BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

NZTDT 2019/106

UNDER	the Education Act 1989
IN THE MATTER	of a charge referred by the Complaints Assessment Committee to the New Zealand Teachers Disciplinary Tribunal
BETWEEN	**THE COMPLAINTS ASSESSMENT COMMITTEE**
AND	**Sundy Hoi Wah Ng, registered teacher, teacher registration 341997**
	Respondent

DECISION OF NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

HEARING:	29 January 2020 (on the papers)
TRIBUNAL:	John Hannan (Deputy Chair), Aimee Hammond, Maria Johnson
DECISION:	21 May 2020
COUNSEL:	N Tahana and M Tukapua for Complaints Assessment Committee P Moore for Respondent

Introduction

1. By notice of charge dated 23 September 2019 the CAC charges the respondent that:

    (a) On or before 14 February 2019 she used a Kindercare Learning Centre's Countdown charge account to make an unauthorised purchase of personal items; and/or

    (b) On 8 March 2019 she was dishonest in a job application form submitted to Evolve Education Group (Evolve) by:

        (i) Failing to disclose Kindercare Learning Centre's enquiry into her conduct; and/or

        (ii) Ticking "NO" to questions relating to whether she had been involved in any conduct investigations, disciplinary processes or had any disciplinary action taken against her; and/or

        (iii) Dishonestly recording her reason for leaving Kindercare Learning Centre as "end of maternity cover as Acting Centre Director"; and/or

        (iv) Knowingly making a declaration that the information contained in the application form was accurate, complete, and correct.

2. The CAC says that this conduct amounts to serious misconduct under section 378 of the Education Act 1989 and Rule 9(1)(g) and/or (k) of the Education Council Rules 2016, or alternatively amounts to conduct which otherwise entitles the Disciplinary Tribunal to exercise its powers pursuit to section 404 of the Education Act 1989.

3. This matter was heard on the papers on the basis of an agreed summary of facts.

4. The respondent has made an application for permanent name suppression.

Facts

5. An agreed summary of facts has been prepared and signed by the respondent dated 4 November 2019. This is as follows.

Introduction

1. *The Respondent **SUNDY HOI WAH NG** (the **Respondent**) was provisionally certificated in 2013 and received full teacher's certification in 2015.*

2. *The Respondent was employed by Kindercare Learning Group (**Kindercare**) for approximately five years. In February 2019 she was the Acting Centre Director at Kindercare Armagh Street (the **Centre**).*

3. *The Respondent is currently working as a nursery Teacher at Prebbleton Childcare.*

Circumstances

Kindercare Countdown Purchases

4. *As the Acting Centre Director, the Respondent had access to the Countdown expense card. This enabled the Respondent to buy items from Countdown for the Centre.*

5. *In November or December 2018, the Respondent used the Centre's Countdown expense card to purchase items for the Centre, but also added personal items to the transaction which was paid for using the Centre's expense card.*

6. *On 14 February 2019, the Centre Administrator identified these purchases as well as other concerns about spending beyond budget and raised concerns with the Centre Services Manager.*

7. *On 20 February 2019, the Centre Services Manager met with the Respondent to discuss the Centre's expenses and use of the Countdown expense card. At this meeting, the Respondent made an "open admission" to purchasing personal items with the Countdown expense card. She also offered to repay the money.*

8. *On 1 March 2019, the Respondent attended a disciplinary meeting where she again admitted that she had purchased personal items and took "full responsibility". She explained it was not premeditated but was a spur of the moment mistake to take items for her housewarming. The total amount in issue is $132.24. Reimbursement was not pursued by Kindercare or referred to New Zealand Police.*

9. *Subsequently, the Respondent resigned from for her position with Kindercare.*

10. *Kindercare submitted a mandatory report (**Kindercare Mandatory Report**) to the Teaching Council on 22 March 2019.*

Evolve

11. *On 8 March 2019, the Respondent submitted a job application for a position at Lollipops Blighs Road (**Lollipops**), which is part of Evolve Education Group (**Evolve**).*

