

BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

NZTDT 2019-72

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 **DAVID LIVINGSTON NANDIGAM**

Respondent

TRIBUNAL DECISION

3 DECEMBER 2020

HEARING: Held at Wellington on 5 November 2019 (on the papers)

TRIBUNAL: Theo Baker (Chair)
Aimee Hammond and Simon Williams (members)

REPRESENTATION: Ms Best for the CAC
Ms King 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. It is alleged that **DAVID NANDIGAM**, (**the respondent**):
 - a) In or around June 2018 digitally falsified the date, time and location on a professional development flyer from 28 June 2018 to 11 June 2018 and/or;
 - b) On 6 June 2018 provided the false professional development flyer to his Deputy Principal and requested professional development leave for 11 June 2018 to attend this professional development; and/or
 - c) In or around May 2018 requested and took professional development leave for Friday 11 May 2018 to attend professional development which was held on Saturday 12 May 2018.
2. The CAC alleged that the conduct amounted to serious misconduct under section 378 of the Education Act 1989 (**the Act**). 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 Teaching Council's criteria for reporting serious misconduct.*

3. The criteria for reporting serious misconduct, referred to in paragraph (b) are found in rule 9 of the Rules. The CAC relied on rule 9(1)(k): and rule 9(1)(g) and/or (k) of the Teaching Council Rules 2016 (**the current Rules**) and/or rule 9(1)(h) and/or rule 9(1)(o) of the Education Council Rules 2016 (**the former Rules**).¹
4. Rule 9 of the current Rules says:

9 Criteria for reporting serious misconduct

¹ These were renamed the Teaching Council Rules 2016 in September 2018. The amendments made by the Education Council Amendment Rules 2018 to the criteria in rule 9 do not apply to conduct before 18 May 2018. See Schedule 1 Part 2.

(1) *A teacher's employer must immediately report to the Teaching Council in accordance with section 394 of the Act if the employer has reason to believe that the teacher has committed a serious breach of the Code of Professional Responsibility, including (but not limited to) 1 or more of the following:*

...

(g) acting dishonestly in relation to the teacher's professional role, or committing theft or fraud:

...

(k) any act or omission that brings, or is likely to bring, the teaching profession into disrepute.

5. Rule 9 of the former Rules is relevant to the May 2018 allegations:

9 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:*

...

(h) theft, or fraud;

...

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

6. Therefore we must find that the respondent's conduct meets one of the three definitions of serious misconduct **and** that it is of a character or severity to meet one of the criteria in rule 9 a serious breach of the Code of Professional Responsibility (**the Code**).

Agreed Facts

7. Before the hearing the parties conferred and submitted an Agreed Summary of Facts (**ASF**). The agreed facts and our findings are set out below under each allegation.

8. It was agreed that the respondent was first fully registered on 28 January 2016. His practising certificate expired on 28 January 2019.

9. The respondent was employed at the Auckland Seventh Day Adventist High School (the school) from April 2014 and was the Teacher in Charge of Technology. He resigned from the school on 23 July 2018.

Allegation (a): In or around June 2018, Mr Nandigam digitally falsified the date, time and location on a professional development flyer from 28 June 2018 to 11 June 2018

Allegation (b): On 6 June 2018 Mr Nandigam provided the false professional development flyer to his Deputy Principal and requested professional development leave for 11 June 2018 to attend this professional development

10. The parties agreed that on 6 June 2018, the respondent applied for professional development leave to attend a "MICRO BIT Mini League workshop" on Monday 11 June 2018. The respondent told the Deputy Principal that the duration of the course was one day, that it would be held at Birkenhead College and the application fee was \$85. He also sent the Deputy Principal an email attaching a flyer for the workshop. This noted the details of the workshop as 11 June 2018, 9am-4pm at Birkenhead College.
11. When the Deputy Principal called Birkenhead College to confirm the details of the course, she was told that the workshop would in fact be held on 9 July 2018 (in the school holidays), not on 11 June 2018.
12. The Director of MICRO BIT Mini League confirmed that the date, time and location of the workshop had been altered. In particular, the workshop was actually due to be held on 28 June 2018 at Botany Downs College. The Director's details had also been left out at the bottom of the flyer.
13. On 7 June 2018, the Principal spoke with the respondent, who first said that the 11 June 2018 date was correct and that he had received the invitation from the Head of Department at Birkenhead College. However, the respondent returned to the Principal's office approximately 15 minutes later and admitted to digitally altering the professional development flyer. His explanation was that he wanted a day off.
14. On 22 June 2018, at a meeting with the respondent, his PPTA representative met with the Principal, Deputy Principal and a representative from the NZ School Trustees Association. The respondent's representative said that the respondent had falsified the date because he panicked and that he was under stress. The respondent said that he realised that honesty and integrity were important attributes of being a teacher and the special character of the Seventh-Day Adventist organisation. He apologised to the

members present and said he regretted letting the school down.

