EDUCATION COUNCIL
NEW ZEALAND | Matatū Aotearoa

Complaints Assessment Committee (CAC) v Teacher

NZ Disciplinary Tribunal Decision 2018/5

Teachers have an obligation in the Code of Professional Responsibility to promote the wellbeing of learners and protect them from harm.

In this case, a Teacher made physical contact with a child in her class by putting her hands on his shoulders and pushing him to his table causing the child to cry. The Teacher then walked away and returned to her teaching table. She asked the child to go next door to another classroom. When he later returned, he was settled and got on with his work.

The Complaints Assessment Committee (CAC) of the Teaching Council investigated and found the Teacher's actions amounted to misconduct. The Teacher explained that she engaged in this behaviour to guide the child back to their seat. She acknowledged she did not use best judgement with a physical response, and her actions will have caused upset and embarrassment to the child. She has expressed regret for what happened.

The CAC referred the matter to the New Zealand Teachers Disciplinary Tribunal (Tribunal) on a charge of misconduct.

The Tribunal agreed the conduct amounted to misconduct because it involved physical force. The Tribunal considered it did not reach the threshold for serious misconduct because the contact was short and involved little pressure; it was her attempt to guide the student to his desk and was not motivated by anger or correction.

In deciding penalty, the Tribunal agreed with the CAC's original proposal for censure and a condition to report the decision to any employer for the period of one year. No costs order was made.

BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

NZTDT 2018-5

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	**TEACHER S** **Respondent**

TRIBUNAL DECISION

DATED: 21 August 2018

HEARING: Held at Wellington on 22 May 2018

TRIBUNAL: Theo Baker (Chair)
Sheila Grainger and David Spraggs (members)

REPRESENTATION: Mr Mortimer for the CAC
Ms Andrews for the respondent

1. The Complaints Assessment Committee (**CAC**) has referred to the Tribunal a charge of misconduct entitling the Tribunal to exercise its powers under s 404 of the Education Act 1989 (**the Act**). The charge is that on 15 August 2016 the respondent made physical contact with a child in her class by putting her hands on the child's shoulders and pushing him to his table. For reasons set out below, the CAC alleged misconduct rather than serious misconduct.

Summary of findings

2. The CAC proved the charge. We agree with the CAC that this conduct does not meet the threshold of serious misconduct. It would not have required referral to the Tribunal if the school (who initiated the complaint) had agreed with the proposed outcome. We are satisfied that a finding of misconduct is appropriate and impose a censure and condition on the respondent's practising certificate as outlined in paragraph 27. We have also made an order for non-publication of the respondent's name and identifying details.

Evidence

3. This matter was heard on the papers. Before the hearing the parties conferred and filed an Agreed Summary of Facts (**ASF**). The parties agreed that the respondent was employed as a relief teacher at [redacted] (the School) between May 2011 and September 2016. On 15 August 2016, while teaching a class of six-year-old students, the respondent helped a student (Student A) to start his writing task. The respondent agreed that Student A could sit on the floor, but while there, he began to misbehave and so the respondent asked him to go back to his desk.

4. According to the ASF, as Student A walked back to his desk, the respondent approached him from behind and while talking to him, placed her hands on his shoulders to get his attention. She then pushed him over to his desk with her hands on his shoulders, causing Student A to cry. The respondent then walked away and returned to her teaching table. She asked Student A to go next door to another classroom. When he later returned, he was settled and got on with his work.

5. The respondent accepts on reflection that her response to the situation was ill-considered and that she did not exercise best judgement when she used a physical response. She acknowledged that her actions will have caused upset and embarrassment to Student A and she has expressed regret for what happened.

6. Based on the ASF, we are satisfied that the factual allegations contained in the charge are proved. In particular, we find that the respondent made physical contact with a child in her class by putting her hands on the child's shoulders and pushing

him to his table.

Misconduct and serious misconduct

7. In his submissions for the CAC, Mr Mortimer told us that following its investigation, the CAC came to the view that the matter warranted a finding of misconduct, but in order to exercise its powers under s 401(2)(d), both the respondent and the person who made the complaint (in this case the School) must agree. Because there has been no agreement, the CAC has referred the matter to the Tribunal.

