EDUCATION COUNCIL
NEW ZEALAND | Mātaitū Aotearoa

Complaints Assessment Committee (CAC) v Teacher B
NZ Teachers Disciplinary Tribunal 2017/7

This case is about the inappropriate use of force against a student.

The teacher was approached by three children in a distressed state at lunchtime who stated that another child, Student A, had hurt them. The teacher approached Student A to talk to them; Student A refused to engage and so the teacher directed Student A to go to the principal's office.

On the way to the principal's office, Student A tried to walk away - the teacher placed his hands on Student A's shoulders, and steered him towards the office.

Student A then tried to duck out of the teacher's grasp, but the teacher again caught hold of Student A.

Student A then grabbed hold of a bar outside the office - the teacher responded by prising Student A's fingers off the bar.

Student A tried to run away again so the teacher again caught hold of Student A, picked him up around the waist, and carried him to the principal's office.

The Tribunal considered this was a borderline case for serious misconduct as these actions were not a "brief reaction" but rather a sustained use of force. The Tribunal noted, as the teacher had accepted, that the teacher's conduct was likely to adversely affect the wellbeing of Student A. Student A was clearly distressed at the time, and the teacher's actions added to this distress. The Tribunal also noted that the teacher's use of force reflected adversely on his fitness to practice.

The Tribunal did accept that the teacher's use of force was not for bad effect or purpose, and did not constitute physical abuse. The Tribunal also acknowledged that the combination of Student A's behaviour and their known history placed the teacher in a difficult situation in determining the best intervention to protect other students from harm.

In these circumstances, the Tribunal did not find the teacher was guilty of serious misconduct, but agreed that the teacher's conduct did amount to a finding of misconduct.

The Tribunal granted non-publication orders for Student A, the school's name and location, and for the teacher on the basis that publication would lead to the identification of Student A, which in turn, would be detrimental to the efforts already made to further manage and improve his behavioural challenges.

The Tribunal censured the teacher for misconduct.

BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

NZTDT 2017-7

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 B**
	Respondent

TRIBUNAL DECISION
2 AUGUST 2017

HEARING: Held on 11 July 2017 (on the papers)

TRIBUNAL: Theo Baker (Chair)
Maria Johnson and Graeme Gilbert (members)

REPRESENTATION: Mr I Auld/Ms L Hann for the CAC
Ms J Andrews for the respondent

Introduction

1. The Complaints Assessment Committee (CAC) has referred to the Tribunal a charge of serious misconduct and/or conduct otherwise entitling the Disciplinary Tribunal to exercise its powers arising from the respondent's interactions with a student. The CAC has charged that the respondent:

   engaged in an inappropriate physical interaction with a student.

2. The hearing proceeded on the papers. The Tribunal considered the following documents:

   a) The notice of charge
   b) An agreed summary of facts
   c) A joint memorandum addressing disciplinary threshold
   d) An application for name suppression for the respondent
   e) Two affidavits in support of name suppression
   f) Submissions on behalf of the respondent in support of name suppression.
   g) Submissions on behalf of the CAC on costs, disciplinary threshold and name suppression.

3. The parties conferred and agreed the facts and suggested outcome.

4. The parties did not agree on the matters of costs and non-publication of name.

Evidence

5. The evidence in support of the charge was contained in an Agreed Summary of Facts (ASF) signed by counsel for each party. The agreed facts are set out in full:

   1. *On the 13th of June 2016 [the respondent] dealt with a student in an inappropriate manner.*
   2. *[The respondent] was on duty at lunch time. Three male students approached the respondent in a distressed state. Two of them were covered in mud and their clothes were wet. The boys told the respondent that Student A had pushed them through the mud and wet grass on the field. The respondent asked the boys where Student A was and went to find him.*
   3. *As the respondent approached the area, another student walked towards him crying. The respondent asked him what was wrong and this student said*

Student A had thrown stones at him and been nasty toward him.

