

TEACHING COUNCIL

NEW ZEALAND | Matatū Aotearoa

Complaints Assessment Committee (CAC) v Teacher A

NZ Disciplinary Tribunal Decision 2018/36

Teachers are obliged to maintain public trust and confidence in the teaching profession by demonstrating a high standard of professional behaviour and integrity.

This case concerns a secondary school teacher, Teacher A. During 2016, Teacher A reported several thefts of money and other property located in his office or pigeonhole. Teacher A also reported finding doors open during the weekend and when he came in on Monday mornings. As a result, the school installed a security camera in its main office in mid-October 2016.

On Sunday 30 October 2016, the security camera captured footage of Teacher A entering the school office, accessing a drawer and removing an envelope containing \$60.80 cash, which he put into his pocket before leaving.

When confronted, Teacher A said he had taken the envelope and placed it in a spare office in an attempt to catch the person who had been stealing from the school. Teacher A submitted that he was suffering from anxiety, depression and stressful situations at home and work. Teacher A described becoming obsessed with the break-ins at the school as a coping mechanism.

Teacher A denied taking the envelope and cash for his own benefit. The case was referred to the Teaching Council Complaints Assessment Committee (CAC), which investigated and referred a charge of serious misconduct to the New Zealand Teachers Disciplinary Tribunal (Tribunal).

The Tribunal considered evidence that Teacher A was seen by his general practitioner after the incident and was referred as an urgent patient to adult mental health services. A psychiatrist assessed Teacher A as suffering from a major depressive disorder, and a generalised anxiety disorder. Teacher A was prescribed antidepressant drugs.

The Tribunal found that taking or dealing with school property, without authority, in a covert way, can amount to serious misconduct, even if dishonest intent is not established. The Tribunal found that it was most likely that Teacher A's conduct was the result of distorted thinking resulting from the psychological conditions which Teacher A was suffering from.

The Tribunal found serious misconduct, noting that it reflected adversely on Teacher A's fitness to be a teacher. Teacher A was censured, had conditions imposed on his practising certificate (monthly meetings with a mentor) for a period of one year from the date he resumes teaching, and annotations to the register to reflect the conditions.

Teacher A applied for a permanent non-publication order and the Tribunal ordered suppression of Teacher A's name and any details capable of identifying him. Teacher A was ordered to pay 40 percent of the CAC's costs and 40 percent of the Tribunal's costs.



BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

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 **Teacher A**
Respondent

DECISION OF NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

Tribunal: John Hannan (Deputy Chair), Patrick Walsh, Maria Johnson

Hearing: 13 November 2018 (on the papers)

Decision: 6 March 2019

Maria Johnson

Counsel: JM O'Sullivan/M A Shaw for Complainant
Dzintra King for Respondent

Introduction

1. By a Notice of Charge dated 23 July 2018 the Complaints Assessment Committee (**CAC**) charged the respondent pursuant to section 378 of the Education Act 1989 with behaving in a manner amounting to serious misconduct in that he removed an envelope of \$60.80 cash from the school office without permission or authority.
2. The CAC alleges that this conduct either amounts to serious misconduct under section 378 of the Education Act 1989 and Rule 9(1)(h) , (n) and/or (o) of the Education Council rules 2016 (as drafted prior to the May 2018 amendment), or alternatively amounts to conduct otherwise entitling the Disciplinary Tribunal to exercise its powers pursuant to section 404 of the Education Act 1989.
3. The parties were able to conclude an agreed statement of facts which is set out below.

Facts

4. The agreed statement of facts is as follows:

Background

1. *The respondent, Teacher A is a registered teacher. The respondent was employed at relevant times by Nelson College (the College).*

Theft of property

2. *During 2016, there were a considerable number of instances of property going missing from the College's classrooms and offices. This included an envelope of money from a staff sweepstake being taken from the respondent's offices.*
3. *The respondent reported a number of thefts, including thefts of money and other property located in his office or pigeonhole. On several occasions, he also reported finding doors open during the weekend and when he came in on Monday mornings.*

4. *In response to concerns around theft of property, the school installed a security camera in its main office in mid-October 2016.*
5. *On Sunday, 30 October 2016, the security camera captured footage of the respondent going into the school office, going into a draw and removing an envelope, and putting this in his pocket before leaving.*
6. *The envelope contained \$60.80, and came from the College's petty cash and proceeds from snack food sales.*

