



EDUCATION COUNCIL
NEW ZEALAND | Matatū Aotearoa

Complaints Assessment Committee (CAC) v Tregurtha :

New Zealand Teachers Disciplinary Tribunal 2017/39

An early childhood teacher's registration has been cancelled for serious misconduct and failing to demonstrate her ongoing fitness to be a teacher.

Laura Hope Tregurtha, a provisionally registered teacher, taught between July 2016 and March 2017 in a kindergarten. During that time, she was found to have failed to ensure the physical, psychological and emotional wellbeing of children in her care. They were aged between two years and four years. Ms Tregurtha resigned in April 2017.

The Education Council's Complaints Assessment Committee (CAC) referred Ms Tregurtha to the New Zealand Teachers Disciplinary Tribunal (Tribunal) with a charge of serious misconduct.

Ms Tregurtha agreed to the statement of facts presented to the Tribunal. The Tribunal heard that Ms Tregurtha regularly used force to prevent children from moving during nap time and mat time. There were three children who she did this to during nap time, and four children at mat time.

At nap time, Ms Tregurtha lay children onto their stomachs, with their faces to the side. She then forcefully held them in this position by holding the children's hands behind their backs and using her forearm and her elbow to push them down. She sometimes pressed down on their legs with her foot or leg.

The Tribunal stated, "Ms Tregurtha's repeated use of force to 'correct' children's behaviour formed a pattern of actions amounting to physical abuse." Following her resignation, the Police gave Ms Tregurtha a warning as her behaviour at nap times was considered assault on a child.

Other matters included making a child stay at the Kai table for approximately 40 minutes as Ms Tregurtha wanted him to say 'please' before excusing him; and refusing to give him his soother when he became upset.

The Tribunal found the teacher's behaviour amounted to psychological abuse and ill treatment under the Education Council Rules 2016. The Tribunal stated this was a clear case of serious misconduct, in that Ms Tregurtha's behaviour was likely to affect the child's wellbeing, it reflected adversely on her fitness to teach, and it brought the teaching profession into disrepute.

The final matter involved Ms Tregurtha asking a child to pick up a toy. When she didn't comply, Ms Tregurtha grabbed her hand, pulled her along behind her, over to the toy. She bent over and pulled

the child's hand down to pick up the toy. She forced the child to bend over and hit her chin on a shelf, causing a cut to the girl's lip.

The Tribunal agreed that Ms Tregurtha had used unnecessary force making the child injure herself.

In determining penalty, the Tribunal considered that Ms Tregurtha lacked insight both into the seriousness of her conduct, and into the role of a teacher. It decided that Ms Tregurtha's shortcomings as a teacher were so fundamental, cancellation was the only outcome possible to ensure children's safe learning.

BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

NZTDT 2017-39

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 **LAURA HOPE TREGURTHA**
Respondent

TRIBUNAL DECISION

DATED: 21 June 2018

HEARING: Held at Wellington on 22 May 2018

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

REPRESENTATION: Ms Hann for the CAC
Ms Stone for the respondent

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 under s 404 of the Education Act 1989 (**the Act**).
2. The original charge, dated 13 December 2017, was that between July 2016 and March 2017, the respondent, a provisionally certificated teacher, failed to ensure the physical, psychological and emotional well-being of children and included an allegation of “immobilising and/or restraining children...against their will”.
3. At a pre-hearing conference on 24 April 2018, the parties advised that they had discussed amendment of the charge.
4. In an amended notice of charge dated 11 April 2018, before the Tribunal, the words, “immobilising and/or restraining” were changed to “applying force to”. The other amendments to the charge were the inclusion of the children’s first names which had previously been anonymised, and a change in particular 1.b of the time period from “1 to 2 hours” to “up to 40 minutes”.
5. No application for amendment to the charge was filed, but it is understood that the respondent agreed to the amendments. The charge is therefore amended.
6. The amended notice of charge reads:
 1. *The CAC charges that **LAURA HOPE TREGURTHA**, provisionally certificated teacher, of Napier, failed to ensure the physical, psychological and emotional well-being of children between July 2016 and March 2017 by:*
 - a. *applying force to children, namely Child A, Child B, Child C and Child D against their will:*
 - i. *during nap time(s), by using force to hold Child A, Child B and Child C (the children) down on their stomachs with their hands behind their backs, and/or preventing them from moving from that position when they resisted, for up to 30 minutes and/or until the children fell asleep; and/or*
 - ii. *during mat time(s), by wrapping her arm(s) and/or leg(s) around Child A, Child B, and/or Child D, and preventing them from getting up and/or moving away from her hold when they resisted; and/or*
 - b. *forcing Child C to remain seated at the kai table for periods of up to 40 minutes and/or withheld Child C’s soother (dummy) from him when he became upset during this time; and/or*

