87. The CAC submits therefore that the respondent's conduct gives rise to real concerns about the respondent's ongoing fitness to practise, such that cancellation is the only appropriate outcome in the circumstances. And further, that cancellation will best meet the need for public protection, maintenance of proper professional standards, and deterrence. In addition, the less restrictive orders which have more of a rehabilitative focus in s 404 of the Act (such as mentoring and supervision) would serve little purpose given that the respondent has indicated that she does not wish to continue practising as a teacher.

88. The CAC made submission for an alternative penalty, if the Tribunal considered a penalty less than cancellation was appropriate.

89. As noted above, on 15 August 2017 the respondent emailed advising that she wished to be deregistered as she did not intend to teach again.

90. We acknowledge that where a respondent denies certain conduct, it can be difficult to engage in a rehabilitative process or express remorse. However, the respondent seemed unable to accept that even the conduct she admitted might reflect adversely on her fitness to practise. Without the willingness to reflect on one's practice, or how one's behaviour is perceived by others, a teacher runs the risk of becoming ineffective and closed to the opportunities to ongoing professional learning.

91. It is possible that this conduct might not have led to cancellation, had there been a willingness to engage and learn, but in the circumstances where the teacher has not wished to do so and has asked to be de-registered, cancellation is the appropriate penalty.

Costs

92. The CAC sought 40% of the costs, noting that although the matter proceeded on the papers, significant costs were incurred because there was no agreement on the papers.

93. We observe that not only was there no agreement on the papers, but the respondent said she would not attend a hearing and yet still tried to defend the charge.

94. The Tribunal orders the respondent to pay 40% of the costs of conducting the hearing,

under section 404(1)(h) and (i), that is 40% of the Tribunal's costs and 40% of the CAC's actual and reasonable costs. The Tribunal delegates to the Chairperson authority to determine the quantum of those costs and issues the following directions:

a) Within 10 working days of the date of this decision:

   i. The Secretary is to provide the Chairperson and the parties a schedule of the Tribunal's costs

   ii. CAC to file and serve on the respondent a schedule of its costs

b) Within a further 10 working days the respondent is to file with the Tribunal and serve on the CAC any submissions she wishes to make in relation to the costs of the Tribunal or CAC.

c) The Chairperson will then determine the total costs to be paid.

Non-publication

95. The respondent has asked for permanent name suppression. In a direction made at a pre-hearing conference she was to file all evidence and submissions in support of name suppression by 21 August. As noted above, that date should probably have been 24 August.

96. In the document dated 23 August 2017 the respondent began by saying that she was applying for permanent name suppression as a lot of the allegations against her are all hearsay. She did not want her name tarnished because of something someone thought they might have heard. She did not provide any grounds for name suppression.

97. In the absence of any ground supporting her application, the CAC opposes name suppression. Mr Waalkens also stated some general legal principles, noting that the principle of open justice is contained in s 405(3) of the Act.[20] The Tribunal has noted that the primary purpose behind the open justice principle in the disciplinary context is the maintenance of public confidence in the profession concerned through the transparent administration of the law.[21]

98. Mr Waalkens noted that section 405(6) of the Act gives the Tribunal the power to make one or more orders for non-publication specified in ss 405(6)(a) to 405(6)(c) "if [it] is of

[20] This principle was deliberately carried over from the New Zealand Teachers Council (Conduct) Rules 2004 in 2014. See New Zealand Teachers Council (Conduct) Amendment Rules 2014.

[21] *CAC v Teacher* TDT2016/27, 25 October 2016 at [66].

the opinion that it is proper to do so, having regard to the interest of any person (including (without limitation) the privacy of the complainant (if any)) and to the public interest". In its decision in *CAC v Teacher (TDT2014/52P)*, the Tribunal held that suppression should only be made in exceptional circumstances "where it can be said that the public interests or the interest of individuals demand such orders, or where they are necessary to protect individuals in one or more of the categories identified in rule 32(2)".[22] It is acknowledged that, in more recent cases, the Tribunal has indicated that the term "exceptional" may overstate the position.[23] Nonetheless, Mr Waalken submits that it is clear that publication is the default position and the threshold for suppression is a high one.[24]

99. We agree with the CAC that the respondent has provided no information to support her application for non-publication of name, and that publication is the default position. We do not agree that the threshold for suppression is necessarily a "high" one. In deciding if it is proper to make an order prohibiting publication, the Tribunal must consider the interests of the respondent, as well as the public interest. If we think it is proper, we may make such an order.

100. In this jurisdiction, the threshold of whether it is "proper", is the same as under the Lawyers and Conveyancers Act 2006. That Tribunal has suggested that "proper" is arguably between "exceptional" and "desirable", but in any event the threshold is somewhat lower than that imposed in the courts.[25]

101. There is no onus on the applicant and the question is simply whether the circumstances justify an exception to the fundamental principle.[26] The correct approach is to strike a balance between the open justice considerations and the interests of the party who seeks suppression.[27]

102. However the respondent has advanced no argument in support of her application and so it must fail.

103. We do however make orders for non-publication of the names of any children at the

[22] *CAC v Teacher (TDT2014/52P)* TDT2014/52P, 9 October 2014 (emphasis added).
[23] See for example *CAC v Kippenberger* TDT2016/10S, 29 July 2016 at [11].
[24] *CAC v Kippenberger* TDT2016/10S, 29 July 2016 at [11]; *CAC v Teacher* TDT2016/39, 25 October 2016 at [22]–[25].
[25] *Canterbury Westland Standards Committee No.2 v Eichelbaum* [2014] NZLCDT 23
[26] *ASB Bank Ltd v AB* [2010] 3 NZLR 427(HC) at [14]
[27] *Hart v Standards Committee (No 1) of the New Zealand Law Society* [2012] NZSC4 at [3]

Centre.

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).