4. *The respondent approached Student A. The respondent asked him what happened. He responded, "I can't remember." The respondent prompted Student A three times for a response but Student A remained quiet. The respondent waited in silence for about 30 seconds for a response, but nothing came. The respondent then said "Well, if you won't tell me what happened then maybe you should tell [the principal] instead." The respondent and Student A started to walk towards the principal's office.*

5. *At one point on the walk to the office Student A started to walk away from the direction of the Principal's office. The respondent put his hand on his shoulder and steered him towards the office areas. They walked towards the office in silence.*

6. *As the respondent and Student A approached the office, Student A shouted something an tried to duck away from the respondent. The respondent caught hold of Student A.*

7. *Student A started to lash out, splashing mud all over the respondent's pants and bruising his arm.*

8. *Student A then grabbed hold of the bars by the staffroom window. The respondent prised his fingers off them. Student A was still lashing out.*

9. *Student A then grabbed hold of the outside bar leading to the office. The respondent prised his fingers off the bar.*

10. *Student A then attempted to duck down under the bar and run away from the respondent.*

11. *The respondent put both of his arms around Student A's waist, picked him up and carried him to the Principal's office.*

Misconduct/Serious misconduct

6. Dealing first with statutory provisions, serious misconduct is defined in s 378 of the Education Act 1989 (the Act). It 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.*

7. The Council's criteria for reporting serious misconduct are found in r 9 of the New Zealand Education Council Rules 2016. In the Notice of Charge, the CAC relies on rr 9(1)(a) and (o):

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

8. Section 139A prohibits the use of force by way of correction or punishment, towards any student or child enrolled at or attending the school, institution, or service.

9. Section 401 sets out the powers of a Complaints Assessment Committee. Section 401(4) provides:

> *The Complaints Assessment Committee must refer to the Disciplinary Tribunal any matter that the Committee considers may possibly constitute serious misconduct.*

10. Therefore because the Committee considered the matter might possibly amount to serious misconduct, it was required to refer the matter to the Tribunal. This was discussed in *CAC v Rowlingson*[1] NZTDT 2015-54 where we observed:

[1] *CAC v Rowlingson* NZTDT 2015-54, 9 May 2016

> *Then, having arrived at a judgement about the parameters of the factual situation with which they are dealing, basing their assessment exclusively on that, CACs are obliged to make a judgement about whether the teacher's conduct, "... may possibly constitute serious misconduct". And the second point which the Tribunal would emphasise is that the words "...may possibly..." are not synonymous with "...may conceivably...". In other words the possibility that a teacher's conduct may constitute serious misconduct must be a realistic possibility. The CAC must be satisfied that if the facts as they have assessed them to be can be proved then there is a realistic possibility that the Tribunal will regard the teacher's conduct as constituting serious misconduct.*

11. If the CAC does not think there is such a realistic possibility, the CAC is not obliged to lay the charge. The present charge places the Tribunal in an unusual situation, where the CAC is on the one hand telling us that there is a realistic possibility that we will regard the teacher's conduct as serious misconduct but at the same time telling us it is not serious misconduct. However, the basis of the parties' agreement that this case may be resolved by a finding of misconduct was the unusual circumstances, those being not only the borderline nature of the case, but the respondent's personal circumstances. The personal circumstances are that because his daughter has special health needs that can better be met in the United Kingdom, the respondent has permanently returned there, where he also has family. The CAC accepted that a pragmatic solution would be in the public interest.

Physical force

12. It is accepted that the use of physical force – even at a lower level – is unacceptable in New Zealand schools,[2] and that any teacher who uses physical force contrary to the prohibition in the Act[3] puts his or her status as a teacher in peril.

13. In *CAC v Haycock* NZTDT 2016-2[4] this Tribunal did not hesitate in finding 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:

[2] NZTDT 2014-49, 20 May 2016
[3] The decision refers to s 149, but we take it to mean s139A
[4] *CAC v Haycock* NZTDT 2016-2, 22 July 2016

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

14. This position was modified in NZTDT 2016-50,[5] 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 proven – thus it is not merely a question of dealing with gradations at the penalty stage.*

15. In *CAC v Emile* NZTDT 2016/51[6] we found that a single push did not warrant a finding of serious misconduct in circumstances where a teacher did not recall the specific event and the only witness had not remained to ascertain the wellbeing of the child or to speak with the respondent. From what she saw, the child was not affected at all. There was insufficient evidence to determine that it was for the purposes of punishment or correction. We found that although harm to the child is not the sole determining factor, it is difficult to find that one push resulting in neither physical or emotional harm can reasonably be termed "physical abuse".