Teacher's response

7. *The respondent stated that he had taken the envelope in order to try and catch the person who had been stealing from the College. After taking the envelope, the respondent stated that he placed the envelope with the money showing in a spare office. This was done with an intent that the respondent would catch the thief himself.*
 8. *The respondent also stated that he was suffering from anxiety, depression and stressful situations at home and work. As a result of these, he described becoming obsessed with the break-ins at the College as a coping mechanism.*
 9. *The respondent denied taking the envelope and cash for his own benefit.*
5. The respondent's submissions attached a number of documents including a letter from the respondent. His letter says that he had become increasingly concerned about a series of thefts and security breaches at the school over the preceding year including a theft of \$240 from his office. He says that these losses were reported to the headmaster and deputy headmaster. He says that on 30 October 2016 there was evidence that his office had been entered. When he arrived at the school at Sunday he noticed the front office door was ajar. He went in and removed the money (i.e. the \$60.80) because he thought he could catch the thief himself as he had become frustrated by the efforts or lack of efforts of the College management to address the matter.

6. On reflecting on his actions and why he had behaved in this way he first went to the school counsellor who recommended that he see his GP. He says that on 10 November 2016 he was referred to a clinical psychologist who began treating him for anxiety and obsessive behaviour. He says that, retrospectively, after nearly 4 months of input from mental health agencies, he can see that he has a history of depression going back at least 10 years. He says this was combined with a number of personal circumstances of a distressing nature, some serious health issues with his youngest daughter, and 2 deaths in his immediate family in 2016. As well, he says, he was managing a difficult department with a dysfunctional working environment. He says that he became obsessed with the intrusions at work, possibly as part of a coping mechanism. He states that he is not a thief but is a teacher who, following an "unfortunate combination of genetics and personal difficulties", took the decision that seemed correct at the time to try to control his environment. He says he now has control of his depression and anxiety and loves teaching and is good at it.
7. Documents put before the Tribunal show that the respondent was seen by his general practitioner on 9 November 2016 and was referred as an urgent patient to adult mental health services. He was then seen on 24 November 2016 as an urgent patient by a psychiatrist. A "crisis initial assessment" letter dated 24 November 2016 from the psychiatrist assessed him as suffering from a major depressive disorder, and a generalised anxiety disorder. It stated that the risk of intentional harm to himself or others was currently low but there was a moderate risk of impulsive harm. Antidepressant drugs were prescribed.
8. A medical certificate from a general practitioner 17 October 2018 put forward in support of the respondent's application for a non-publication order records that he "has known depression and is medicated for this medical condition". It says that publication of his name would have have an adverse outcome for his mental health.
9. A peculiarity and difficulty in this matter for the Tribunal is that while the respondent has been referred to an impairment process by the CAC, as stated in a letter from the chair of the CAC to the respondent's PPTA representative dated 27 February 2018 (more than a year after the incident), no steps appear to have been taken to progress the impairment process. This is unexplained. There has been no finding of impairment.

10. The respondent resigned from his position with the school with effect from the end of 2016. He took some sick leave prior to that. He says that he does not presently intend to return to teaching and has started a business. He states that his mental and physical health have improved

Submissions

Submissions for Complaints Assessment Committee

11. Counsel for the CAC reminded the Tribunal of the elements which must be established here:
- Serious misconduct, being conduct that adversely affects or is likely to adversely affect the wellbeing or learning of one or more students; or
 - Being conduct that reflects adversely on the Teacher's fitness to be a teacher; or
 - Being conduct that may bring the teaching profession into disrepute: and,
 - Is of a character or severity that meets the Education Council's criteria for reporting serious misconduct;
12. The CAC submitted that the respondent's conduct reflects adversely on the respondent's fitness to be a teacher and may bring the teaching profession into disrepute. It also says that the conduct is of a character which falls within the Education Council Rules 2016, Rule 9 (1) (h) (theft or fraud), or (n) (act or omission punishable by imprisonment for 3 months or more), or (o) (an act or omission that brings is likely to bring the teaching profession into disrepute).
13. The CAC also referred to some provisions of the Education (now Teaching) Council Code of Ethics in its current form and in the form that existed at the time of the relevant conduct.
14. It also referred to prior Tribunal cases involving theft of school property. In NZTDT 2012/29 the teacher pawned a school laptop. The Tribunal in that case considered that this "is not the most serious case of theft by a teacher from school. That said, it is serious enough". The Tribunal concluded that the CAC had made out its charge

of serious misconduct. The teacher was censured and conditions were imposed requiring the respondent in that case to inform any future employer of the disciplinary decision for a period of 3 years.