- c. *on or about 3 February 2017, forcefully pulling Child E's hand down to pick up a toy, and, in doing so, injured Child E.*
2. *The conduct alleged in paragraph 1 either separately and/or cumulatively amounts to serious misconduct pursuant to section 378 of the Education Act 1989 and Rules 9(1)(a) and/or (c) and/or (f) and/or (n) and/or (o) of the Education Council Rules 2016, or alternatively amounts to conduct otherwise entitling the Disciplinary Tribunal to exercise its powers pursuant to section 404 of the Education Act 1989.*

Summary of Findings

7. The Tribunal made the following findings:
 - a. All particulars of the charge are proved.
 - b. Particulars 1.a and 1.b each amount to serious misconduct.
 - c. Particular 1.c amounts to serious misconduct when considered cumulatively with particulars 1.a and 1.b.
 - d. Under s 404(1)(g) we order that the respondent's registration is cancelled. We would expect any qualified teacher, especially one who has completed an Early Childhood programme to know that these were not appropriate methods. Any lack of mentoring does not amount to a mitigating factor in this instance because the respondent's shortcomings are so fundamental. We found the respondent showed no insight into her behaviour. We are sufficiently concerned about her aptitude for teaching that we are not satisfied that anything short of cancellation would adequately address the need to ensure safe learning as provided in s 377 of the Act.
 - e. The respondent is ordered to pay 40% of costs.
 - f. There is an order for non-publication of the names of the children.

Evidence

8. Before the hearing the parties conferred and filed an Agreed Statement of Facts which is set out in full:
 1. *Between July 2016 and March 2017, LAURA HOPE TREGURTHA taught at Havelock North Kindergarten (the Kindergarten) as an early childhood educator.*
 2. *In this role, Ms Tregurtha was responsible for a group of children, aged between 2.5 years and 3.5 years.*

Particulars 1(a)(i) and (ii): Use of force

3. *Throughout Ms Tregurtha's time at the Kindergarten, Ms Tregurtha regularly used force to prevent children from moving during nap time and mat time. There were three children who she did this to at nap time, and four children at mat time.*
4. *The use of force of this nature is unacceptable and can have significant adverse impacts on children.*

Occasions of use of force during nap timeChild B and A

5. *On a regular basis, at nap time, when Child B and Child A were unsettled, Ms Tregurtha, on separate occasions, and when dealing with each child separately, would lay Child B and Child A on their stomachs, with their faces out to the side, and hold them in that position, by holding their hands behind his back.*
6. *On occasion, Ms Tregurtha would also place her foot or leg over Child B and Child A's legs and press down on their legs.*
7. *Whilst holding Child B and Child A down, Ms Tregurtha would hold their hands with her hand, and run her forearm up their backs so that her elbow was in between their shoulder blades. She would then push down so that they were unable to move.*
8. *While Ms Tregurtha held them in this position, both Child B and Child A would resist, show signs of distress and upset, and cry.*
9. *Ms Tregurtha would hold them, on separate occasions, in this position for up to half an hour, or until they would fall asleep.*

Child C

10. *On occasion, when another child (Child C) struggled to sleep at nap time, Ms Tregurtha would also lie Child C on his stomach and hold his hands behind his back until he went to sleep.*

Occasions of use of force during mat time

11. *When trying to get the children to sit down at mat time, Ms Tregurtha would, on occasion, hold down Child A, Child B, Child C and Child D on the mat, separately, if they refused to sit down.*
12. *On separate occasions, Ms Tregurtha would sit either Child A, Child B, Child C or Child D down between her legs and would wrap her legs around the respective child. Ms Tregurtha put her arms over the top of the child, so that the child was not able to move.*

13. *When Ms Tregurtha held Child A and Child D in between her legs at mat time, Child A and Child D would resist, cry and show signs of distress.*
14. *On one occasion, Child A kept moving away from the mat, so Ms Tregurtha held onto Child A while she was reading a story. Child A fought Ms Tregurtha, trying to get away from her. Child A cried and wrestled her, while Ms Tregurtha was reading the story. On this occasion, Ms Tregurtha had one arm around Child A's body. Child A was still able to move his arms around.*

Particular 1(b): Forcing Child C to remain at the kai table and withholding his soother