16. In a joint memorandum, the parties submitted that the present case is analogous to *CAC*

[5] NZTDT 2016-50, 6 October 2016
[6] *CAC v Emile* NZTDT 2016/51, 14 December 2016

v Teacher[7] where we found misconduct when a teacher pulled a student "quite forcibly" to get him to release his grip on a netball pole as she was taking him to the school office following an episode of disruptive behaviour.

17. They submit that in the present case the respondent's conduct also occurred in the context of dealing with a student who was misbehaving/lashing out in a physical manner. Similarly, the way in which the respondent chose to deal with the student's misbehaviour, by prising the student's fingers off the bar to get him and picking him up to carry him to the principal's office, was inappropriate and has the potential to be categorised as serious misconduct under each of the three limbs of the s 378 definition of the Education Act.

18. The parties agree that:

    (a) it had an adverse impact of the student's wellbeing at the time of the incident. The student was clearly distressed, and the respondent's actions added to this distress.

    (b) the respondent used force to correct the student's behaviour. The Tribunal has said on a number of occasions,[8] that a teacher's use of force for such purposes can bring into question a teacher's fitness to practice.

19. The parties submit that in light of the circumstances surrounding the respondent's actions, it cannot be as strongly asserted that his actions were of a nature that brings the teaching profession into disrepute. They agreed that the respondent's actions do not amount to physical abuse, and submitted that, like *NZTDT 2016-50*, the incident appears to present as a spontaneous and brief reaction to the student's "sudden intransigence."[9]

20. We agree that this case is comparable to *NZTDT 2016-50,* but the respondent's actions in the present case involved a greater use of force than in that case. He not only prised the student's hands off the bar, but he picked the boy up to move him. We also do not find that the student A presented with "sudden intransigence". We would have thought that his reaction to being taken to the school office was not unforeseeable.

21. However, we also find that the risk of harm to other students appears greater in the present case. The respondent had strong grounds to believe that Student A had already

[7] Above, n 5
[8] The parties referred to *CAC v Rangihau* NZTDT 2016/18 at [58]. This should be read in conjunction with paragraph 59
[9] Above, n 5 at [39]

caused harm to other students, and would continue to do so. Three boys were upset and had told the respondent that they had been pushed through the wet grass and mud (two boys being covered in mud). A fourth boy was crying, saying that Student A had thrown stones at him.

22. The Tribunal also considered matters contained in an affidavit from the Principal of the school. The Principal told us that the student at the centre of this case has posed a number of behavioural challenges. On many occasions staff have had to restrain or relocate this student to ensure both his own safety and that of others. The student was stood down at one stage for verbally and physically abusing a staff member. The Principal gave us examples of the student's behaviour when angry. These include pushing, hitting and kicking students of all ages, verbally abusing staff and throwing objects at them. There has been a referral to the RTLB (Resource Teacher Learning Behaviour) service.

23. We find that the combination of Student A's behaviour on that day and his known history placed the respondent in a difficult situation in determining the best intervention to protect other students from physical and emotional harm. We queried where other staff were, and whether any assistance was offered. In October 2016, the Ministry of Education issued *Guidance for New Zealand Schools on Behaviour Management to Minimise Physical Restraint.* These were not in place at the time of the present conduct, but nonetheless are helpful in considering the level of disapproval that respondent's behaviour might attract. Had this case been conducted in person, we would have had further opportunity to explore the options that were open to him, but we mean no criticism of the parties that they agreed to dispose of the charge in the present way.

Findings under s 378 and r 9

24. The respondent has accepted that the conduct was likely to adversely affect the well-being or learning of one or more students, and the use of force tends to reflect adversely on the respondent's fitness to teach. Without argument to the contrary, we also accept that conclusion.

25. In considering both the third ground under s 378 (may bring the teaching profession into disrepute), we are guided by the High Court decision *Collie v Nursing Council of New Zealand.*[10] We are not satisfied that reasonable members of the public, informed of the

[10] [2001] NZAR 74 at [28]

facts and circumstances, could reasonably conclude that the reputation and standing of the profession is lowered by the behaviour of the practitioner. In reaching this conclusion, we find the likelihood of further harm to other students material.

26. With the grounds under s 378(1)(a)(i) and (ii) established, the next step is to determine whether the conduct is *of a character or severity that meets the Education Council's criteria for reporting serious misconduct* (s 378(1)(b)).

