

BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

NZTDT 2019/136

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 **CHARLOTTE AGNES BETTINA NIUIA-TOFA**
Respondent

TRIBUNAL DECISION

28 JULY 2020

HEARING: Held at Wellington on 23 April 2020 (held by Skype)

TRIBUNAL: Ian Murray (Deputy Chair)
David Spraggs and Simon Walker (members)

REPRESENTATION: N Copeland for the CAC
Respondent: Self-Represented

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. The CAC charges that the respondent dishonestly took cash payments totalling \$3,651.30, from Manurewa Early Learning Centre.
2. The CAC contends that this conduct amounts to serious misconduct pursuant to s 378 of the Education Act 1989 (**the Act**) and rr 9(1)(g) and/or (j) and/or (k) of the Education Rules 2016¹ (**the Rules**); or conduct that otherwise entitles the Tribunal to exercise its powers under s 404 of the Act.

Summary of decision

3. We concluded that this amounts to serious misconduct because it:
 - a) reflected adversely on her fitness to be a teacher;
 - b) is likely to bring the teaching profession into disrepute;
 - c) involved obvious dishonesty in her professional role; and
 - d) could have amounted to an offence punishable by at least three months' imprisonment.
4. We impose the following penalty:
 - a) Censure;
 - b) Annotation on her registration for eighteen months referring to this decision, the censure and the conditions imposed; and
 - c) Conditions imposed on her practising certificate for eighteen months on the following terms:
 - i. A condition requiring that the respondent inform her current employer and

¹ The amendments made by the Education Council Amendment Rules 2018 do not apply to conduct before 18 May 2018. However, the majority of the conduct (all but 16 days) occurred after the amendment to the Rule so we have applied the current version of the Rules.

any prospective employer of the Tribunal's decision, and to provide them with a copy of the Tribunal's decision; and

- ii. A condition requiring that the respondent not undertake any professional role involving management without the approval of the Manager of Teacher Practice at the Teaching Council.

Evidence

5. Before the hearing, the parties conferred and submitted an Agreed Summary of Facts (**ASF**), signed by the respondent and counsel for the CAC. The ASF is set out in full:

AGREED SUMMARY OF FACTS

Introduction

1. The respondent, **CHARLOTTE AGNES BETTINA NIUIA-TOFA**, is a registered teacher with a full practising certificate.
2. At the time of the conduct, the respondent was employed by Barnardos at the Manurewa Early Learning Centre (**Centre**) as the Head Teacher and Centre Manager. Manurewa Early Learning Centre is part of the Barnardos Early Learning Group, which has approximately 57 Centres across New Zealand.
3. The respondent admitted to taking **\$3651.30** cash received by the Centre for student fees between 2 May 2018 and 8 April 2019.
4. A table of the payments taken is attached at **Tab One**.
5. On or about 19 May 2019, the respondent signed an agreement with Barnardos that she would repay the \$3651.30 taken.
6. By engaging in this conduct, the respondent breached clause 1.3 of the Code of Professional Responsibility, which requires teachers to demonstrate a high standard of professional behaviour and integrity.

Fee collection

7. Barnardos Early Learning Group's policy is for fees and payments to be made by automatic payment or EFTPOS. However, cash is accepted in approximately 14 Early Learning Centres, specifically when a parent is reducing debt incurred and where it supports the needs of the local community. The Centre was one of those that accepted cash.
8. As the Head Teacher and Centre Manager, the respondent was the sole person responsible for the finances at the Centre. This included receiving, receipting and banking any cash payments made by parents of children at the Centre.
9. Between 2 May 2018 and 8 April 2019, the respondent received cash payments from parents/guardians of children at the Centre

on account of the child's fees. On 50 occasions, the respondent collected the cash payment, gave the parent or guardian a receipt acknowledging the payment had been made and then recorded the payment against the child's account in Infocare, the Centre's management software. However, rather than banking the money into the Centre's bank account, she would keep the cash payment for her own use.

