NZTDT 2019/102

BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

UNDER	the Education Act 1989
IN THE MATTER	of a charge of serious misconduct referred by the Complaints Assessment Committee to the New Zealand Teachers Disciplinary Tribunal
BETWEEN	**THE COMPLAINTS ASSESSMENT COMMITTEE** Referrer
AND	**ANGELA KAY ECKHOFF** Respondent

DECISION OF THE TRIBUNAL

Tribunal:	Nicholas Chisnall (Deputy Chair), Rose McInerney and William Flavell
Hearing:	On the papers
Decision:	11 August 2020
Counsel:	F A Manning for the referrer The respondent in person

Introduction

[1] The referrer, the Complaints Assessment Committee (the CAC), charged Angela Eckhoff with serious misconduct and/or conduct otherwise entitling the Tribunal to exercise its powers. Its notice of charge dated 16 September 2019 alleges that the respondent, while employed at an early childhood centre during 2018 and 2019:

(a) Offered, without authority, free hours to two families at the centre, resulting in a loss of income to her employer; and

(b) Falsified records at the centre.

[2] The respondent agreed to this matter being dealt with on the papers, and, to her credit, did not seek to resist the CAC's assertion that her behaviour constitutes serious misconduct. We are satisfied that the CAC has made out its charge of serious misconduct. While relatively finely balanced, we accept the outcome proposed by the parties, which is that a penalty short of cancellation will achieve the applicable disciplinary purposes and principles.

The factual background

[3] What follows is the agreed statement of facts presented by the parties:

> **Introduction**
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> The respondent, ANGELA ECKHOFF, is a fully registered teacher. She became fully registered on 11 April 2008. Her practising certificate is due to expire in 2021.
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> Ms Eckhoff was the Head Teacher at Barnardos Early Learning Centre, Pakuranga (the Centre). On 18 February 2018 Ms Eckhoff resigned as Head Teacher at the Centre.
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> She is now employed as Head Teacher at Parnell Trust (another centre that offers childcare to preschoolers and school aged children).
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> **Circumstances of the charge**
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> On 24 January 2019, it was discovered that the respondent had offered the families of Child 1 and Child 2 an additional 10 free Early Childhood Education (ECE) hours each per week at the Centre. Both families were acting on this offer.
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> This was discovered when Child 1's mot her made a complaint regarding an incident at the Centre concerning her child on 23 January 2019.

Approximately two months prior, at the respondent's instigation, an agreement was reached between the respondent and Child 1's mother that Child 1 would remain enrolled in the Centre for 30 hours a week, but only record 20 hours a week.

In particular, Child 1's mother was to sign Child 1 in at 8:30am and sign her out at 12:30pm, even though Child 1 's scheduled pick up was at 3pm.

The incident report dated 23 January 2019 records that Child 1's incident occurred at 12:10pm, however the incident in fact occurred later at around 3pm, but the incident form had been adjusted to hide the fact that Child 1 had been at the Centre longer than her booked 20 hours a week. The form also records that the parent was informed at 12:30pm (Child 1's incident report is attached as Appendix A).[1]

Child 1's mother said this arrangement was offered to her when they said they would be taking Child 1 to another childcare centre called KidSpace, and that Ms Eckhoff asked Child 1's mother not to leave.

The same arrangement detailed above applied to Child 1's cousin, Child 2.

Child 2 was also involved in an incident on 23 January 2019. Again, the incident form in respect of Child 2 was adjusted to hide the fact that Child 2 had been at the Centre longer than 20 hours per week. In particular, the incident form records the incident as occurring at 1:20pm, but with the "parent informed (time)" as 12:30pm, being prior to the incident (Child 2's incident report is attached as Appendix B).

The additional 10 hours free to two families resulted in financial loss to the Centre of approximately $5,395.

The daily sign in sheets are attached as Appendix C.

Respondent's comments

In an interview on 24 January 2019 held at the Centre, Ms Maree Findlay (Regional Manager) asked the respondent about the above. During the interview, the respondent admitted that she agreed to enrol Child 1 and Child 2 for 30 hours, but keeping them on the roll for 20 hours (accordingly providing them with 10 free ECE hours per week each).