15. On 23 July 2018, Mr Nandigam resigned from the school.
16. On 7 September 2018 the Teaching Council received a mandatory report from the Principal of the school.
17. Included in the respondent's response to the CAC investigation was a letter dated 30 July 2018 from his GP, advising that the respondent had been suffering from stress and anxiety for the previous two months.

Allegation (c): In or around May 2018, Mr Nandigam requested and took professional development leave for Friday 11 May 2018 to attend professional development which was held on Saturday 12 May 2018.

18. On 9 May 2018, the respondent made a leave application requesting leave for Friday 11 May 2018 for "professional training" for a "PLD Focus – NCEA Digital Technologies Level One" workshop. However, the workshop was actually held on Saturday 12 May 2018.
19. The school relief sheet for 11 May 2018 shows that the respondent took leave on 11 May 2018.
20. On 21 December 2018, the respondent's representative advised that the respondent recalled attending the workshop on 12 May 2018.
21. The school does have a mechanism for compensating an employee when they are required to work extra hours out of school time, noting they usually give time/a day in lieu.

Findings

22. On the basis of the agreed facts, the allegations in the charge are established. We must now decide if the conduct amounts to serious misconduct.
23. The CAC submitted that the respondent's conduct was unacceptable and amounts to "theft or fraud" or "acting dishonestly in relation to the teacher's professional role" under rr 9(1)(h) or 9(1)(g). Ms Best referred to *CAC v Clark* NZTDT 2017/4,² where we noted that the term "fraud" is not defined in New Zealand criminal law, and referred

² *CAC v Clark* NZTDT 2017/4, 18 September 2017

to the following aspects of the dictionary definition of fraud:

- a) Criminal deception; the use of false representations to gain an unjust advantage.
 - b) A dishonest artifice or trick.
24. It was submitted that the respondent's conduct in May 2018 falls within the definition of "fraud" in the sense that he falsely represented that professional development course was on a Friday (when in fact it was a Saturday), and that he did so to gain an unjust advantage (namely a day off, without disclosing the true reason why the day off was required).
25. It was further submitted that the respondent's actions in June plainly fall within the definition of "acting dishonestly in relation to the teacher's professional role", as well as the definition of "fraud".
26. Ms Best submitted that the conduct clearly amounted to a breach of his obligations under rr 9(1)(k) or 9(1)(o), and that it met the following definitions of serious misconduct in paragraph (a) of section 378:
- it reflects adversely on the Respondent's fitness to be a teacher; and
 - it may bring the teaching profession into disrepute.
27. For the respondent, Ms King accepted that the behaviour constitutes serious misconduct.

Discussion

28. Although the parties have agreed the conduct amounts to serious misconduct, we must nonetheless satisfy ourselves that it meets that threshold.
29. The first particular of the charge refers to the alteration of the professional development brochure. That act in itself is not necessarily misconduct. It is the dishonest intent, as evidenced by the respondent's action in obtaining professional development leave on the basis of providing the false professional development flyer to his Deputy Principal, that is the wrongdoing. We have therefore considered the combination of particulars a) and b) as one act.
30. We agree with the CAC that this is conduct that reflects adversely on the respondent's fitness to be a teacher. The Code of Professional Responsibility requires teachers to

maintain public trust and confidence in the teaching profession by demonstrating a high standard of professional behaviour and integrity.³ We also agree that such conduct may bring the teaching profession into disrepute. The first part of the test for serious misconduct is met.

31. In order to find serious misconduct, we must also find that the conduct is of a character or severity to meet one of the criteria in rule 9. The charge cites rules 9(1)(g) and 9(1)(k).
32. In the present case, the respondent went to some lengths to obtain leave that he was not entitled to. We agree that the respondent acted dishonestly in relation to his professional role⁴ and that the conduct is likely to bring the profession into disrepute. He sets a bad example for students and we would expect there to be consequences for a student who forged a note from a parent in order to obtain leave from school. We also find that reasonable members of the public, informed of the facts and circumstance could reasonably conclude that the respondent's behaviour brings or is likely to bring the teaching profession into disrepute.⁵
33. The same reasoning applies to the respondent's conduct in particular 1 c). By representing that the respondent was attending professional development on Friday 11 May 2018, the respondent made a false statement in order to take leave that he was not entitled to. We accept the CAC's submission that this was fraud, and so meets the criterion in rule 9(1)(h) of the former rules and rule 9(1)(o). It therefore amounts to serious misconduct.