10. On a number of occasions between 2 May 2018 and 8 April 2019, Cindy Gundry, an administrator at Barnardos (based at the North Shore Office), questioned the respondent about the cash deposits that were received by the Centre and recorded in Infocare but not banked into the Centre's account. The respondent told Ms Gundry that she was busy and would do it when she could. This includes the following email responses:
 - a. 08/03/19 - "Hi Cindy - I will go on Monday - sorry - I have been on the floor all day"; and
 - b. 17/04/19 - "Hi Cindy, Humble apologies for this, definitely tomorrow as I have to take my mother to the hospital today. Kind regards, Charlotte

Events on 1 and 2 May 2019

11. On or about 1 May 2019, during a fortnightly Business Support team meeting, Ms Gundry raised the issue of outstanding cash deposits for the Centre.
12. A review of Infocare showed that, on a number of occasions, payment of fees had been logged against a child's account, however the corresponding deposit of fees did not show in Barnardos' bank account. Ms Gundry noted that some cash amounts had been entered into Infocare after she had run her initial report as part of her weekly reconciliation.
13. Rachel Allen, Team Leader - Administration at Barnardos, attended the Centre on 2 May 2019 and reviewed the unreconciled cash payments identified in the Infocare review.¹ Ms Allen queried the amount of cash onsite with the Centre Administrator and was advised there was only \$100 onsite. Given the amount of unbanked money identified in the Infocare review was significantly higher than the unbanked cash at the Centre, Barnardos commenced an investigation.

Investigation

First meeting with the respondent

14. Maree Findlay, Regional Manager of Barnardos, arranged for a meeting with the respondent and Ms Allen on 7 May 2019.
15. At the meeting, the respondent confirmed the cash handling process employed at the Centre, namely that the cash was collected by her, a receipt written and the payment entered on the child's account in Infocare. The respondent confirmed she would then bank the cash at BNZ Manurewa and was the only one to do so. Additional administrative support had been scheduled for the

week beginning 29 April 2019 to assist the Centre. Ms Allen attended the Centre as that support.

16. The respondent stated that the staff at the Centre had searched for the receipt book, the deposit book and any bank receipts but could not find anything. She suggested that one of the cleaners may have thrown them away by mistake.
17. At the meeting, the respondent was advised that Barnardos were going to request information about the Centre's bank deposits from BNZ Manurewa and that someone would come to the Centre the following day to search for the receipt book, deposit book and the deposit receipts.

Visit to the Centre on 8 May 2019

18. Ms Findlay and Ms Allen attended the Centre on 8 May 2019. Ms Findlay received a text message from the respondent stating that she was going to take the day off as stress leave and had left a letter for Ms Findlay in the office. The letter was the respondent's resignation.
19. While the respondent's office had been tidied, the receipt book, deposit book and/or the relevant deposit receipts could not be located. Ms Findlay phoned the respondent and stated she would not accept the respondent's resignation straight away and that the investigation would continue. The respondent was told to consider her resignation over the next two days and that she would be phoned by Leslie Brown (in Ms Findlay's absence) on 10 May 2019.

Subsequent events

20. The respondent emailed Ms Brown on 10 May 2019, thanking her for the opportunity to "rethink" her resignation. The respondent noted that the only reason she submitted her resignation was because she was so embarrassed by her current situation and that it had been a stressful time for her dealing with regret and "huge sorrow" for her actions. The respondent told Ms Brown that she was deeply ashamed at "letting down my team, our centre families, my own family, and Barnardos, as well as compromising the career that I love". The respondent offered to remain at Barnardos and support the team until another teacher could be found as she did not want to leave the Centre "in the lurch".
21. Ms Brown later phoned the respondent and informed the respondent that her employment was terminated immediately in light of her admission to taking the money. The respondent was advised that the investigation would continue, but that given her admission and action to return the money to Barnardo's, it was unlikely Barnardos would notify the Police. Ms Brown also advised the respondent that the Teachers Council would be notified. The respondent advised Barnardos that she was committed to repaying the amount taken (which at that time was unknown).
22. The respondent emailed Ms Brown on 13 May 2019 and asked Barnardos to take \$500 from her final pay to go towards the missing money as she needed the rest of money to cover expenses. She thanked Ms Brown for allowing her the "opportunity to have a

payment plan to go towards the missing money".

Total money taken from the Centre

23. The Barnardos investigation established that the respondent had taken money totalling \$3,651.30 from the Centre/Barnardos.
24. The respondent signed an agreement to repay the above amount of money to Barnardos by 1 January 2020. The respondent has repaid this amount in full.

Mandatory report

25. On 6 June 2019, Lianne Lee of Barnardos filed a mandatory report with the Teaching Council (**Council**) regarding the respondent's conduct.