The respondent said she did this because the families were planning on moving Child 1 and Child 2 from the Centre for another. She admitted this was agreed about two months ago. She said she did not run this past Ms Findlay first as, she "just

[1] Not replicated in this decision, and nor are the details recorded in Appendices B and C.

acted as she didn't want to lose the children".

On 24 January 2019, the respondent wrote a handwritten letter responding to the allegations. She stated:

As discussed, I made a special arrangement with [the mother of child 1's cousin] and (Child 3's mother] a few months ago. They asked about thirty Free hours and said they would be leaving. I offered them Free hours as a special arrangement telling them both that it was confidential as we did not offer that anymore to parents.

The reason I decided to do this was the occupancy was low and I felt It was the right decision at the time. I am aware of ratio every day and understand that safety is a priority of children in my care, I do understand the implications of this and realize now that I should have run this by my manager Maree.

On 11 February 2019, Ms Findlay interviewed the respondent again at the centre. The respondent confirmed that there were two children receiving the 30 hours free, whilst enrolled for only 20 hours. The respondent also stated that she never begged any parent to stay but said "I do believe in asking when they are leaving why, is there any concerns or issues".

The respondent went on to say that Child 1's grandmother was demanding around 30 hours and she "felt pressured by them in a weak moment" and said "I should have approached you Maree, and gosh I know I can't do anything like this again".

On 6 April 2019, Ms Eckhoff provided a typed letter in response to the Teaching Council. She said:

After 8 years at Barnardos Pakuranga I have had an exemplary record. I have always loved my job and have always made decisions not alone but with approval from Maree Findlay my business manager. I made a mistake in offering parents 30 free hours to help their financial situation. I deeply regret this and I am very sorry.

Reflecting on the situation I did from the heart not really thinking about the serious nature of what I was doing. I wanted to alleviate stress from parents, but I know that what I should have done was seek advice first.

One of the parents that I had given extra hours to was not happy with a special needs child that had hurt her child. This parent was unhappy that this child was still at the centre. At the time this child with special needs had an early intervention teacher working with him. It is my personal philosophy to ensure all children have the same opportunities to learn alongside others. This parent had the opinion that because I allowed our special child to stay at Barnardo's I showed poor performance as manager.

When my manager Maree Findlay asked in the first meeting

if I had offered extra hours to this parent I did not hide the fact that this is what I did. I was open and honest to questions asked of me and it was documented and from this several weeks went by before I was told that this was now an investigation.

I was devastated at this thought and it caused me anxiety to think of the serious nature of my actions. Through the stress it caused me due to endless proposed meetings being cancelled by Maree and the HR person it was weighing heavily on me. It was then I felt with a heavy heart I decided to resign from Barnardos. It was the hardest decision I have had to make in a longtime and I felt physically sick. I was always very proud to tell family, friends, about all the good work my team were doing and my contributions adding value to the centre.

Our findings

[4] Section 378 of the Education Act 1989 defines "serious misconduct" as behaviour by a teacher that has one or more of three outcomes. It is that which:

(a) Adversely affects, or is likely to adversely affect, the well-being or learning of one or more children; and/or

(b) Reflects adversely on the teacher's fitness to be a teacher; and/or

(c) May bring the teaching profession into disrepute.

[5] The Court of Appeal has affirmed that the test for serious misconduct under s 378 of the Education Act is conjunctive.[2] As well as having one or more of the three adverse professional effects or consequences described in s 378(1)(a), set out above, the conduct concerned must also be of a character and severity that meets the Teaching Council's criteria for reporting serious misconduct. The Teaching Council Rules 2016 (the Rules) describe the types of behaviour that are of a prima facie character and severity to constitute serious misconduct.[3] That which the CAC says is primarily engaged in the respondent's case is r 9(1)(g). It relevantly

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[2] *Teacher Y v Education Council of Aotearoa New Zealand* [2018] NZCA 637.
[3] Which came into force on 1 July 2016 and had a name change from the Education Council Rules to the Teaching Council Rules 2016 in September 2018. The Rules were amended on 19 May 2018, and it is those which apply to the respondent's conduct.

describes “acting dishonestly in relation to the teacher’s professional role”. The CAC also relied upon r 9(1)(k), which encompasses “any act or omission that brings, or is likely to bring, discredit to the profession”.[4]

[6] We have reminded ourselves that the burden rests on the CAC to prove the charge. While the standard to which it must be proved is the balance of probabilities, the consequences for the respondent that will result from a finding of serious professional misconduct must be kept in mind.[5]

[7] We are satisfied that the test for serious misconduct is met, for the reasons we will explain.