15. *On several occasions, Ms Tregurtha made Child C sit at the kai table for periods of up to 40 minutes, and/or until Child C said, "please". Centre Manager, Ms Blackmore, confirmed this was not a practice at the Kindergarten.*
16. *On one occasion in particular, after morning tea, Child C had not said, "please" to leave the kai table. Ms Tregurtha made Child C remain at the kai table until he said, "please". Child C has language difficulties and saying "please" was difficult for him. Child C became upset and cried.*
17. *When Child C became upset, Ms X told Ms Tregurtha that Child C wanted his dummy to calm him down, and asked if Child C could leave the kai table.*
18. *Ms Tregurtha refused to give Child C his dummy and let him leave the kai table until he said, "please". Child C was made to stay at the table for approximately 40 minutes, until another teacher in the room lied and told Ms Tregurtha that Child C had said "please", so that Child C could get down from the table. After 40 minutes at the kai table, Child C had missed play time and it was time for him to have a nap.*

Particular 1(c): Forcefully pulling child's hand, bending over her and causing injury

19. *On 3 February 2017, Ms Tregurtha asked Child E to pick up a toy. Child E was not yet able to talk. Ms Tregurtha told Child E she would count to three, and told Child E that either Child E was going to pick the toy up, or she would help her do it.*
20. *When Child E did not pick up the toy, Ms Tregurtha grabbed Child E's hand, and pulled Child E along behind her, over to the toy.*
21. *Whilst still holding Child E's hand, Ms Tregurtha then bent over and pulled Child E's hand down to pick up the toy. As Ms Tregurtha was standing directly behind Child E, and was holding Child E's hand, Child E had no option but to bend her*

body over at the same time as Ms Tregurtha.

22. *This quick action resulted in Child E banging her chin on a shelf which Ms Tregurtha had not seen, causing a cut to the inside of her lip. Child E's lip puffed up and bled.*
23. *Ms Tregurtha asked another staff member to put her (the other staff member's) name to the incident form as well as Ms Tregurtha's. Ms Tregurtha states it was her understanding that there needed to be two names on the incident form.*

Teacher's responses to the CAC

24. *In explanation to the CAC, Ms Tregurtha admitted that when the children were struggling to go to sleep, she would hold their hands "lightly" behind their backs while they were on their stomachs. She states she did so to help them settle. Ms Tregurtha explained that she had learnt this technique from another teacher, but acknowledged how this practice could be perceived and accepted it was not good practice.*
25. *In response to the mat time use of force, Ms Tregurtha stated to the CAC that mat time was not optional, and if a child was struggling to join mat time then they were sat on a teacher's lap. Ms Tregurtha stated that this practice was used by her manager also.*
26. *In response to keeping Child C at the kai table, Ms Tregurtha emphasised to the CAC "the importance of manners", and that "the children did need to ask to leave the table". Ms Tregurtha further stated that Child C was, "more than capable of saying please". Ms Tregurtha also said that she understood the practice of saying "please" was a centre wide expectation, and expressed upset that this had not been directly communicated to her.*
27. *In relation to withholding Child C's dummy, Ms Tregurtha stated that Child C was "having a tantrum" as he did not want to go to mat time. She stated Child C had thrown himself on the ground and that she was "sitting with him trying to calm him down". Ms Tregurtha further commented: "I don't recall when it became best practice to give a child exactly what they wanted when they were having a tantrum".*
28. *Finally, in respect to the incident with Child E, Ms Tregurtha accepted to the CAC that the incident did occur.*

Other matters

29. *The Kindergarten investigated the above allegations and notified the New Zealand Police.*

30. *Ms Tregurtha resigned from her position on 12 April 2017.*
31. *As a result of the Police investigation Ms Tregurtha was warned for assault on two children in relation to particulars 1(a)(i) and (ii) above.*

9. Based on this ASF, we are satisfied that the factual allegations contained in the charge are proved. In particular, we find that the respondent applied force to three children during nap times to hold them down while holding their hands behind their backs and prevented them from moving when they resisted, and that she did this for up to 30 minutes or until they fell asleep. We are also satisfied that during mat times she wrapped her arms or legs around children to prevent them from getting up or moving away from her, and that the respondent forced Child C to remain seated at the kai table for up to 40 minutes and withheld Child C's soother from him when he became upset during this time. Finally, in forcefully pulling Child E's hand down to pick up a toy, she injured Child E.

Serious misconduct

10. Having found the factual allegations proven, we must now decide whether any of these findings amounts to serious misconduct (or conduct otherwise entitling the Tribunal to exercise its powers). The respondent did not accept that the facts meet the test for serious misconduct.
11. 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.*

12. 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), (c), (f), (n) and (o), as set out below:

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):*

...