12. *On the job application form, the Respondent answered 'NO' to all questions relating to whether she had been involved in any conduct investigation, disciplinary process or action. She recorded her reason for leaving Kindercare as "End of maternity cover as Acting Centre Director."*

13. *The Respondent's employment with Lollipops commenced on 15 March 2019 and on 29 April 2019 the Respondent informed the Lollipops Manager of the Kindercare Mandatory Report.*

14. *On 7 May 2019, the Lollipops Manager met with the Respondent and asked why her application indicated that she had not been involved in any disciplinary investigation. The Respondent said she did not mention the disciplinary action in her application because it related to financial matters when she was in a management role, as opposed to her teaching. The Respondent said she did not think it was relevant to the application.*

15. *On 21 May 2019, the Respondent was formally notified that her employment was terminated.*

16. *Evolve submitted a second mandatory report (**Evolve Mandatory Report**) to the Teaching Council on 23 May 2019.*

Complaints Assessment Committee's Investigation

17. *The Committee investigated both allegations and prepared a report for response.*

Teacher's Response to Kindercare Mandatory Report

18. *In a response letter to the Kindercare Mandatory Report dated 5 May 2019, the Respondent again apologised, saying she was "deeply ashamed of myself". With regard to her misuse of the Kindercare charge card, she noted that she was under professional, personal and financial stress in her life at the time of the incident and that she attended counselling to gain greater understanding about this.*

Teacher's Response to Evolve Mandatory Report

19. *In a response letter to the Evolve Mandatory Report dated 5 June 2019, the Respondent stated that she failed to mention Kindercare investigation in her job application form because she did not think the disclosure was relevant.*

The Respondent stated that she considered the matter was one which relates to expenses in a management role, as opposed to a teaching role.

Submissions for CAC

6. The CAC submitted that the respondent's use of the Countdown card for personal items, and failure to disclose she had been involved in a disciplinary process, reflect adversely on her fitness to teach, and are of a nature that brings the teaching profession into disrepute, consequently amounting to serious misconduct.

7. The CAC accepted that the amount used for personal items was modest and the respondent offered to pay the money back. But the respondent failed to report that she had used the Countdown card for personal items and did not address it until confronted by centre management.

8. In relation to the failure to disclose she had been involved in a disciplinary process to the subsequent prospective employer, the CAC submitted that she ought to have known that the incident at the Kindercare centre was relevant. As well, she provided a misleading answer as to why she left the previous employment.

9. The CAC therefore submitted that her conduct did not demonstrate the high standard of integrity expected of teachers.

10. In relation to the criteria for reporting serious misconduct in the Teaching Council Rules 2016, the CAC relied on Rule 9(1)(g), acting dishonesty in relation to the teacher's professional role or committing theft or fraud, and (k) an act or omission that is likely to bring the teaching profession into disrepute.

11. The CAC also referred to the Code of Professional Responsibility and Standards for the Teaching Profession (**Code**) specifically section 1.3 which provides for teachers to demonstrate a high standard of professional behaviour and integrity. The CAC referred also to the "Examples in Practice" of behaviour that does not demonstrate a high standard of professional behaviour and integrity. These include "behaving in a way that damages the trust or confidence that… colleagues or others have in the individual as a teacher, or in the profession as a whole…" and "using professional resources…inappropriately or for personal gain".

12. The CAC referred to several cases where teachers have used school resources for personal gain and provided false information. In summary, where school property is taken dishonestly and the amounts in question are at the lower or intermediate end of the spectrum, typical penalties are censure, and conditions requiring the teacher to inform any employer or future employer of the decision, and not to accept any

position as a registered teacher which involves having managerial financial responsibility.[1]

13. In situations where teachers have misrepresented their qualifications to a school, for example to get a particular position resulting in higher remuneration, the penalties imposed typically include censure and deregistration.[2] Misrepresentation of qualifications is a clear and major indication of a deliberate intent to deceive and of a fundamental lack of integrity in relation to a key matter. However in the present case the respondent's misrepresentations/omissions were a step back, in terms of seriousness, from misrepresentation of qualifications.