[8] Starting with the first limb of the definition of serious misconduct, we are satisfied that the respondent’s behaviour fulfils two of the three criteria in s 378(1)(a) of the Education Act. First, we accept that the respondent’s dishonesty in respect to her employer adversely reflects on her fitness to teach.[6] As we have said previously, practitioners have an obligation to both teach and model professional and lawful behaviour.[7] Behaviour of this type is the antithesis of the standard of honesty expected of teachers. We also accept, as a corollary, that the respondent’s behaviour is of a nature that brings the teaching profession into disrepute when considered against the objective yardstick that applies.[8]

[9] We are also satisfied that the second limb of the test for serious misconduct is satisfied, as the respondent’s behaviour is of a character and severity that meets r 9(1)(g) of the Rules.[9]

[10] We emphasise that we unreservedly accept that there was no personal financial incentive behind the respondent’s stratagem to provide “free” hours to Children 1 and 2’s parents. Ms Eckhoff emphasised the fact that she acted with the best interests of the children in mind, as she wanted to ensure

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[4] In *Teacher Y* above n 2, the Court of Appeal held that r 9(1)(k) is not subject to the ejusdem generis rule, but rather is a “catch all” provision.
[5] *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1 (SC).
[6] Education Act, s 378(1)(a)(ii).
[7] The obligations are described in the Teaching Council’s Code of Professional Responsibility.
[8] Education Act, s 378(1)(a)(iii). See *Collie v Nursing Council of New Zealand* [2001] NZAR 74, at [28].
[9] It has therefore not been necessary for us to separately consider the “catch all” in r 9(1)(k).

they had learning continuity before transitioning to primary school. The respondent explained to us that she knew that the parents of Children 1 and 2 could not afford to pay full tuition. We also accept that the respondent may have been under a degree of pressure from her employer to arrest the Centre's falling roll. However, while we accept that the respondent's behaviour was motivated by altruism, that does not detract from the fact that she devised a scheme to mislead her employer. It is an aggravating feature that the plan required her to make the parents of Children 1 and 2 complicit to the lie that their children were only attending – and paying for – 20 hours of ECE a week.

[11] We are satisfied that the respondent's behaviour demonstrates a serious lapse of professional judgement. The respondent's decision to mislead her employer is behaviour that strikes at the heart of the expectation for honesty and integrity that the profession and the public have of practitioners.

[12] We do not consider that Ms Eckhoff's case is on all fours with the decisions cited by the CAC, which reduces their utility as comparators.[10] Two addressed deceit of a type that undermined the "high trust model" for securing funding that New Zealand enjoys.[11] The other two decisions involved deceit for personal professional gain. While we consider that the gravity of the conduct with which we are concerned sits below that addressed in the cases referred to by the CAC, we emphasise that Ms Eckhoff's dishonesty was not victimless and had financial repercussions for her employer.

Penalty

[13] The primary motivation regarding the establishment of penalty in professional disciplinary proceedings is to ensure that three overlapping purposes are met. These are to protect the public through the provision of a safe learning environment for students, and to maintain both professional

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[10] *CAC v Leach* TDT 2016/66, *CAC v Teacher* NZTDT 2014/13, *CAC v Teacher* NZTDT 2012/12 and *CAC v Teacher* NZTDT 2013/20.
[11] Which was the way the model was described in *CAC v Thornton* NZTDT 2015/63, at [20].

standards and the public's confidence in the profession.[12] We are required to arrive at an outcome that is fair, reasonable and proportionate in the circumstances in discharging our responsibilities to the public and profession.[13]

[14] Whether we must cancel a teacher's registration in order to discharge our disciplinary obligations tends to turn on the practitioner's rehabilitative prospects and the degree of insight into the causes of the conduct concerned. We accept that this is not a case that squarely falls within either of the two overlapping situations described in *CAC v Fuli-Makaua*[14] that means there is a clear-cut need to cancel the respondent's registration to teach.

