

IN THE MATTER

of The Education Act 1989

AND

IN THE MATTER


of charges brought by the Complaints
Assessment Committee of the New
Zealand Teachers Council

BETWEEN

**COMPLAINTS ASSESSMENT
COMMITTEE**

Applicant

AND


Respondent

DECISION OF TRIBUNAL

Tribunal:

Kenneth Johnston (Chair)

Megan Cassidy

Graeme Gilbert

David Hain

Patrick Walsh

Hearing:

4 December 2012

Decision:

19 February 2013

Counsel:

Stefan Kaminski for Complainant

No appearance by or for Respondent

Introduction

In this case, the Complainant charges the Respondent with serious misconduct. The Notice of Charge is dated 3 May 2012. It particularises the charges in the following terms:

3. *The Complaints Assessment Committee, pursuant to Section 139AT(4)(a) and/or (b) charges that ..., teacher of ..., behaved in an unprofessional manner amounting to serious misconduct and/or conduct warranting referral to the Disciplinary Tribunal in that –*

3.1 *some time in 2006, when teaching a child, ..., she:*

3.1.1 *pinched him; and/or*

3.1.2 *pulled his ear; and/or*

3.1.3 *slapped his head; and/or*

3.1.4 *pulled him by the trousers;*

3.2 *on or about 8 April 2008, when teaching a child, ..., she:*

3.2.1 *pulled him by the ears; and/or*

3.2.2 *spoke to him inappropriately; and/or*

3.2.3 *on various occasions on or around that time, used an inappropriately loud voice with him in circumstances where she knew or ought to have been aware of the allegation that she had pulled his ears previously;*

3.3 *on or about 17 June 2009, when teaching a child, ..., she:*

3.3.1 *raised her voice inappropriately; and/or*

- 3.3.2 *grabbed his hand; and/or*
- 3.3.3 *yanked him off the floor; and/or*
- 3.3.4 *pulled him roughly back across the classroom;
and/or*
- 3.3.5 *restrained him by holding his hand and
grabbing him; and/or*
- 3.4 *on or about 5 November 2008, when teaching a child,
..., she touched her inappropriately;*
- 3.5 *on or about 27 June 2010, when teaching a child
sitting on the floor during a mathematics lesson, ...,
she:*
 - 3.5.1 *tapped his hand with ruler; and/or*
 - 3.5.2 *used the ruler to get him to focus on his work;*
- 3.6 *on or about 29 June 2011, when teaching a child, ...,
she —*
 - 3.6.1 *spoke to him in an aggressive manner; and/or*
 - 3.6.2 *manhandled him to sit down; and/or*
 - 3.6.3 *grabbed him by the arm.*
- 4. *The conduct alleged in paragraphs 3.1 to 3.6 either
separately or cumulatively amounts to serious
misconduct and/or conduct warranting referral to the
Disciplinary Tribunal.*

The Chairman convened a pre-hearing telephone conference on 2 October 2012. Mr Kaminski participated in that conference for the Complainant. The Respondent was not present or represented.

At the conclusion of the conference the Chairman set the matter down for hearing and made directions in relation to the filing and service of evidence and submissions.

When the matter came on for hearing, the Respondent was not present.

Evidence

The Complainant's evidence was contained in an affidavit made by the Principal of the school at which the Respondent formerly taught. She began by describing her position and recording that on 9 May 2011, in her capacity as the Principal of the school, she furnished a report to the New Zealand Teachers Council. She then went on to say that from 2005 the Respondent was the subject of six complaints from parents, all of which involved allegations of inappropriate discipline. These complaints, she told us, had ultimately resulted in the initiation of a disciplinary process within the school, and the Respondent resigned before that process had run its course. The report to the Council followed.

The Principal went on to say that the Respondent had denied the allegations made in these complaints.

She provided details of the six complaints. It is unnecessary to relate these here, as the Complainant has identified the key aspects in the Notice of Charge.

We quote the last three paragraphs from the Principal's affidavit:

5. *I was aware ... had been having domestic problems at home in recent years which I considered placed her under stress and had impacted on her temperament at school. I understand that more recently she has moved out of the home she shared with her husband, and she appears more relaxed and calm. Things seem now to be under control.*
6. *... attends professional development sessions, and appears to want to learn and get things right. I consider she is a gentle soul, is a good reliever, and is open and easy to talk to. The*

School is happy to continue support of ..., which it might not so readily have been willing to do with teachers of a different character who had accumulated ...'s unfortunate list of reported incidents.

7. *In saying that I do not condone what ... has done. But I believe she has learnt her lesson, and is now in a much better domestic situation and relieved of the stresses she was under. I was willing, and had expected I might have been asked, to give evidence for*

Submissions

Mr Kaminski's submissions on the Complainant's behalf began by summarising the substance of the charges as involving an allegation of rough handling by the Respondent of young children in her care. He noted that the school and the Principal, convinced of the Respondent's sincere wish to change, and her suitability as a relieving teacher, has re-employed her in that capacity since her resignation, and that one of the incidents which forms the basis of the charge took place during such a period of re-employment.