14. Similarly, deliberate failure to disclose convictions, coupled with convictions involving dishonestly using a document for pecuniary advantage and of offences of deception, have resulted in cancellation of registration.[3]

15. The CAC says it is difficult to accept the respondent's explanation for not ticking the appropriate box when completing the job application form. It considers that the respondent's explanation that she was acting in a management role as opposed to a teaching role, so she considered it was not relevant, is hard to accept, in particular when coupled with a misleading statement about her reason for leaving the centre.

16. The CAC submitted that the respondent's conduct clearly meets the reporting criteria.

17. As to penalty, the CAC noted the following aggravating factors; failing to immediately report the personal use of the card, and the timing of the two incidents with two separate employers within 6 months.

18. As to mitigating factors, the CAC acknowledged that the respondent has expressed remorse, has attended counselling to help her reflect on the wrongfulness of the conduct, and has cooperated with the centre's investigation and that of the committee.

19. The CAC submitted that appropriate penalties would be;

- censure;
- conditions requiring the respondent to advise future employers of the Tribunal's decision for a period of 2 years, and to undertake professional

[1] For example *CAC v Hill* NZTDT 2015/59
[2] For example *CAC v Teacher* NZTDT 2008/8
[3] *CAC v McCaskill* NZTDT 2018/15

development before taking any position at a school or centre which has financial responsibility.

Submissions for Respondent

20. The respondent has filed no separate submissions on outcome but has filed some submissions in relation to her application for permanent name suppression. These will be outlined below.

Decision

Serious Misconduct

21. Section 378(1) of the Education Act 1989 defines "serious misconduct" as behaviour by a teacher that:

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

    (b) reflects adversely on the teacher's fitness to be a teacher; or

    (c) may bring the teaching profession into disrepute.

22. As well as having one or more of these effects, the conduct must also be of a character or severity that meets the Teaching Council's criteria for reporting serious misconduct, as found in the Teaching Council Rules 2016. In the present case the relevant rules are those post the 18 May 2018 amendments, Rule 9 (1) (g), acting dishonestly in relation to the teacher's professional role or committing theft or fraud and (k) an act or omission that is likely to bring the teaching profession into disrepute..

23. It is clear from the decisions referred to by the CAC (see above) that teachers who dishonestly use school or centre resources for personal gain will be found to have engaged in serious misconduct even if the amounts in question are not large. Such conduct is a breach of trust and calls into question their fitness to be a teacher.

24. We agree with the CAC that it is difficult to accept the respondent's explanation of why she did not disclose the previous disciplinary matter when she applied for her next position. There was not just the failure to disclose by ticking the box, but also the positive misleading statement about her reasons for leaving the previous role. Together, these indicate a deliberate intent to mislead the next employer about the

matter. This too amounts to serious misconduct, although it is at a lesser level than false claims about qualifications.

25. We readily conclude that the respondent's behaviour amounts to serious misconduct.

26. We make the following comments about the relative level of seriousness. The amount involved in the use of the Countdown card was relatively small. There is no evidence of a large scale or extended course of dishonesty. If these actions stood alone, in a context where it could be said that the respondent gave way to a momentary temptation (as in fact she does say), the misconduct might be regarded as being at the lower end of the scale. However when coupled with the respondent's misleading behaviour in relation to her subsequent job application the matter in its totality must be viewed more seriously. It certainly cannot be regarded as being only just within the threshold of serious misconduct. Dishonest behaviour of this type certainly raises question marks over the respondent's fitness for practice and is clearly likely to lower the status of the profession.

Penalty

27. The primary purposes of professional disciplinary proceedings are the protection of the public and the maintenance of professional standards. In discharging its responsibilities to the public and profession, the Tribunal is required to arrive at an outcome that is fair, reasonable, and proportionate in the circumstances. It also must seek to apply the least punitive sanction which is appropriate in the circumstances. If rehabilitation appears a reasonable possibility that will be a highly relevant consideration.

28. Dishonesty by teachers a serious matter. The public has a right to expect that they act in all matters with integrity. They are role models to students. They have clearly stated obligations under the Code. It cannot be suggested the respondent did not know what she was doing. The respondent's conduct is not at the lowest end of the serious misconduct spectrum.