(c) *the psychological abuse of a child or young person, which may include (but is not limited to) physical abuse of another person, or damage to property, inflicted in front of a child or young person, threats of physical or sexual abuse, and harassment:*

...

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

...

(n) *any other act or omission that could be the subject of a prosecution for an offence punishable by imprisonment for a term of 3 months or more:*

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

Submissions for the CAC

13. For the CAC, Ms Hann referred to previous Tribunal decisions. The statement in NZTDT2014-49 is often quoted:¹

We repeat as we have said in a number of cases in the past that the use of physical force – even at a lower level such as evident in this case – is unacceptable in New Zealand schools, and that any teacher who uses physical force contrary to section [139A] puts his or her status as a teacher in peril.

14. Ms Hann also referred to Regulation 56(2) of the Education (Early Childhood Services) Regulations 2008 (the EC Regulations) which requires operators of early childhood centres to exclude a person from coming into contact with the child participating in the service or, as the case requires, the children being educated by the educator if satisfied it is necessary to do so to ensure that no child is ill-treated. This obligation is engaged if a person has “in guiding or controlling a child, [subjected] the child to solitary confinement, immobilisation, or deprivation of food, drink, warmth, shelter, or protection”.²

¹ NZTDT2014/49, 20 May 2014 at 6.

² Regulation 56(1)(b).

15. Ms Hann referred to *CAC v Teacher*,³ where a head teacher managing nap time tried to settle a struggling child by holding her “at times” over a 30-minute period, so that the child could not leave. This caused the child to become so distressed that she disturbed other children. The Tribunal agreed that the conduct amounted to serious misconduct on the basis that the teacher’s conduct had the potential to engage all three of the considerations in s 378(1) of the Act,⁴ but acknowledged the distress felt from being restrained appeared to have been “transitory”. We were satisfied that the teacher’s conduct reflected adversely on her fitness to teach and was of a nature that brings the teaching profession into disrepute when considered against the objective yardstick that applies.⁵ We also considered that the teacher’s behaviour was of a character and severity that met one or more of the reporting criteria in 9(1) of the Rules; in this case, r 9(1)(o). We found that the teacher’s actions in holding the child and preventing her from moving away amounted to “immobilisation”.
16. The CAC also referred to *CAC v Ngapo and Ngapo*,⁶ where two early childhood teachers (who were mother and daughter) were charged with the mistreatment of children between 2011 and 2014. The conduct involved:
- (a) washing a child’s mouth out with soap;
 - (b) force-feeding children;
 - (c) yelling at children in an angry tone when they misbehaved;
 - (d) confining children in a small room on their own with the door closed for periods of at least five minutes as punishment;
 - (e) rough handling of children, by:
 - (f) dragging children by the arms when they did not want to walk;
 - (g) wrapping children who were aged two or above tightly in sheets for sleep when they had misbehaved, in the manner that was used to wrap babies for sleep;
 - (h) pushing a child to the ground;
 - (i) flicking or pulling a child’s ear;
 - (j) pushing children apart by the head; and
 - (k) holding a child upside down.
 - (l) Throwing a ball at a child when the child did not respond to their name being called.
17. The Tribunal agreed with the parties that the conduct, either separately or cumulatively, amounted to serious misconduct pursuant to the then s 139AB of the

³ *CAC v Teacher* NZTDT 2016/67, 20 March 2017.

⁴ At [15].

⁵ At [16].

⁶ *CAC v Ngapo & Ngapo* NZTDT 2014/46 & 47, NZTDT 3 September 2014.

Act (now s 378), and Rules 9(1)(f) and (o) of the New Zealand Teachers Council (Making Reports and Complaints) Rules 2004 (now the Education Council Rules 2016 (the **Rules**)).

18. In light of these two cases, the CAC submitted that there can be no question that the level and circumstances of physical force used by the respondent in respect to both nap times and mat times, passes the threshold of serious misconduct and is likely to bring discredit to the profession.
19. Ms Hann submitted that the force used at nap-time in particular was sustained, and that the respondent continued to apply force to hold the children in the position described in the agreed summary of facts, even when the children would resist, show signs of distress and upset, and cry. Similarly, at mat-time, the respondent would hold each child in between her legs, wrapping her legs around the child and her arms over the top of the child, so that the child could not move and again, held the child there in the face of signs of resistance and distress.
20. The CAC also submitted that the use of force at nap-time was more serious than that observed in *CAC v Teacher* (above) on the basis that:
 - This occurred on a regular basis, rather than on one occasion.
 - There was also a higher degree of force used in this case.
 - There was a higher level of restriction on the movement of the children.
 - The application of the force and restriction of movement occurred over a sustained period, rather than “on and off” over a period of 30 minutes.
21. The CAC further submitted that the evidence suggests that the respondent’s use of force during both mat times and nap times occurred for the purpose of correction, but a finding that the respondent’s use of force was contrary to s 139A is not required for a finding of serious misconduct.
22. The CAC submitted that the respondent’s further conduct of forcing another child to remain seated at the kai table for periods of up to 40 minutes and refusing that child’s comforter, amounted to psychological abuse of that child.
23. In addition, the CAC submitted that particular 1.c further elevates the seriousness of the respondent’s conduct overall.
24. The CAC submitted the following in relation to r 9:
 - (a) *Rule 9(1)(a)*: The respondent’s use of force is similar to, but significantly more serious than in *CAC v Teacher* and that it amounted to “physical abuse” in this case on the basis that:

- (i) the respondent intentionally applied force to the children at mat times, and at nap times, in circumstances which may be in contravention of s 139A of the Act, and regulation 56(2) of the EC Regulations;
 - (ii) the respondent's use of force during nap times was found by Police to meet the definition of an assault on a child pursuant to s 194 of the Crimes Act 1961;⁷ and
 - (iii) the duration and intensity of the force used, which continued even when the children showed signs of resistance, distress and upset.
- (b) *Rule 9(1)(c) and (f)*: The CAC submits that the respondent's actions in making Child C sit at the kai table on his own for periods of up to 40 minutes because he did not say "please" to be excused, constitutes psychological abuse and/or amounts to neglect and ill-treatment of Child C. Child C has language difficulties, and saying "please" was difficult for him. The CAC submits that this is further aggravated by the fact that when Child C became upset and cried, and a staff member told the respondent that Child C needed his dummy to calm him down, the respondent refused to give him his dummy, or let him down from the kai table. The extent of Child C's distress is reflected by the fact that the respondent's colleague felt the need to lie to her about Child C saying "please" in order to then be in a position to let Child C down from the kai table, and comfort him.
- (c) The CAC submitted the respondent's actions in forcefully pulling Child E's hand down to pick up a toy after Child E refused to do so, also amounts to neglect and/or ill-treatment. Whilst the respondent did not intend to hurt Child E, the respondent was careless in her actions, and Child E sustained an injury as a result.
- (d) *Rule 9(1)(n)*: The respondent received a Police warning for assault on a child under s 194 of the Crimes Act 1961, in respect to the two children she regularly used force against during nap time. Section 194 has a maximum penalty of 2 years' imprisonment. Accordingly, the actions of the respondent trigger rule 9(1)(n) on the basis that it could be the subject of a prosecution for an offence punishable by imprisonment for a term of 3 months or more; and

⁷ "Assault" is defined in the Crimes Act 1961 as, "the act of intentionally applying or attempting to apply force to the person of another, directly or indirectly, or threatening by any act or gesture to apply such force to the person of another, if the person making the threat has, or causes the other to believe on reasonable grounds that he or she has, present ability to effect his or her purpose".

- (e) *Rule 9(1)(o)*: The CAC submits the respondent's conduct, either separately or cumulatively, also triggers rule 9(1)(o) on the basis that there can be no question that such actions brings, or is likely to bring, discredit to the teaching profession.

Submissions for the respondent

25. For the respondent, Ms Stone submitted that the respondent's "student management techniques" did not adversely affect nor were they likely to adversely affect the wellbeing or learning of students, do not reflect adversely on her fitness to be a teacher and would not be likely to bring discredit to the profession.
26. Ms Stone noted that the sleep and mat time practices were used over a period of time and her employer and colleagues did not tell her at any time that they were unacceptable. She submitted that as a recent graduate and inexperienced teacher, the respondent was entitled to rely on her employer to point out and correct any errors in her methods. The respondent was not provided with appropriate mentoring and guidance by her employer, and she had no intention to hurt or harm students, and the injury caused to Child E was entirely unintentional.

Findings on serious misconduct

Particular 1 a – application of force during sleep times and mat times

27. Dealing first with the r 9 criteria, the CAC submitted that the respondent's conduct was physical abuse (r 9(1)(a)). In support of this submission, Ms Hann referred to reg 56(2) of the Early Childhood Regulations. These regulations, made under s 317 of the Act, provide for licensing and standards for early childhood services. As Ms Hann points out, reg 56(2) places an obligation on the service provider to protect children from ill-treatment by excluding anyone employed or engaged in the service if there are reasonable grounds for believing they have engaged in ill-treatment. For clarity, we set that out in full:

56 Ill-treatment of children

- (1) *In order to ensure that the standards set out in this Part are complied with, the service provider of a licensed service and any educator who provides education and care for a licensed home-based education and care service must comply with subclause (2) if the service provider or educator has reasonable grounds to believe that a person employed or engaged in the service, or any other person,—*
- (a) *has physically ill-treated or abused a child or committed a crime against children; or*

(b) in guiding or controlling a child, has subjected the child to solitary confinement, immobilisation, or deprivation of food, drink, warmth, shelter, or protection.