27. For the same reasons that we found the conduct does not amount to conduct that may bring the teaching profession into disrepute, we find that it is not an act or omission that brings, or is likely to bring, discredit to the profession under r 9(1)(o).

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.

30. In summary we do not find the respondent is guilty of serious misconduct, but agree that misconduct is an appropriate finding. The next question is whether, having heard the charge, we should do any of the matters outlined in s 404.

Penalty

31. Section 404 of the Act provides:

> ***404 Powers of Disciplinary Tribunal***
>
> *(1) 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:*
>
> *(a) any of the things that the Complaints Assessment Committee could have done under section 401(2):*
>
> *(b) censure the teacher:*
>
> *(c) impose conditions on the teacher's practising certificate or authority for a specified period:*

(d) *suspend the teacher's practising certificate or authority for a specified period, or until specified conditions are met:*

(e) *annotate the register or the list of authorised persons in a specified manner:*

(f) *impose a fine on the teacher not exceeding $3,000:*

(g) *order that the teacher's registration or authority or practising certificate be cancelled:*

(h) *require any party to the hearing to pay costs to any other party:*

(i) *require any party to pay a sum to the Education Council in respect of the costs of conducting the hearing:*

(j) *direct the Education Council to impose conditions on any subsequent practising certificate issued to the teacher.*

32. When discharging the responsibilities owed to the public and profession, the Tribunal is required to arrive at an outcome that is fair, reasonable and proportionate in the circumstances.[11]

33. The parties submitted that censure was an appropriate penalty. We agree. The respondent is censured under s 404(1)(b).

34. If the respondent had not relocated to the United Kingdom, we would have considered whether conditions on practice were required. Although the respondent has no plans to return to teaching in New Zealand, circumstances might change. We therefore direct that the register is annotated under s 404(1)(e).

Costs

35. There is a dispute as to costs. The CAC seeks 40% of their costs.

36. For the respondent, Ms Andrews submits that there should be no order for costs, or at the most it should amount to 20%. She argues:

- In NZTDT 2016-50[12] the Tribunal indicated that it would consider an award of less than 50% for a finding of misconduct even were a hearing was required.
- In *CAC v* [redacted][13] where there was a finding of misconduct, the Tribunal was

[11] *Roberts v Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354, at [51].
[12] Above n 5
[13] CAC v [redacted] NZTDT 2016-19

minded to require a 20% contribution.

- Because this case was very similar to 2016-50, it was open to the CAC not to refer this case to the Tribunal and the costs would not have been incurred. The CAC could have censured the respondent but chose not to.
- Because the respondent has returned to the UK permanently, any requirement to contribute to costs would be difficult to enforce.

37. For the CAC, Mr Auld responds that:

- the respondent's submissions overlook that the it is the Disciplinary Tribunal, not the CAC that is the ultimate arbiter of the appropriate outcome in this jurisdiction in each case that "may possibly constitute serious misconduct".[14]
- The Tribunal further resolves any disputed facts which, in this case, was critical to the CAC's decision to refer the matter to the Tribunal, as there were some disputed facts, which were not put before the Tribunal which, if accepted by the Tribunal, would almost certainly have proven serious misconduct.[15]
- It is well-established that there is, in this jurisdiction, a category of "misconduct" falling short of "serious misconduct" that nonetheless entitles the Disciplinary Tribunal to exercise its powers under s 404 of the Education Act 1989. Section 401(2)(d) of the Education Act expressly confirms the existence of "misconduct that is not serious misconduct". This phrase was specifically added at the select committee stage to clarify this distinction, which confirms it received particular Parliamentary attention.[16]
- The ability of the Tribunal to make a "misconduct" finding short of "serious misconduct" has been recognised recently by this Tribunal, for example, in its decision *CAC v Teacher* (TDT2016/50).[17]
- The CAC acknowledges the guidance provided by this Tribunal in *CAC v Rowlingson*[18] and assures the Tribunal it is being followed in good faith.

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14 Education Act 1989, s 401(4).

15 These witness statements are not referred to in these submissions because the parties reached an agreement on the facts.

16 Education Amendment Bill (No 2) 2015 (193-2) (select committee report) at 4.

17 *CAC v Teacher (TDT2016/50)* TDT2016/50, 6 October 2016.