29. We accept the mitigating factors noted by counsel for the CAC.

30. We conclude that the appropriate outcome is censure, annotation of the register for a period of 2 years, and a requirement to provide future and prospective employers with a copy of this decision for a period of 2 years.

31. We are also concerned, because of the omissions/misrepresentations to the new employer, that the respondent does not have an adequate grasp of her obligations

under the Code. We are therefore imposing a condition that she undergoes appropriate mentoring in relation to understanding the Code of Professional Responsibility and Standards for the Teaching Profession. We consider the respondent needs to engage with the Code through being mentored by an experienced teacher. A goal within her appraisal cycle could be to develop her understanding of the Code and unpack her professional responsibilities.

Orders

32. The Tribunal orders as follows:

(a) The respondent is censured;

(b) The register is to be annotated for a period of 2 years from the date of this decision;

(c) It will be a condition of the respondent's practising certificate that she provides future and/or prospective employers with a copy of this decision for a period of 2 years from the date of this decision, and on request provides evidence that she has done so to the Manager – Professional Responsibility of the Teaching Council.

(d) It will also be a condition of the respondent's practising certificate that for a period of 18 months from the date of this decision she is supported in the development of her familiarity with and understanding of professional standards and ethics/the Code of Professional Responsibility and Standards for the Teaching Profession by being mentored by an experienced teacher, to the satisfaction of the Manager-Professional Responsibility of the Teaching Council.

Application for non-publication order

33. Counsel for the respondent advanced a number of items in support of the application for a nonpublication order.

34. First, he says that she is suffering from "significant psychological distress". In support of that he put forward the following evidence.

35. First, a brief seven line letter from the respondent's general practitioner dated 29 October 2019. This states that the respondent attended to seek medical attention for "significant psychological distress due to ongoing disciplinary action and investigation". The doctor says that the respondent is ashamed and is having a very

difficult time coping with the ongoing stress. He says she is working with a psychologist already and that medical intervention has now begun. She has been prescribed a drug for anxiety and sleep disturbance. We note that in fact no report from a psychologist has been provided despite the comment by the doctor that the respondent is working with a psychologist.

36. Next, there is a letter from an "independent social worker" dated 4 November 2019. This says that the respondent has been attending private counselling sessions with the writer. It says that the respondent has identified a number of issues as being linked to the ongoing Teaching Council procedure and specifically to the matter of whether name suppression will be granted. The issues are listed as anxiety and stress which the respondent has identified as being pre-existing but, recently heightened with regard to the issue of name suppression, significant weight loss, ruminating on negative thoughts, poor emotional well-being and self-esteem, the impact if name suppression is not granted for "yourself and your family", "culturally specific issues such as guilt and shame in relation to your immediate and wider family given your heritage", and overall poor emotional well-being. This counsellor is not a psychologist or psychiatrist. The Tribunal notes that the counsellor merely confirms that the respondent has been addressing these issues with her but does not opine as to the impact of publication on the respondent.

37. Finally, there is a letter from the respondent's partner dated 6 November 2019. This says that shortly before the date of the letter the respondent said to him "if they release my name, it would be better if I'm gone". Her partner says there is a "history of that kind of problem in the family". He says that her Chinese culture makes it very difficult for her to admit to having any kind of mental health problem or struggle. It was after this that he encouraged the respondent to go to see a doctor. He refers to her culture which represses emotions and puts a tremendous amount of value on maintaining and saving "face". The letter says that if name suppression is not granted her parents and extended family will not speak to her because of the shame she will bring on the family. This would be difficult for her parents who are part of a tightknit community of immigrants who would be judged and "talked about harshly" in a way that would be particularly embarrassing and isolating. The letter says that her parents are in poor health. They and the respondent are also stressed at the impacts of protests and political events involving unrest and violence in Hong Kong on family who remain there.

Applicable principles relating to non-publication orders

38. Section 405 (3) of the Education Act 1989 provides that hearings of the Tribunal are in public. This is consistent with the principle of open justice.