Penalty

34. The CAC submitted that the respondent's conduct is less serious than that involved in *CAC v Leach*⁶ NZTDT 2016/66 and *CAC v Clark* NZTDT 2017/4⁷. In those cases, the conduct involved the teachers (in *Leach*, the Principal) acting fraudulently in the course of renewing their practising certificates. In *Clark* in particular, the teacher falsified multiple documents, and the conduct resulted in her being convicted of two charges of making a false

³ Code of Professional Responsibility, clause 1.3

⁴ Rule 9(1)(g) of the current Rules

⁵ Applying the test in *Collie v Nursing Council of New Zealand* [2001] NZAR 74 at [28]

⁶ Note above

⁷ *CAC v Clark* NZTDT 2017/4, 18 September 2017

document and two charges of forgery.

35. It was further submitted that the respondent's conduct is also less serious than in *CAC v Teacher NZTDT 2013/20*⁸ where the teacher falsified a total of 59 documents in order to receive additional funding for the centre. The teacher in that case was also convicted of three charges of taking/obtaining/using a document for pecuniary advantage as a result of the conduct.
36. The CAC also accepted benefit obtained as a result of the conduct was limited. The respondent either obtained or attempted to obtain two days of leave in circumstances where he likely would have been entitled to leave if he had simply attended the professional development on the correct dates.
37. The CAC submitted that the starting point for the conduct should be cancellation for the following reasons:
- a) there were two separate incidents, approximately one month apart, of dishonesty relating to the respondent taking leave, or attempting to take leave, which he falsely claimed was to attend professional development workshops;
 - b) the June 2018 incident involved the respondent deliberately falsifying a document. It is submitted that this suggests a relatively high degree of premeditation;
 - c) when first confronted about the falsified document, the respondent initially attempted to maintain the deception, telling the Principal that the flyer was correct and said he had received the invitation from the Head of Department at Birkenhead College.
38. The CAC submitted that it will be for the respondent to demonstrate that he should remain in the teaching profession, and in particular the extent of his rehabilitative prospects, and the degree of insight that he has demonstrated into the causes of the behaviour. In particular, it was submitted that it will be necessary for the respondent to explain why, if he needed additional leave because of stress, he did not simply request such leave from his Principal, rather than deliberately setting out to deceive the

⁸ *CAC v Teacher NZTDT 2013/20*, 19 April 2013

Principal.

39. If we do not propose to cancel the respondent's registration, the CAC submitted that the following penalty is appropriate:
- a) censure;
 - b) annotation; and
 - c) a condition that the Respondent is required to provide a copy of the Tribunal's decision to any prospective employer
40. For the respondent, Ms King submitted that cancellation was not warranted, but the alternative penalties were acceptable. In particular, it was an uncharacteristic action that could only be explained by the fact that the respondent had been suffering from stress and anxiety as evidenced by the letter from his GP. Given that leave was available, the only explanation for his behaviour was that he was unwell and acting irrationally.
41. Ms King also referred to *CAC v Cormack* NZTDT 2018/79 in which a Principal submitted a falsified performance appraisal to the Teaching Council. We imposed a censure, conditions and annotation. As with the teacher in *Cormack*, the respondent also accepted responsibility early.
42. Our powers on hearing a charge of serious misconduct are found in section 404:

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.*

Discussion

43. We appreciate the point the CAC is making. In *CAC v Leach*⁹ we said that a Principal's behaviour, in providing a false performance appraisal of her performance to her Board of Trustees, "... struck at the heart of the expectation for honesty and integrity that teachers owe the public. Her deception had the potential to bypass the standards and processes put in place to ensure high quality teaching and learning".
44. It is unclear to us why the respondent's mental state led him to be dishonest, given the degree of premeditation. This was not a one-off lapse of judgement and his efforts to alter the flyer show an element of sophistication. However, the respondent's deception is different from cases where a teacher has falsified references, credentials, appraisals or interfered with NCEA processes. Those actions undermine the integrity of the profession and the effectiveness of the education system. The respondent's dishonesty was in his role as an employee. Our finding of serious misconduct reflects the disapproval of his peers and of community at large and the expectation that teachers are honest in all their dealings. On this occasion we will impose a penalty short of cancellation.
45. Under section 404(1)(c), for a period of two years from the date of this decision, the respondent is to inform all prospective employers of the Tribunal's decision and provide them with a copy of it. We had intended to make this condition for three years,

⁹ *CAC v Leach* NZTDT2016/66, 26 April 2017

but the reduction is in recognition of the delay in issuing this decision

46. We also censure the respondent under section 401(1)(b).
47. The register is to be annotated for a period of two years under section 401(1)(e). This is consistent with the period of the conditions imposed.

Costs

48. The CAC sought a contribution of 40% of its costs under s 404(1)(h). In her submission, Ms King reserved the right to reply to the schedule.
49. The CAC filed schedule of costs totalling \$4,668.94, with 40% being \$1,867.58. The Tribunal Secretary filed a schedule totalling \$1145.
50. There has been no response and so we order that the respondent contribute \$1,867.58 under section 404(1)(h), and \$458 under section 404(1)(i).

Non-publication

51. There are no applications for non-publication.



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).