Mr Kaminski readily accepts that the Complainant's evidence is equivocal in some respects.

Turning to this, he carefully identified the key evidence supporting the charges, very properly identifying where the evidence might be regarded as falling short of establishing the particulars.

Mr Kaminski summarised his submission in the following terms:

In summary, I submit that the evidence establishes Particulars 3.1.4, 3.3, and 3.5, plus, perhaps marginally, 3.4 and 3.6. They describe conduct capable of falling within the Criteria set out in the New Zealand Teachers Council (Making Reports and Complaints) Rules 2004 at R9(1)(a), (c), and (g).

As to penalty, Mr Kaminski's submission was that "... none of the incidents appear in themselves to be much above low to mid range examples of the categories of misconduct, but they do gain cumulative force. On the other hand, they stretch from 2006 ... to June 2011 ..., and although there is cause for suspicion of a sustained pattern of behaviour, the evidence to prove it is unfortunately thin."

He concluded by saying that the Complainant's position was that it had not reached the same conclusion as the Principal in relation to the Respondent.

Discussion

It is most unfortunate that the Respondent has elected – as is her absolute right – to take no part in this disciplinary proceeding. The Tribunal can envisage that she may have been able to put a different perspective on some of these incidents. However, her failure to take any part means that the allegations in the Notice of Charge stand uncontradicted. That said, in any professional disciplinary proceedings, the onus remains on the Complainant to put evidence forward establishing the substance of the charges. In this case, the Complainant has done that. As Mr Kaminski submits, it has established at the very least the particulars set out in the Notice of Charge at 3.1, 3.3 and 3.5. In the light of the Respondent's failure to participate in this disciplinary proceeding, the Tribunal is also prepared to accept that the Complainant has established particulars 3.4 and 3.6.

These are not serious assaults. That said, the Education Act 1989 prohibits any form of corporal punishment or physical discipline. Furthermore, in this case, the Respondent was responsible for very young children.

We observe also that on any view this case does not involve an isolated incident but a series of incidents. Plainly, it was the Respondent's view that physical chastisement was an appropriate form of discipline.

Such behaviour by a teacher, in flagrant breach of the Education Act 1989 and the aspects of the 2004 Rules referred to earlier, clearly constitutes serious misconduct, and calls seriously into question the Respondent's fitness to teach.

The real question is the appropriate penalty in this case, and more particularly whether the Tribunal can discharge its responsibilities to the public and the profession without ordering this Respondent's deregistration.

In considering that question, which the Tribunal has not found an easy one to resolve in this case, we have been conscious of the principal purposes of disciplinary proceedings, those being the protection of the public and the profession, bearing in mind an appropriate level of punishment and the prospects of rehabilitation, and we have also had regard to the legal requirement that we must impose the least punitive outcome consistent with the discharge of our responsibilities.

On careful consideration, and giving due regard to the views of the Principal as outlined earlier, we have reached the view, by a fairly fine margin, that we are not obliged to order this Respondent's deregistration. We are inclined to think that the objects of the legislation would be better served in this case by a combination of orders, effectively designed to ensure that the Respondent does not present a danger to students in the future.

The Complainant, of course, seeks costs, and, no argument having been put up to dissuade us from this course, we can see no reason why the Complainant should not have its costs on the usual basis.

Conclusion

The Tribunal's formal order as follows:

- (a) Pursuant to s 139AW(1)(b) of the Education Act 1989, the Tribunal formally censures the Respondent for her serious misconduct;
- (b) Pursuant to s 139AW(1)(e), the Tribunal orders that the register be annotated to make reference to this decision;
- (c) Pursuant to s 139AW(1)(c), the Tribunal imposes the following conditions on the Respondent's practising certificate:
 - Within three months of the date of this decision, the Respondent is to complete an accredited anger management course, which course is first to be approved by the New Zealand Teachers Council's Manager Teacher Practice. On completion of the course, the

Respondent is to provide the Manager Teacher Practice with satisfactory evidence of her completion of the same;

- Within three months of the date of this decision, the Respondent is to complete an accredited classroom management course, which course is first to be approved by the New Zealand Teachers Council's Manager Teacher Practice. On completion of the course, the Respondent is to provide the Manager Teacher Practice with satisfactory evidence of its successful completion;
- (d) Pursuant to s 139AW(1)(h) and (i), the Respondent is ordered to pay half of the Complainant's actual and reasonable costs, and the Tribunal delegates to the Chairman authority to determine the quantum of those costs on receipt of memoranda from the parties, if they cannot be agreed.

Kenneth Johnston
Chairman

NOTICE

1. A person who is dissatisfied with all or any part of a decision of the Disciplinary Tribunal under sections 139AU (2) or 139AW 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. Subsections (3) – (7) of section 126 apply to every appeal as if it were an appeal under subsection (1) of section 126.