39. The provision is subject to subsections (4) and (5) which allow for the whole or part of the hearing to be in private. Subsection (6) provides that if the Tribunal is of the opinion that it is proper to do so, having regard to the interest of any person including the privacy of the complainant, and to the public interest, it may make an order prohibiting the publication of the name, or any particulars of the affairs, of the person charged or any other person.

40. The default position is therefore that Tribunal hearings are to be conducted in public and that the names of teachers who are the subject of disciplinary proceedings are to be published. This reflects the principle of open justice which applies to the Tribunal's proceedings.

41. In deciding if it is proper to make an order prohibiting publication the Tribunal must consider the interests of the respondent, but the Tribunal must also consider the public interest. If the Tribunal thinks it is proper it may make such an order.

42. Many cases discuss the principle of open justice in courts and tribunals. The principle has been described as a fundamental principle of common law, manifested in three ways.

43. First, proceedings are normally expected to be conducted in "open court". Second, information and evidence presented in court is communicated publicly to those present in the court. Third, nothing is to be done to discourage the making of fair and accurate reports of judicial proceedings conducted in open court, including by the media. This includes reporting the names of the parties as well as the evidence given during the proceedings.

44. A passage from a judgement of Fisher J is often quoted:

> *In general, the healthy winds of publicity should blow through the workings of the courts. The public should know what is going on in their public institutions. It is important that justice should be seen to be done. That approach will be reinforced if the absence of publicity might cause suspicion to fall on other members of the community, if publicity might lead to the discovery of additional evidence or*

offences, or if the absence of publicity might present the defendant with an opportunity to reoffend.[4]

45. The Court of Appeal has stated:

…the starting point must always be the importance in a democracy of freedom of speech, open judicial proceedings, and the right of the media to report the latter fairly and accurately as "surrogates of the public"… The basic value of freedom to receive and impart information has been re-emphasised by section 14 of the New Zealand Bill of Rights Act 1990.[5]

46. The principle of open justice exists regardless of any need to protect the public. The starting point has been said to be one of openness and transparency,

47. Several decisions discuss what differences, if any, there are between the courts and professional disciplinary tribunals in relation to non-publication orders. In *Director of Proceedings v I* [6] Frater J found that any differences in approach between the courts and medical disciplinary processes under the Medical Practitioners Act 1995 were differences of emphasis and degree. The most significant difference was the threshold to be reached before the balance is tipped in favour of name suppression. Unlike the courts, where "exceptional" circumstances are commonly required, the criterion for cases before the Medical Practitioners Disciplinary Tribunal was whether suppression is desirable.

48. In this jurisdiction the threshold is whether it is "proper". This is the same as under the Lawyers and Conveyancers Act 2006. That Tribunal has suggested that "proper" arguably sits between "exceptional" and "desirable", but in any event the threshold is somewhat lower than that imposed in the courts.[7]

49. In NZTDT 2016/69 this Tribunal discussed the differences between name suppression applications in the ordinary courts (for example in criminal prosecutions) and in professional disciplinary tribunals. It too noted that the most significant difference is that the criterion in some disciplinary tribunals is whether suppression is "desirable" (medical) or "proper" (law practitioners, and this Tribunal), whereas in the courts "exceptional" circumstances are commonly required.

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[4] *M v Police* (1991) 8 CRNZ 14, at 15
[5] *R v Liddell* [1995] 1 NZLR 538 at 546
[6] [2004] NZAR 635
[7] *Canterbury Westland Standards Committee No2 v Eichelbaum* [2014] NZLCTD 23

50. In *CAC v Finch* NZTDT 2016/11 the Tribunal discussed the High Court decision of *ABC v Complaints Assessment Committee* [2012] NZHC 1901. In that case Chisholm J said that the test used in disciplinary proceedings involves a threshold that is "significantly lower" than that used by courts in the criminal jurisdiction (at [44]).

51. So, the threshold is whether it is "proper" to order non-publication. If the evidence gets across that threshold the Tribunal may exercise its discretion whether to order non-publication. The threshold is somewhat lower than that applying in the courts. It was said in *Finch* at [18] that while a teacher faces a "high" threshold to displace the presumption of open publication to obtain permanent name suppression, it is wrong to place a gloss on the word "proper" that imports the standard that must be met in the criminal context.