18 *CAC v Rowlingson* TDT2015/54, 9 May 2016. This is outlined above at paragraph 10

- The Tribunal in Rowlingson recognised that the discretion vested in CACs was "reduced considerably" by the change.[19] And the legislative history confirms the purpose of the 2015 amendments included to "strengthen and streamline the disciplinary regime for teachers, especially in relation to the investigation of reports of, and complaints about, possible serious misconduct".[20]

38. In light of these points, the CAC submitted that the new requirement to refer cases that "may possibly" constitute serious misconduct must encompass situations where, even after having made a discerning assessment of the circumstances as mandated by *Rowlingson*:

- the CAC considers the appropriate finding is one of "misconduct";
- but it cannot exclude a "realistic possibility" that a differently constituted, competent decision-maker might reasonably reach a different view about the level of misconduct.

39. Mr Auld argued that the fact that the Tribunal is the ultimate decision-maker is the reason for the CAC's practice of laying charges of "serious misconduct and/or conduct otherwise entitling the Disciplinary Tribunal to exercise its powers" (as in the present case).

40. Mr Auld submitted that the lowered threshold in s 401(4) means cases of this kind are more likely to arise, possibly even in the way foreshadowed in *Rowlingson*. He noted that a departmental report to the select committee rejected submissions to change the "may possibly" wording, noting the "policy intent" was to ensure "instances of *possible* serious misconduct are to be dealt with expeditiously *and at the appropriate level*" and, as was stated in the explanatory note, above n 20, at 2, to "*strengthen* and streamline the disciplinary process" (emphasis added).[21]

41. Mr Auld submitted that the deliberately low legislative threshold for referral does not and should not oblige the CAC to advocate for a finding of "serious misconduct" once a matter is with the Tribunal. This is reinforced by the fact the 2015 amendments have not extinguished the availability of "misconduct" findings, as explained above. It must be

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19 At [18] and see at [14] where the Tribunal said there was "no doubt" that the change "removes a significant discretionary judgment from the Council's CACs".

20 Education Amendment Bill (No 2) 2015 (193-1) (explanatory note) at 2.

21 The Ministry of Education and New Zealand Qualifications Authority *Education Amendment Bill (No 2): Report to the Education and Science Committee* (1 July 2014) at [541].

open to the CAC to submit such a finding should be made, without the risk that the CAC's right to claim ordinary costs is jeopardised as a result.

42. Mr Auld confirmed that in conducting its role as a prosecutor before the Tribunal, a CAC is required to balance the factual circumstances of the case as well as a number of practical considerations in the interests of justice and the public interest. Often this will include things like the need for children or young people to give evidence and the material differences to likely penalties certain factual disputes would make if pursued. In this way, proper parallels can be drawn with the Solicitor-General's Prosecution Guidelines.

43. The reality is that the CAC is now obliged to refer to the Tribunal all matters where serious misconduct is a realistic possibility. The respondent's submission, therefore, that the CAC could have dealt with this matter without referring it to the Tribunal but simply "chose not to", is procedurally incorrect.

44. The CAC submits that the referral to the Tribunal on the basis a "serious misconduct" finding is a "realistic possibility" is not mutually exclusive with a submission that a finding of "misconduct" simpliciter should be made. In other words, the CAC submits that a finding of "serious misconduct" is a "realistic possibility" here. That is because the Tribunal could disagree with the CAC's position based on the agreed statement of facts.

45. Mr Auld also referred to the joint memorandum in which the respondent accepted that one of the reasons a pragmatic approach was taken to agree on misconduct was because this case was "borderline". Both parties were in agreement that the present case was analogous to NZTDT 2016/50 where the Tribunal accepted the teacher's conduct in that case "might be categorised as serious misconduct under each of the three limbs of the definition in s 378." Therefore it cannot be argued that a case involving conduct which is "borderline" serious misconduct, or conduct which, on a factual comparison to another case, "might be categorised as serious misconduct", cannot fall under "may possibly" constitute serious misconduct.