Teacher's response to the Council

26. In her response to the Council Investigator dated 19 July 2019, the respondent stated the following in respect of the \$3,651.30 taken from the Centre:

I admit that I took the money that parents had paid for their fees in cash, to the amount as given by Barnardos. I am very ashamed of what I did as I was not brought up this way and had never done anything like this before. I know that it was morally and legally wrong but I was under a lot of stress. I had recently divorced from my ex-husband and he had left me in quite a lot of debt. I thought that when I had taken the money I would pay it back once I got on my feet, but it never seemed to happen. I know that this incident is very serious and am deeply remorseful for what I have done. I am ashamed because I was put into a position of trust by Barnardos and by the parents and I broke this trust by my actions. I am committed to paying the missing money back to Barnardos. I have been paying the agreed amount every week and will continue to do so until it is all repaid.

When making your decision I ask that the council please consider the fact I have been teaching for the past sixteen years because teaching children is my passion. Up until this incident my conduct as an early childhood teacher has been exemplary. I am also still struggling to pay back my debt and really need to work in order to do this. I will never again do something like this and sincerely hope that you will allow me to continue to teach.

27. On 27 June 2019, the Council Investigator advised the respondent, by phone, that she needed to inform her current employer about the matter that was with the Council. The respondent was advised of this again by the Council on 28 June 2019.
28. The respondent is currently employed with Provincial

Education Group and is the Centre Manager at Happy Feet Otahuhu.

29. The respondent did not advise Provincial Education Group about the circumstances of her termination from the Centre or that she had a matter before the Council at the time of her employment, despite having been advised to by the Council.
30. Provincial Education Group have now confirmed they are aware of the matter before the Council and have seen the Mandatory Report.

6. We must be satisfied on the balance of probabilities that the CAC has proved the charge. It is clear from paragraph 26 of the ASF that the respondent accepts that she stole the money from the child care centre. Accordingly, we find the charge is proved.

Serious misconduct

7. While the respondent does not appear to contest that her conduct amounted to serious misconduct, nonetheless we must still be satisfied that the established conduct amounts to serious misconduct (or conduct otherwise entitling the Tribunal to exercise its powers).
8. The starting point of any analysis for serious misconduct is s 378 of the Act. Section 378 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.*

9. The criteria for reporting serious misconduct are found in r 9 of the Rules. The CAC relies on rr 9(1)(g) and/or (j) an/or (k) of the Education Rules 2016 that were in place at

the time of this conduct.²

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:*
- (g) *acting dishonestly in relation to the teacher's professional role, or committing theft or fraud:*
- (j) *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...*
- (k) *an act or omission that brings, or is likely to bring, discredit to the profession.*

CAC submissions

10. The CAC's submissions on the level of misconduct are:

- 2.3 The Committee submits that the dishonesty involved in the respondent's course of conduct reflects adversely on her fitness to be a teacher, and risks bringing the teaching profession into disrepute. The Tribunal has previously emphasised on a number of cases that conduct involving dishonesty on the part of a teacher will reflect adversely on a teacher's fitness and is capable of amounting to serious misconduct.¹ The Committee further submits that reasonable members of the public could reasonably conclude that the reputation and good-standing of the profession was lowered by the respondent's conduct in the present case. The public have a right to expect that teachers will act honestly and with integrity.²
- 2.4 It is submitted that the respondent's conduct also meets the criteria for reporting serious misconduct in the Teaching Council Rules 2016 (as drafted prior to the May 2018 amendments), in particular rr 9(1)(h) (theft or fraud) and 9(1)(o) (any act or omission that brings, or is likely to bring discredit to the teaching profession). The respondent's conduct would also fall under r 9(1)(n), which relates to conduct that could be the subject of a prosecution for an offence punishable for a term of imprisonment for a term of three months or more.³
- 2.5 It is further submitted that the respondent's conduct breached the Code of Professional Responsibility. Specifically, the respondent's conduct breached

² Clause 3 of Schedule 1 of the Teaching Council Rules 2016 provides that possible serious misconduct by a teacher that occurred before 19 May 2018 must be reported and dealt with in accordance with the principal rules that were in force immediately before that date. In this case we have applied the current version because all but sixteen days of the conduct occurred after the amendment.

clause 1.3 of the Code, which requires teachers to demonstrate a high standard of professional behaviour and integrity.

Respondent submissions

11. The respondent did not appear to contest that the behaviour amounted to serious misconduct. Ms Nuia Taufau commented:

While I understand that my actions and serious lapse of judgement breach our Teaching Codes and Standards I would ask you to consider that there were various factors that contributed to this incident, my remorse at my actions, the fact that I have repaid the amount taken in full, my willingness to cooperate in full in this matter and the impact your penalty will have on my family as well as my current work role.