8. The powers of a Complaints Assessment Committee are set out in s 401 of the Act:

> ***401 Powers of Complaints Assessment Committee***
>
> *(1) The Complaints Assessment Committee may investigate any report, complaint, or matter referred to it under section 400.*
>
> *(2) Following an investigation, the Complaints Assessment Committee may do 1 or more of the following:*
>
> *(a) resolve to take the matter no further:*
>
> *(b) refer the teacher concerned to a competency review:*
>
> *(c) refer the teacher concerned to an impairment process, which may involve either or both of the following:*
>
> *(i) assessment of an impairment:*
>
> *(ii) assistance with an impairment:*
>
> *(d) if there has been made a finding of misconduct that is not serious misconduct, by agreement with the teacher and the person who made the complaint or report or referred the matter, do 1 or more of the following:*
>
> *(i) censure the teacher:*
>
> *(ii) impose conditions on the teacher's practising certificate or authority, such as (without limitation) requiring the teacher to undergo supervision or professional development:*
>
> *(iii) suspend the teacher's practising certificate or authority for a specified period, or until specified conditions are met:*
>
> *(iv) annotate the register or the list of authorised persons in a specified manner:*
>
> *(v) direct the Education Council to impose conditions on any subsequent practising certificate issued* to the teacher.
>
> *(3) The Complaints Assessment Committee may, at any time, refer a matter to the Disciplinary Tribunal for a hearing.*
>
> *(4) The Complaints Assessment Committee must refer to the Disciplinary Tribunal any matter that the Committee considers may possibly constitute serious misconduct.*

…

9. Serious misconduct is defined in s 378 of the Education Act 1989:

> ***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.*

10. For the CAC, Mr Mortimer submitted that misconduct is an appropriate finding because:

- The use of physical force is unacceptable and therefore a disciplinary finding is warranted.
- The contact did not last long and involved little pressure.
- The action was akin to guiding Student A back to his desk; it was not retaliatory or motivated by anger and it was not designed to punish.
- The respondent's actions have caused some degree of distress, but it is not possible to tell whether the distress arose from her actions or as a continued part of Student A's misbehaviour.
- The respondent has expressed regret and realises her actions were ill-considered.
- A finding of misconduct is consistent with previous Tribunal decisions.

11. Mr Mortimer referred to the following relevant decisions: *CAC v Rowlingson*,[1] *CAC v Teacher B*[2] and *CAC v Emile.*[3]

12. Mr Mortimer submitted that in contrast to *CAC v Rowlingson*,[4] there is nothing to suggest the respondent's actions were motivated by frustration or anger, and that the ASF does not disclose any degree of robustness. While the goal may have been to make Student A behave, in the sense that he would return to where he should be and stop his disruption, the respondent's actions were not a violent means of ensuring compliance.

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[1] *CAC v Rowlingson* NZTDT 2015-54, 9 May 2016
[2] *CAC v Teacher B* NZTDT 2017-7, 2 August 2017
[3] *CAC v Emile* NZTDT 2016-51, 14 December 2016
[4] *CAC v Rowlingson* above note 1

13. *CAC v Teacher B* involved the use of force by a teacher taking a misbehaving student to the principal's office.[5] When the student walked away the teacher put his hand on the student's shoulder and steered him towards the office area. A short while later, when the student tried to evade the teacher, the teacher caught hold of the student, who fought back. The student grabbed hold of a set of bars and the teacher prised the student's fingers off the bars. The teacher then carried the student to the office.

14. Mr Mortimer reminded us that although described as a borderline case, we concluded it was not serious misconduct. We said:

> *[28] Despite the wording of the charge, the parties accept that the respondent's actions do not amount to physical abuse (r 9(1)(a)). This is on the basis that the respondent did not use force for a bad effect or purpose and presented as a spontaneous and brief reaction to student A's intransigence.*
>
> *[29] We do not agree that this conduct was a brief reaction; it was more sustained. However, we do agree that the use of force was not for a bad effect or purpose, and we do not consider it constitutes physical abuse.*

15. Mr Mortimer submitted that unlike *Teacher B* there is no evidence in the present case of a history of violent incidents towards teachers. In Teacher S's case, the physical force was for a much briefer period. It involved no violent struggle such as prising a student's fingers off a structure. Teacher S's conduct was similarly not for a bad effect or purpose. In the CAC's submission, the conduct is less serious and therefore Teacher S's case falls squarely within misconduct territory.

16. In *CAC v Emile* the teacher was helping a child wash dishes at a sink when another child had approached them and pushed the first child.[6] The teacher turned around and pushed the child back with one hand. The child fell over. There was no evidence as to the reaction of the child that the teacher pushed. We found that the conduct amounted to misconduct only. This was partially on the basis that the teacher's motivations and the effect on the child were unknown.