52. In order to justify a conclusion that it is proper to order name suppression there must be a real risk that publication will have or will be likely to have significant and serious adverse effects on the teacher (or in appropriate cases their family). It must be clear that such potential effects are likely to go beyond the normal embarrassment, distress, anxiety, and shame which will afflict any teacher who is the subject of a published disciplinary decision. One example of circumstances which may, if they are at the required level, potentially justify a non-publication order is if it is established that a teacher's rehabilitation and recovery from (for example) a mental illness or an adverse psychological condition are likely to be significantly harmed or impaired by publication, in a way which could cause appreciable harm to the teacher. If self-harm is a real possibility that will be a major consideration. In this type of circumstance appropriate specialist medical or psychological evidence would usually be required. The evidence must provide sufficiently detailed information about the condition or circumstances of the teacher relating to which publication might cause such harmful effects. A bare assertion by a teacher that a condition exists or that they will suffer beyond the norm will usually not be enough, although that possibility cannot be excluded.

53. The categories of circumstance which could justify a non-publication order are not closed, and the examples given above are by no means exhaustive.

54. We have carefully considered the material put forward by the respondent. On balance, we conclude that the respondent has not provided sufficient evidence to demonstrate that the impact upon her or her family will be sufficiently beyond the normal distress, anxiety and humiliation which any teacher found to have engaged in professional misconduct must face, so as to make it proper to order name suppression.

55. The evidence does not establish that the respondent suffers from any diagnosed psychological or psychiatric condition which renders her particularly vulnerable in the ways that in other cases have justified orders for name suppression. There is no evidence from a specialist psychiatrist or psychologist. Her GP's letter is brief and refers to psychological distress resulting from the disciplinary action and investigation. It does not specifically speak of any danger to her which might arise from publication. Similarly the letter from the independent social worker refers to anxiety and stress having been identified by the respondent as pre-existing, but more recently heightened with respect to name suppression. Again it does not speak of any particular danger to the respondent which might arise from publication. The writer does not have psychology or psychiatric qualifications. The letter from her partner raises concerns about risk to the respondent but they are vaguely expressed and he is not a qualified medical or other therapeutic practitioner.

56. The public interest in publication is somewhat heightened where a respondent has engaged in dishonest behaviour in the education context such as concealing a past employment disciplinary process from a prospective employer, despite a direct question requiring disclosure. We have given the public interest in the publication of decisions some additional weight on that basis.

57. In these circumstances the Tribunal considers that it would not be proper to order that there is to be no publication of the name of the respondent.

Costs

58. It is appropriate that in a professional disciplinary system the costs of carrying out appropriate professional disciplinary procedures be borne at least to a significant extent by teachers who are found to have engaged in professional misconduct, to avoid an inappropriate burden being placed upon the balance of the teaching profession. The Tribunal normally requires teachers found to have engaged in serious misconduct to pay 50% of the costs of both the CAC, and of the Tribunal itself. In situations where the teacher has cooperated with the process and has avoided the need for an in-person hearing by agreeing a summary of facts, the Tribunal will reduce the costs to 40%, and sometimes to a lesser percentage in cases involving proven hardship or other particular circumstances.

59. The Tribunal considers that it should follow its normal practice and fix costs at 40% in this situation, where the teacher has cooperated with the process and has avoided the need for an in-person hearing by agreeing a summary of facts.

60. The respondent is ordered to pay 40% of the CAC's and the Tribunal's costs. No schedules of costs have yet been provided. If the respondent considers the figures are inappropriate, once schedules are been provided, counsel for the CAC and for the respondent are to seek to agree costs. The Tribunal delegates to the Deputy chair the task of determining the dollar amount of those costs in the event that there is disagreement between the CAC and the respondent on the appropriate figures

Date: 21 May 2020

John Hannan
Deputy Chairperson

NOTICE - Right of Appeal under section 409 of the Education Act 1989

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 a 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. Subsections (3) – (6) of section 356 apply to every appeal as if it were an appeal under subsection (1) of section 356.