Discussion

12. Before we can make a finding of serious misconduct we must be satisfied that the respondent's conduct meets one of the definitions of serious misconduct in s 378 of the Act, *and* that the conduct is of a character or severity that meets the criteria for reporting serious misconduct.
13. We agree with the CAC that the following factors were significant in our determination this conduct was serious misconduct.
14. The behaviour occurred while the respondent was in a position of trust at the Childcare Centre and as such involved her breaching the trust of her employer, her colleagues, the parents and children that attended the Centre. The offending was repetitive, occurred over a significant period of time, and involved a not unsubstantial amount of money. The defendant initially denied it when confronted and only finally admitted it when she could no longer deny it.
15. In our view dishonesty of this kind impacts on the respondent's fitness to be a teacher. The Tribunal has noted before that behaviour of this kind is unacceptable and clearly impacts on a teacher's fitness to teach.³
16. The test for deciding whether a teacher's actions are likely to bring the teaching profession into disrepute is informed by the conclusions of the Court in *Collie v Nursing*

³ See *CAC v Teacher*, (2012) NZDT 2012-29.

Council of New Zealand.⁴ It is an objective test and requires consideration of whether reasonable members of the public informed of the facts and circumstances, could reasonably conclude that the reputation and good standing of the profession is lowered by the respondent's actions.

17. We consider that a member of the public would reasonably conclude that the reputation and good standing of the profession is lowered by such dishonesty in a professional setting.
18. The conduct involved both the respondent acting dishonestly in her professional role and involved potential offending with a maximum penalty of at least three months' imprisonment.
19. In summary, this conduct amounts to serious misconduct because it:
 - a) reflected adversely on her fitness to be a teacher;
 - b) is likely to bring the teaching profession into disrepute;
 - c) involved obvious dishonest in her professional role; and
 - d) could have amounted to an offence punishable by at least three months' imprisonment.

Penalty

20. In *CAC v McMillan*,⁵ we summarised the role of disciplinary proceedings against teachers 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.

⁴ *Collie v Nursing Council of New Zealand* [2001] NZAR 74.

⁵ NZTDT 2016/52, 23 January 2017, paragraph 23.

21. Section 404 of the Act provides:

404 Powers of Disciplinary Tribunal

- (1) *Following a hearing of a charge of serious misconduct, or a hearing into any matter referred to it by the Complaints Assessment Committee, the Disciplinary Tribunal may do 1 or more of the following:*
- (a) *any of the things that the Complaints Assessment Committee could have done under section 401(2):*
 - (b) *censure the teacher:*
 - (c) *impose conditions on the teacher's practising certificate or authority for a specified period:*
 - (d) *suspend the teacher's practising certificate or authority for a specified period, or until specified conditions are met:*
 - (e) *annotate the register or the list of authorised persons in a specified manner:*
 - (f) *impose a fine on the teacher not exceeding \$3,000:*
 - (g) *order that the teacher's registration or authority or practising certificate be cancelled:*
 - (h) *require any party to the hearing to pay costs to any other party:*
 - (i) *require any party to pay a sum to the Education Council in respect of the costs of conducting the hearing:*
 - (j) *direct the Education Council to impose conditions on any subsequent practising certificate issued to the teacher.*

22. The CAC do not seek cancellation. We agree and found the following factors significant in our decision not to cancel her registration. While the behaviour was unacceptable and dishonest, it did not relate directly to students or impact on their learning. Further, we considered the fact that she had very difficult challenging personal circumstances at the time which explained, if not excused, the offending. Also, mitigating and pointing against cancellation was the fact that the money has been paid back and she co-operated with the centre. For all of these reasons, we concluded we could stop short of cancellation of her registration.
23. We consider the appropriate penalty is:
- b) Censure;⁶
 - c) Annotation on her registration for eighteen months referring to this decision, the censure and the conditions imposed;⁷
 - d) The imposition of the following conditions on the respondent's practising certificate for eighteen months:⁸
 - i. A condition requiring that the respondent inform her current employer and any prospective employer of the Tribunal's decision, and to provide them with a copy of the Tribunal's decision; and
 - ii. A condition requiring that the respondent not undertake any professional role involving management without the approval of the Manager of Teacher Practice at the Teaching Council.
24. These conditions largely reflect what the CAC submitted was appropriate, however there is one small but important difference. The last of the CAC's proposed condition would have required that the respondent not undertake a professional role involving the management of money without approval, but in our view any management role will inevitably have some connection to money. As a result, we consider it appropriate that the condition prohibit any involvement in any management role for the prescribed period.