17. Mr Mortimer noted that in the present case, it is accepted that Student A was crying, but there was no further lasting effect. The CAC accepted that the respondent's actions were slightly longer in duration than that in *Emile* but involved lesser force. Mr Mortimer submitted that here we have the advantage of more context recorded in

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[5] *CAC v Teacher B* above note 2
[6] *CAC v Emile* above note 3

the agreed summary of facts, than was present on the evidence in *Emile,* but that context does not aggravate the position greatly beyond the situation in *Emile* and that a similar finding of misconduct is open to the Tribunal.

Discussion

18. The actions in the present case are described as "pushing" to the table. The degree of force used is not clear, but we are satisfied that it involved more force than the hypothetical tapping of a student to gain attention discussed in the *Rowlingson* case. In our discussion of "abuse" in *CAC v Emile* NZTDT 2016/51,[7] we suggested that a single push would undoubtedly amount to physical abuse where there is significant force used, or the teacher is either intending (or reckless as to the likelihood of) harm, for example pushing with two hands into a wall, or off a platform, but did not find physical abuse in the case of Ms Emile's single push.

19. In addition to the cases Mr Mortimer referred to, we have considered some other decisions where the demarcation of serious misconduct was considered. In *CAC v Davies* NZTDT 2016-28,[8] we rejected the parties' agreement that the conduct did not reach the threshold for serious misconduct. There we found that the application of force (of any degree) to a student's head is a serious matter.

20. The referral in *CAC v Griffiths* NZTDT 2017-22[9] also resulted from a lack of agreement with a CAC's decision, this time by the respondent, who did not accept that her physical interaction with Child A was inappropriate and amounted to misconduct. The CAC proposed to censure her and refer her to a Competence Assessor, but she refused to sign the draft censure agreement. The teacher did not attend the hearing. Having heard the evidence, we found that the respondent used a forceful action to push Child A to sit on the floor, and that it amounted to misconduct. We said:

> *In considering the degree of force used in removal of the child taking him to the office and pushing him to the floor, we do not consider respondent's actions (in particular the degree of force used), fall into the same category as cases such as CAC v Simpson,[10] where a teacher carried a student out of class by his shoulder blades or CAC v Leau,[11] which involved a teacher pulling a student's hair to remove them from under a table. In the present case, we find that the conduct was likely to adversely affect the well-being or learning of Child A, but we are not satisfied that it properly meets the other*

[7] *CAC v Emile* NZTDT 2016-51, 14 December 2016
[8] *CAC v Davies* NZTDT 2016-28, 6 September 2017
[9] *CAC v Griffiths* NZTDT 2017-22,
[10] NZTDT2015-50, 15 April 2016
[11] NZTDT2014-75, 10 December 2014

> *criteria required for a finding of serious misconduct. That is because in our view, first, the degree of force used does not amount to abuse or ill-treatment; and second, although we find that the teacher did not conduct herself appropriately and her behaviour fell below the standards expected of a teacher, that is not the same as bringing the profession into disrepute or bringing discredit to the profession. Applying the test in the High Court decision Collie v Nursing Council of New Zealand,*[12] *we are not satisfied that reasonable members of the public, informed of the facts and circumstances, could reasonably conclude that the reputation and standing of the profession is lowered by the behaviour of the practitioner.*

21. In NZTDT 2016-50,[13] 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 proved – thus it is not merely a question of dealing with gradations at the penalty stage.*

22. We accept Mr Mortimer's submissions that the use of physical force is unacceptable and therefore a disciplinary finding is warranted, but that the following factors mean that misconduct is the appropriate level: the contact did not last long and involved little pressure; it was akin to guiding Student A back to his desk; it was not retaliatory or motivated by anger and it was not designed to punish; it is not possible to tell whether the distress arose from her actions or as a continued part of Student A's misbehaviour. We note that the respondent's expression of regret and realisation that her actions were ill-considered is better considered as factors in mitigation, rather than disciplinary threshold.