46. The factors that have influenced the CAC to take a pragmatic approach in consenting to a finding of only "misconduct" is appropriate are as follows:

    (a) The incident was short-lived, and appears to be a "one-off" incident;

    (b) The respondent has undertaken restorative processes, having met with Student A and his family afterwards and apologising for the way he elected to handle the

situation. It is accepted, though, that this feature does not directly impact on the gravity of the conduct itself;

(c) The respondent has now returned permanently to live in the United Kingdom where he has family;

(d) The respondent would not be able to return to New Zealand for a full Tribunal hearing because he has a daughter with special health needs whom he is in care of;

(e) There would be significant costs incurred in arranging for the respondent to give evidence from the United Kingdom;

(f) Further costs would be incurred if the matter went to a Tribunal hearing on witnesses who would be required to be called to give evidence and be cross-examined; and

(g) In light of the respondent's personal circumstances, the present case was agreed by the parties to be "borderline". On this basis, the CAC accepted that a pragmatic solution would be in the public interest.

Discussion

47. We are grateful for the CAC's fulsome analysis.

48. In the present case, according to paragraph 2 of the joint memorandum, the parties "agree this case can be resolved by way of a finding of misconduct because of the unusual circumstances". In the next paragraph, we are told that the respondent has returned permanently to the United Kingdom. In paragraph 5 we are told that in light of the respondent's personal circumstances and the borderline nature of the case, the CAC accepts that a pragmatic solution would be in the public interest". And at paragraph 11 they say, "The parties have now reached the shared viewpoint that the respondent's actions fall short of the threshold for serious misconduct, but reach the threshold of misconduct." This is a joint memorandum, signed by both counsel and so we are satisfied that the respondent accepts that the CAC is being pragmatic, and the reasons given for that, as outlined above at paragraph 45.

Difficult to enforce

49. Ms Andrews submits that because the respondent has gone back to the United Kingdom, an order for costs will be difficult to enforce. In putting this as a ground, we

hope that Ms Andrews is not suggesting that her client has no intention to pay the costs. Possible difficulty in enforcing an order for costs is not a reason to refrain from making an order. We leave it to the CAC and the Tribunal to decide what steps they wish to take in order to enforce any order.

Should the CAC have laid the charge?

50. Ms Andrews argues that because this case was very similar to 2016-50, it was open to the CAC not to refer this case to the Tribunal and the costs would not have been incurred. The CAC could have censured the respondent but chose not to.

51. We accept that an allegation of the use of force may possibly constitute serious misconduct. Each case will turn on its own facts. Factors may include the degree of force used; the number of individual contacts with the student (eg one slap versus three); the time involved (eg 2 seconds versus 20); the effect on the student physically and emotionally; the effect on other students witnessing the events; the teacher's emotional state and therefore unintended force and potential for harm; the motivation of the teacher. This list is not exhaustive. However, in an environment where the use of corporal punishment (including for corrective purposes) is an offence, it is reasonable to consider that the use of physical force may possibly constitute serious misconduct.

52. Mr Auld indicated that there was evidence that would have been heard that would have made a finding of serious misconduct more likely. We have to put that to one side, but even without that suggestion, we accept that the way evidence pans out at a hearing can depart from expectations. At a full hearing of the case, we might have explored what management plans were in place, and what other staff were doing at the time and what, if anything, they observed. We would have heard more about the respondent's state of mind when he behaved as he did. Those findings might have placed the agreed facts in a better or worse light.

53. Any of the following findings could have been made:

    a) The respondent's conduct (either based on each incident individually or together) amounted to serious misconduct.
    b) The respondent's conduct did not amount to serious misconduct, but warranted a disciplinary response under s 404. In that case we might have found it was misconduct.
    c) The respondent's conduct did not warrant a disciplinary response either

because not all the facts were proven or because his actions were reasonable in the circumstances.

54. On the agreed facts, there were several factors that meant that a finding of serious misconduct was a possibility: the respondent "grabbed" the student, twice tried to prise his fingers from bars, and he picked the boy up. In other words, there were four distinct events.

55. However, we also found the student's history relevant. There was a risk of him harming others. We want to make it very clear that we are not saying that a student who has behavioural problems has a reduced right to be free from physical abuse. Rather, there were good grounds for the respondent to believe that Student A had harmed and would further harm other students.

56. In summary, it was entirely appropriate that the CAC laid a charge of serious misconduct and indeed, it was obliged to do so. We do not accept the respondent's submission that the CAC need not have brought the charge to the Tribunal.