(2) The service provider and the educator must ensure that—

(a) the person is excluded from coming into contact with the children participating in the service or, as the case requires, the children being educated by the educator; and

(b) if satisfied that it is necessary to do so to ensure that no child is ill-treated, ensure that the person is excluded from the service and does not enter or remain in any premises where the service is provided while it is being provided, or as the case requires, is excluded from the home and does not enter it or remain in it while the educator is providing education and care.

28. It is not the conduct of the staff member or agent concerned that is a breach of this regulation. Rather, the regulation requires the exclusion of that person to ensure no contact with the children or even from entering the facility or home. The grounds for exercising this power are that the teacher has physically ill-treated or abused a child or committed a crime against children; or in guiding or controlling a child, has subjected the child to solitary confinement, immobilisation, or deprivation of food, drink, warmth, shelter, or protection.
29. The second ground (in guiding or controlling a child) is not the same as the first ground (physical ill-treatment or abuse). Therefore, although such a technique might amount to physical abuse in some circumstances, this provision does not support the proposition that using immobilisation amounts to physical abuse.
30. The CAC also submitted that the respondent's behaviour was in breach of s 139A of the Act, which prohibits the use of force, by way of correction or punishment in any school or early childhood service. We accept that the respondent used force to "correct" children's behaviour. At nap time, she held the children's hands behind their backs and used her forearm to hold them in position lying on their stomachs. She also placed her foot or leg over their legs and pressed down on their legs. At mat time, the respondent held children down on the mat, wrapped her legs around individual children, putting her arms over the top.
31. We also acknowledge that the Police considered that the respondent's behaviour at nap time constituted an assault under s 194 of the Crimes Act 1961. Although such a finding has not been made by a court, we accept that the respondent's actions, the

intentional application of force, seem to meet the definition of assault.

32. Because of the broad definition of assault, not every assault will amount to “physical abuse”. There may also be occasions when the use of force for correction does not meet that criterion. In *CAC v Haycock*, the Tribunal commented that where an assault has occurred the level of force used will generally determine the appropriate penalty:⁸

[I]t 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 be otherwise regarded than abusive... 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... once the application of force reaches the point of constituting a breach of s 139A and attracts disciplinary attention, it seems to the Tribunal it is better to deal with the gradations as a matter of penalty.

33. However, this position was modified in NZTDT 2016-50,⁹ 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.

34. We have also considered cases involving forms of “restraint”. In *CAC v Teacher B NZTDT 2017-7* a teacher prised a boy’s fingers off a bar and put his arms around his waist and carried him to the Principal’s office. In that case a finding of misconduct was made, where we accepted the parties’ joint submission that the use of force was not for a bad effect or purpose and that it did not constitute physical abuse.
35. Although the respondent would argue that there was no such intention here, we find that the respondent’s conduct amounts to physical abuse. We agree with the CAC that the duration (up to 30 minutes at a time) and intensity of the force used are

⁸ NZTDT2016/2 at [13]-[16].

⁹ NZTDT 2016-50, 6 October 2016

factors which move this conduct into that realm. Added to this is the fact that the children showed signs of distress. We also find that the repetition of the respondent's conduct formed a pattern which amounts to physical abuse.

36. We also accept the CAC's submission that the respondent's treatment of children at nap time is conduct that could be the subject of a prosecution for an offence punishable by imprisonment for a term of 3 months or more, as evidenced by the Police warning for assault on this matter. The criterion under 9(1)(n) is met.
37. We also agree that the respondent's conduct amounts to acts that bring discredit to the profession. We have no doubt 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 respondent's behaviour.¹⁰
38. Turning to s 378(1)(a), we also find that the respondent's application of force during sleep times and mat times was likely to adversely affect the well-being of children. Although there is no evidence of physical harm, there is evidence of distress. It is difficult to know the extent of psychological harm caused. It is an agreed fact that "*The use of force of this nature is unacceptable and can have significant adverse impacts on children*".¹¹
39. The respondent's methods are not consistent with the values which underpin Early Childhood Education Programmes and practical training. It is a matter of common sense that holding children down to make them sleep is not useful or appropriate. This is not the standard of care that parents of these children expect when they entrust their children to the care of an early childhood facility.
40. For the same reasons that we found the respondent's conduct brings discredit to the profession, we find that the respondent's conduct may bring the teaching profession into disrepute. We were appalled at her methods and we find that her behaviour reflects adversely on her fitness to teach. Therefore all three limbs under s 378(1)(a) are met.
41. We accept the CAC's submission that the respondent's use of force during nap time and mat time was similar to, but more serious than, the use of force demonstrated in *CAC v Teacher* (above). The technique used by the respondent in the present case rendered the children unable to escape her hold or move from the position they were being held in.