⁶ Section 404(1)(b) of the Act.

⁷ Section 404(1)(e) of the Act.

⁸ Section 404(1)(j).

Costs

25. The CAC sought a contribution of 40% of its costs under s 404(1)(h).
26. The Tribunal orders the respondent to pay 40% of the CAC's actual and reasonable costs under s 404(1)(h) and the Tribunal's costs under s 404(1)(i). The Tribunal delegates authority to determine the quantum of those costs to the Deputy Chair and issues the following directions:
- a) Within 10 working days of the date of this Decision:
 - i. The Secretary is to provide the Chairperson and the parties a schedule of the Tribunal's costs; and
 - ii. The CAC is to file and serve on the respondent a schedule of its costs.
 - b) Within a further 10 working days, the respondent is to file with the Tribunal and serve on the CAC any submissions she wishes to make in relation to the costs of the Tribunal or CAC.
27. The Deputy Chair will then determine the total costs to be paid.

Non-publication

28. The respondent has sought non-publication of her name.
29. Section 405(3) provides that this Tribunal's hearings take place in public. This is consistent with the principle of open justice. The provision is subject to ss (4) and (5) which allow for whole or part of the hearing to be in private and for deliberations to be in private. Subsection (6) provides:
- (6) *If the Disciplinary Tribunal is of the opinion that it is proper to do so, having regard to the interest of any person (including (without limitation) the privacy of the complainant (if any)) and to the public interest, it may make any 1 or more of the following orders:*
 - (a) *an order prohibiting the publication of any report or account of any part of any proceedings before it, whether held in public or in private:*
 - (b) *an order prohibiting the publication of the whole or any part of any books, papers, or documents produced at any hearing:*
 - (c) *an order prohibiting the publication of the name, or any particulars of the affairs, of the person charged or any other person.*

30. In deciding if it is proper to make an order prohibiting publication, the Tribunal must consider relevant individual interests as well as the public interest. If we decide that it is proper, then we may make such an order. There is no onus on the applicant and that the question is simply whether the circumstances justify an exception to the fundamental principle.⁹
31. The correct approach is to strike a balance between the open justice considerations and the interests of the party who seeks suppression.¹⁰
32. The grounds on which the respondent seeks name suppression are as follows:
- a) She outlined her difficult personal circumstances at the time and the emotional and physical abuse she suffered at the hands of her ex-husband for 21 years. When they separated, he left her with a significant amount of debt.
 - b) She had no one to turn to and the pressure she was under left her in a vulnerable state which is why she offended.
 - c) She said that she was ashamed of what she has done.
 - d) No one in her family, apart from her brother, is aware of what she has done. Her mother is 71 and has health problems. Her children also suffered at the hands of their father and that has had lasting effects.
 - e) Lastly, she argues that the community she is in is a small one, and if her name becomes public, it will affect her prospect of retaining her current position or gaining any other teaching position.
33. While we have sympathy for the respondent and the circumstances she was in at the time of the offending, we do not consider this is an appropriate case for suppression.

⁹ *ASB Bank Ltd v AB* [2010] 3 NZLR 427(HC) at [14].

¹⁰ *Hart v Standards Committee* (No 1) of the New Zealand Law Society [2012] NZSC4 at [3].

34. Her personal circumstances do not outweigh the need for transparency and open justice. Shame and upset are unfortunately inevitable consequences of having committed serious misconduct in a professional capacity. The circumstances of her family members are not out of the ordinary and the impact on them is an inevitable consequence of a finding of the kind that we have made against the respondent.
35. One of the grounds she seeks suppression on is because it will assist her in maintaining and obtaining future employment, but given that her behaviour involved dishonesty in her professional capacity, then current and future employers need to be aware of what she has done.
36. We are concerned that she has not told members of her family and has sought suppression to assist her to keep this a secret from them and others. While understandable that her shame leads her to want to hide her behaviour that is not healthy and will not help her on moving forward.
37. So, balancing her own difficult circumstances with the interest of the public we conclude that this is not a proper case for non-publication.



Ian Murray
Deputy 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).