23. Although sub-optimal conduct, this incident alone does not reflect adversely on the respondent's fitness to teach (s 378(1)(b)) and we are not satisfied that reasonable members of the public, informed of the facts and circumstances, could reasonably conclude that the reputation and standing of the profession is lowered by the behaviour of the practitioner (s 378(1)(c)). The fact that Student B was crying does not lead automatically to a conclusion the respondent's actions adversely affected or were likely to adversely affect Student B's well-being or learning (s 378(1)(a)). A child may be upset by a reprimand, but that does not mean that their well-being or

[12] [2001] NZAR 74 at [28]
[13] NZTDT 2016-50, 6 October 2016

learning is adversely affected. The need to ensure a safe learning environment does not prevent a teacher from stating when a student's behaviour is interfering with the learning of any student including that of the student who is misbehaving and taking appropriate steps to manage the classroom.

24. To find misconduct rather than serious misconduct is not to condone the conduct. The professional disciplinary regime under the Act clearly provides for degrees of wrongdoing. Parliament has given the CAC the responsibility of deciding the appropriate disciplinary response for conduct which falls below the standard expected of a teacher, but does not meet the requirements of serious misconduct. Based on the evidence before us, we agree with the CAC's assessment of this case.

Penalty

25. Mr Mortimer submitted that the appropriate penalty is censure and a condition that the respondent inform any new employer of the of the Tribunal's decision for 12 months following the date of the Tribunal's decision. Mr Mortimer referred to the following cases:

- *CAC v Emile* where the penalty was censure, conditions of notifying employers and completion of a professional development course and annotation.
- *CAC v Teacher B* where the penalty was censure and annotation.

26. It was submitted that *CAC v Teacher B* was a more serious case than the present case but the personal mitigating factors present in *Teacher B* were also recognised. Mr Mortimer said that the proposed penalty was appropriate given the respondent's co-operation with the process and willingness to admit wrongdoing.

27. We agree. Because of the delay in issuing our decision, we propose that the time for the condition runs from the date of the hearing which was 22 May 2018. Therefore we impose the following penalty:

- The respondent is censured under s 404(1)(b)
- Under s 404(1)(c) there is a condition on her practising certificate that she advise any employer of the outcome of this decision. That condition will stay in place until 21 May 2019.

Costs

28. Under s 404 we may direct any party to pay costs to another or to pay costs to the Education Council in respect to the costs of conducting the hearing. Only the CAC and the respondent are "parties"[14]. The CAC has not applied for costs.

29. An estimate of the Tribunal's costs has been provided. However, we do not think the respondent should have to contribute to the costs of hearing this matter when she had agreed with the CAC's proposed outcome. Accordingly, there is no order for costs in this instance.

Name suppression

30. The respondent filed an application for permanent name suppression, on the basis that publication of her name may risk the identification of Student A.

31. In fairness to the respondent, Mr Mortimer said that this matter came to the Tribunal only because the initiator (the school) did not agree to the outcome the CAC originally proposed, and through no fault or action of the respondent, who agreed with the penalty that the CAC submitted (and now imposed). Mr Mortimer reminded us that CAC decisions are not published, whereas Tribunal decisions are. If this were to be advanced as a ground for a finding of name suppression, the CAC would not oppose it.

32. The school's attitude to name suppression was also ascertained. The CAC provided a file note from the CAC investigator recording that the Principal at [redacted] confirmed that the Board of Trustees would not be seeking name suppression for the school. The Board of Trustees did not agree that publication of the respondent's name would lead to identification of the student.

33. In their submissions, each party set out some legal principles of open justice.

34. For the respondent, Ms Andrews emphasised that risk of identification of the student is at the heart of this application. She also referred to cases where the Tribunal had made an order suppressing the teacher's name and that of the school where there was an appreciable risk that the publication of those details would lead to identification of the student.[15]

35. Although not stipulated in the application for name suppression, Ms Andrews adopted the argument raised by Mr Mortimer that had this matter been resolved at

[14] Rule 23, Education Council Rules 2016
[15] *CAC v Teacher* NZTDT 2016-26: *CAC v Teacher* NZTDT 2016-50; *CAC v Teacher B* NZTDT 2017-7

the CAC stage, this case would not have been published and therefore orders for non-publication would not have arisen.

36. We are satisfied that the first ground raised by the respondent, (risk of identification of the student) cannot be substantiated. However, we agree with the CAC that this is a case where name suppression is appropriate. We do not think that the respondent should be adversely affected because the initiator did not agree with the proposal of the CAC, when our decision is consistent with the CAC's assessment. Therefore there will be an order for non-publication of name of the respondent and identifying details. Because the respondent was a relief teacher at the School for some months, the name of the school will also be suppressed.

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).