¹⁰ The objective standard set out in *Collie v Nursing Council of New Zealand*. [2001] NZAR 74 at [28]

¹¹ ASF paragraph 4

42. We are satisfied that Particular 1.a amounts to serious misconduct.

Particular 1.b - Forcing Child C to remain at the kai table and withholding his soother

43. We agree the CAC that the respondent's treatment of Child C in making him remain at a kai table distressed for 40 minutes amounted to psychological abuse under r 9(1)(c) and ill-treatment under r 9(1)(f). She refused to give Child C his dummy and let him leave the kai table until he said, "please" and later commented, "I don't recall when it became best practice to give a child exactly what they wanted when they were having a tantrum." She showed no insight into her behaviour, particularly in light of the child's speech difficulties. We accept the CAC's submission that the extent of Child C's distress is reflected by the fact that the respondent's colleague felt the need to lie to her about Child C saying "please" in order to then be in a position to let Child C down from the kai table and comfort him.
44. We do not hesitate to find that the respondent's behaviour was likely to adversely affect Child C's wellbeing, reflects adversely on the respondent's fitness to teach and brings the teaching profession into dispute. We believe that most reasonable members of the public would share our dismay at the respondent's conduct and attitude which many would describe as cruel. It is a very poor reflection of the teaching profession. It therefore meets all three limbs under s 378(1) as well as meeting the threshold for criteria under rr 9(1)(c), (f) and (o). It is a clear case of serious misconduct.

Particular 1 c - forcefully pulling Child E's hand down to pick up a toy, and, in doing so, injured Child E

45. We accept that in an Early Childhood Service, there are circumstances in which it is appropriate to guide a child's hand in teaching or encouraging to perform an action. However the respondent acknowledges that she forcefully pulled Child E's hand. It seems to us that had she not used force, the child would likely not have hit her chin on a shelf. Not only was the respondent careless, but she used more force than was necessary.
46. In isolation, this particular would not reach the threshold for serious misconduct. It warrants an adverse finding, but we do not agree that it amounts to neglect or ill-treatment. When considered with the other particulars, it forms part of a pattern of behaviour that demonstrates a lack of patience and unsafe exercise of physical control over children that amounts to ill-treatment. Therefore, we find that cumulatively all three particulars amount to serious misconduct,

Penalty

47. In *CAC v McMillan*¹² 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.

48. Ms Hann referred to *CAC v Mackey*,¹³ where we noted the change in s 377 of the Act from “contribute” to “ensure” that students are provided with a safe learning environment, representing a heightening of the protective obligations resting on the Education Council.

49. In NZTDT 2016/60, the Tribunal summarised the relevance of the Vulnerable Children Act 2014 Act to these proceedings as follows:¹⁴

*The VC Act’s purpose is to reduce the risk posed by those whose profession requires them to associate with children and young persons, and who have convictions for offending of a type that presumptively undermines their suitability to have such contact. Teachers logically form part of the VC Act’s catchment. As we said in NZTDT 2016/50, we accept that the **VC Act’s focus on safety mirrors a key factor the Tribunal must consider whenever it decides if a teacher who has engaged in behaviour prohibited by the Rules** – whether it took place inside or outside the work environment, and whether or not it attracted a criminal conviction – is fit to remain a member of the profession. **We accept the VC Act reinforces the importance of our obligation to closely scrutinise the ongoing fitness to teach of any practitioner who faces a disciplinary charge for behaviour of a type that may pose an ongoing risk to students.***
[emphasis added]

50. Ms Hann submitted that the present case is more serious than *NZTDT 2016/67*¹⁵ She

¹² NZTDT 2016/52, 23 January 2017, paragraph 23.

¹³ *CAC v Mackey*, above n 1, at [41].

¹⁴ At [40]

¹⁵ See above, note 3

emphasised that ensuring the safety of children and young persons in their learning environments is of utmost importance.¹⁶ The Tribunal's assessment on the least restrictive penalty is a balancing exercise. In the present case, cancellation is the starting point.