Does a finding of misconduct affect the quantum of costs?

57. As the CAC submitted, the revised disciplinary regime gives the Tribunal more oversight over the setting of standards and protection of the public. Had the charge not been upheld at all, then it is unlikely that there would have been any order for costs. Where a finding of misconduct is made, the CAC is in a difficult position. It is obliged to bring the case, and yet sometimes may be of the view that misconduct was a more likely or fairer outcome.

58. Consensus as to costs is often part of an agreed outcome. Paradoxically, if either party had decided to proceed to a hearing on the basis that this element was not agreed, the costs and inconvenience for all concerned would have escalated considerably.

59. Ms Andrews says that in *2016-50* the Tribunal indicated that it would consider an award of less than 50% for a finding of misconduct even were a hearing was required. We agree, and note that the CAC is seeking 40%.

60. Ms Andrews notes that in *CAC v* [redacted] 2016-19 where there was a finding of misconduct, the Tribunal was minded to require a 20% contribution. This was a case where the finding of misconduct was made on one particular, and four other particulars of the charge were not upheld at all. Therefore it is of little relevance to the present

case.

61. Taking all matters into account, we find that 40% is a reasonable amount for costs. The CAC was obliged to lay the charge. The CAC has taken a pragmatic approach and considered the cost and inconvenience that a full hearing would involve. This has saved expense for the respondent and the profession. We therefore order 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 orders

62. The respondent has applied for name suppression on the following grounds:

    (a) Identification of the respondent would lead to identification of the student
    (b) The respondent's daughter's mental health would be adversely affected by publication of the respondent's name.

63. In support of his application were two affidavits: one from himself, and one from the principal of the school.

64. The hearing of this application is considered in private (s 405(5)), and so the evidence in support of the applications is public only to the extent as specified in this decision.

65. As noted above, at paragraph 22, the Principal told us that the student at the centre of this case has posed a number of behavioural challenges. He said that the school is a small rural school with a high level of parental support and involvement. Instances of student disobedience and discipline are almost non-existent. He said he was certain

that if details of this incident were made public, the parents and wider community would immediately identify the student at the centre of the case.

66. For the CAC, Ms Hann advised that having obtained the views of student A's parents, the CAC supports name suppression for student A, the school and the respondent.

Discussion

67. Consistent with the principle of open justice, section 405(3) provides that hearings of this Tribunal are in public. This is subject to the following subsections (4) to (6) which provide:

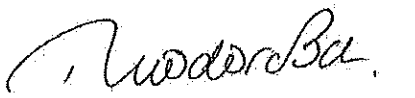
> *(4) If the Disciplinary Tribunal is of the opinion that it is proper to do so, having regard to the interest of any person (including (without limitation) the privacy of the complainant (if any)) and to the public interest, it may hold a hearing or part of a hearing in private.*
>
> *(5) The Disciplinary Tribunal may, in any case, deliberate in private as to its decision or as to any question arising in the course of a hearing.*
>
> *(6) If the Disciplinary Tribunal is of 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, it may make any 1 or more of the following orders:*
>
> > *(a) an order prohibiting the publication of any report or account of any part of any proceedings before it, whether held in public or in private:*
> >
> > *(b) an order prohibiting the publication of the whole or any part of any books, papers, or documents produced at any hearing:*
> >
> > *(c) an order prohibiting the publication of the name, or any particulars of the affairs, of the person charged or any other person.*

68. Under r 34(2)(c) of the Education Council Rules, 2016, the Tribunal "must consider whether it is proper to make an order, in accordance with section 405(6) of the Act, prohibiting publication of the name or particulars of the affairs of "certain witnesses or vulnerable people". One class is if the person is a "child or young person", which is defined as a person who is under 16 or was a student at a school or early childhood facility at the "relevant time".[22]

69. We accept that there is a risk that identification of the respondent and the school would probably lead to identification of Student A. We acknowledge the strategy for managing

[22] Rule 3(1) Education Council Rules 2016

his behavioural challenges requires careful tactics and it would not be fair on him, his family or the school community if publicity of this matter adversely affect those efforts. We are satisfied that it is proper to give student A's interests weight and we order non-publication of student A's name and identifying details. Those identifying details include the name of the school, its location and the name of the respondent.



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).