[15] The CAC proposed that we censure the respondent and impose conditions on his practising certificate. Counsel for the CAC emphasised Ms Eckhoff's, "cooperation with the investigation from a very early stage, her expression of remorse, the lack of personal pecuniary advantage and the fact that the dishonesty appears to have been motivated in part by an attempt to assist the families and retain attendees for the benefit of the business". We endorse this submission and accept that a penalty short of cancellation is justified in the circumstances.

[16] While the CAC proposed some form of professional development to aid the respondent's rehabilitation, we are satisfied from the submission provided by Ms Eckhoff that this proceedings has sheeted home to her the standard of propriety expected. Given Ms Eckhoff's relatively lengthy membership of the teaching profession, and the fact that she has not previously faced disciplinary proceedings, we are of the view that a candour condition will sufficiently address the negligible risk of repetition posed.

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[12] The primary considerations regarding penalty were discussed in *CAC v McMillan* NZTDT 2016/52.

[13] See *Roberts v Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354, at [51].

[14] *CAC v Fuli-Makaua* NZTDT 2017/40, at [54]. These are:

(a) Where the conduct is sufficiently serious that no outcome short of deregistration will sufficiently reflect its adverse effect on the teacher's fitness to teach and/or its tendency to lower the reputation of the profession; and

(b) Where the teacher has insufficient insight into the cause of the behaviour and lacks meaningful rehabilitative prospects. In this scenario, there is an apparent ongoing risk that leaves no alternative to deregistration.

Costs

[17] The CAC seeks a contribution from the respondent towards the costs it incurred undertaking its investigative and prosecutorial functions. We must also consider whether to order the respondent to contribute to the Tribunal's own costs, which is the third category described in our Practice Note.

[18] We have not been provided with a schedule of the CAC's costs. The Tribunal's costs are $1,145.

[19] Our 2010 Practice Note sought to achieve an "objective and predictable" approach to costs applications. However, we acknowledge that costs must be considered on a case-by-case basis to ensure that a fair result is achieved. In recent times, we have ordered a smaller contribution – 40 instead of the usual 50 per cent – where a practitioner has accepted responsibility for his or her behaviour and agreed to the matter being dealt with on the papers. That is the approach we intend to take here.

[20] We order the respondent to make a 40 per cent contribution towards the costs incurred by the CAC unless she challenges their reasonableness. The CAC is to provide the respondent with a schedule of its costs within 10 days of this decision. Should Ms Eckhoff take issue with the reasonableness of the CAC's costs, then she has 10 working days to explain her objection, at which point the Deputy Chair will determine the issue.

[21] We order the respondent to make a 40 per cent contribution towards the Tribunal's own costs.

Orders

[22] The Tribunal's formal orders under the Education Act are as follows:

(a) Pursuant to s 404(1)(b), the respondent is censured.

(b) Pursuant to s 404(1)(c), we direct that the respondent must inform her employer, or any prospective employer, of this proceedings and provide it with a copy of this decision.

(c) The matters referred to in (a) and (b) will be annotated on the register under s 404(1)(e) for a period of two years from the date of this decision.

(d) There is an order pursuant to s 405(6)(c) of the Education Act and r 34 of the Teaching Council Rules permanently suppressing the names of Child 1 and Child 2, and any details that might identify them.

(e) The respondent is to pay 40 per cent of the CAC's costs under s 404(1)(h), unless she disputes their reasonableness, in which case the Deputy Chair will determine the issue afresh.

(f) The respondent is to pay $458 to the Tribunal pursuant to s 404(1)(i).

Nicholas Chisnall
Deputy Chair

NOTICE

1 A person who is dissatisfied with all or any part of a decision of the Disciplinary Tribunal under sections 402(2) or 404 of the Education Act 1989 may appeal to the District Court.

2 An appeal must be made within 28 days of receipt of written notice of the decision, or within such further time as the District Court allows.

3 Section 356(3) to (6) apply to every appeal as if it were an appeal under section 356(1).