51. Ms Stone submitted that the respondent was not provided with appropriate mentoring and guidance by her employer, who did not review her teacher registration folder. Her employer did not tell her that her practices were unacceptable, and the respondent did not act out of anger or malice.
52. We agree that the respondent might have benefited from some mentoring and that her employer or her colleagues should have intervened. That does not excuse her behaviour. As noted above, her techniques at sleep time and mat time would not have formed part of her foundation qualification. The same can be said of making a child remain at a table for 40 minutes, because they haven't said "please". Nor does any lack of guidance mitigate her conduct. We simply do not understand how any qualified teacher would contemplate using those techniques or would consider them acceptable. We have significant concerns about the respondent's attitudes towards children and her aptitude for teaching.
53. Ms Stone submitted that the respondent has taken full responsibility for her actions and is currently not teaching. However at the same time she argued that the conduct does not amount to serious misconduct. The respondent's failure to appreciate the seriousness of these matters demonstrates a significant lack of insight into her conduct and lack of understanding of the role of a teacher.
54. Ms Stone referred to other decisions where the teacher's registration was not cancelled:

*CAC v Jamasbnejad*¹⁷ involved the behaviour of a teacher towards her own daughter and also towards other children. Since the 2013 events, she had worked for a year with no further incident and had received favourable endorsements.

In *CAC v Simpson*¹⁸ a teacher lifted a student by his shoulder blades and carried him out of class. The Tribunal acknowledged Mr Simpson demonstrated insight into his behaviour such that the only penalty required in the public interest was censure and attendance of further professional development and training as conditions to his practising certificate.

¹⁶ Education Act 1989, s 377.

¹⁷ *NZTDT 2015-19*

¹⁸ *NZTDT 2015-50*

In *CAC v a Teacher* a teacher engaged in a pattern of inappropriate behaviour, including, hitting a students with a ruler and a textbook, pushing a student backwards onto her chair; pulling a student out of her chair; calling students “dumb” or “stupid” and one student as an “idiot”.

55. Ms Stone advised that the respondent is willing to accept a censure and a requirement to disclose the matter to a prospective employer and to receive mentoring support in the event that she returns to the teaching profession.
56. For the CAC, Ms Hann submitted that *CAC v Jamasbnejad* can be distinguished on the basis mitigating factors including the teacher’s psychological wellbeing at the time, her insight and remorse. Following the teacher’s resignation from the Centre, the teacher also continued to work in the industry without incident in that case, which supported the Tribunal’s finding that she had “turned a corner” and that her conduct was “unlikely to be repeated”.¹⁹ *CAC v Simpson* was one isolated incident and did not occur in the Early Childhood context, and in *NZTDT 2011-4* mitigating features included the “amount of strain arising from events in his personal life at the time”, the difficult teaching environment in which he was operating and little support from within the school. The CAC submitted this case should also be distinguished on the basis that both the conduct and the decision preceded the Vulnerable Children’s Act 2014, which now requires the Tribunal to closely scrutinise the ongoing fitness to teach of any practitioner who faces a disciplinary charge for behaviour of a type that may pose an ongoing risk to students.
57. We note that the events in both *Jamasbnejad* and *2011-4* precede the Vulnerable Children’s Act. We consider the children in the present case, because of their age are in an even more vulnerable position than *Simpson* or *2011-4*.
58. The respondent is not currently teaching. We have not seen any evidence that the respondent has taken any steps to ensure that she better understands her responsibilities as a teacher. She has not accepted that her conduct may have harmed children. She has not commenced or organised any further education or mentorship. She seems to lack an understanding of the needs of young children. She has not persuaded us that she is fit to be a teacher. We therefore make the following order:
 - a) the respondent’s registration is cancelled under s 404(1)(g)

¹⁹ At [21].

Costs

59. The CAC sought costs of 40%, amounting to \$1,851.13. The respondent asked for the question of costs to be reserved. Given we have upheld the finding of serious misconduct, we intend to order the respondent to pay 40% of the costs of conducting the hearing, under section 404(1) (i), that is 40% of the Tribunal's costs. The Tribunal delegates to the Chairperson authority to determine the quantum of those costs and issues the following directions:

- i. Within 10 working days of the date of this decision, the Secretary is to provide the Chairperson and the parties a schedule of the Tribunal's costs
- ii. Within a further 10 working days the respondent is to file with the Tribunal and any submissions he wishes to make in relation to the costs of the Tribunal.

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

Non-publication

61. The respondent did not seek name suppression.

62. The CAC sought orders for non-publication of the children's names. We are satisfied that the children's privacy interests outweigh any public interest in publication of their names. It is proper to suppress their names. We therefore make orders for non-publication of their names under s 405(6)(c) of the Act.



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).