15. The CAC referred to the considerations in professional disciplinary proceedings as to penalty as discussed in *CAC v McMillan* NZTDT 2016/52. It emphasised that as stated in *McMillan* the role of disciplinary procedure proceedings is to maintain standards so that the public is protected from poor practice and from people unfit to teach.
16. The CAC submitted that the respondent's actions in the present case fall at the lower end of the spectrum but the conduct still reflects adversely on his fitness to practice. It submitted that he should be censured, that this should be annotated on the register and that there should be conditions on this practising certificate ensuring that he engages in counselling prior to re-engaging in teaching.
17. The CAC submitted that the Tribunal should take note of the respondent's unusual explanation for taking the money – it noted that there was apparently a significant mental health issue which played a role in this behaviour. It referred to NZTDT 2015/20 as an example of the Tribunal imposing conditions addressing a teacher's mental health concerns where those concerns were part of the matrix of the serious misconduct.

Respondent's submissions

18. Counsel for the respondent submitted that this behaviour could not amount to serious misconduct. The central plank of the submission was that "an action which is the result of illness cannot be said to be capable of bring the teaching profession into disrepute. A reasonable person, understanding that the action was not volitional (in the sense that there was no intention to take the money for personal gain) and did not and was not intended to benefit the teacher, would think that the issue of mental illness that was at the root of the cause needed to be treated so that the teacher could continue to practice."
19. Counsel referred to the definition of theft and noted that the respondent did not have intention to deprive the owner permanently of the property so that this could not be regarded as theft.

20. She then referred to the respondent's mental health issues and noted the evidence to support the assertion that there were serious mental health concerns at the relevant time, and continue to be such issues (for the purposes of a non-publication application).
21. As to penalty, she noted that even the CAC acknowledges that this case falls at the lower end of serious misconduct. She submitted that there is no need for censure or annotation. She said that the respondent has engaged in counselling and that if the Tribunal required further counselling, and reporting on the counselling, that would not be opposed by the respondent. She said that censure and annotation would be to punish and shame a person who had suffered from a mental illness. She went on to say that "because of his mental health issues, it would not be reasonable to impose anything other than censure on [the respondent]". She submitted the penalty should focus on the rehabilitative rather than the punitive.

Decision

22. Serious misconduct is defined in section 378 (1) of the Education Act 1989 as:
- (a) conduct that adversely affects, or is likely to adversely affect, the well-being or learning of one or more students; or
 - (b) conduct that reflects adversely on the respondent's fitness to be a teacher; or
 - (c) conduct that may bring the teaching profession into disrepute; and,
 - (d) is of a character or severity that meets the Education (now Teaching) Council's criteria for reporting serious misconduct (contained in the Education Council Rules 2016, Rule 9)
23. Clearly the respondent's actions did not adversely affect the well-being or learning of any students. The issues here are whether in their totality the respondent's actions reflect adversely on his fitness to be a teacher or might bring the teaching profession into disrepute.
24. The agreed statement of facts does not accept on the CAC's part that the taking of the property was the result of psychological or psychiatric illness suffered by the

respondent. The CAC maintained in its submissions the thesis that the respondent's conduct amounted to theft and that he had engaged in "dishonesty" which passed the threshold of serious misconduct and was likely to bring discredit to the profession. The Tribunal is therefore left to reach its own conclusions (but without direct evidence from the respondent) as to whether the taking of the property should be regarded or characterised as dishonest. Similarly the Tribunal is left to reach its own conclusions as to whether the conduct could be regarded as criminally culpable for the purposes of Rule 9 (1)(n). The CAC bears the burden of proof on these points. Finally the Tribunal is left reach its own conclusions as to whether the conduct was the product of psychological or psychiatric difficulties. The respondent did not give evidence before us. He was not subject to any questioning. The psychiatric reports which date from after the events clearly establish that he was suffering from a significant psychological or psychiatric condition shortly after the conduct in question, but do not address the relationship of that condition with the taking of the money.

25. Taking or dealing with school property without authority, in particular in a covert way, is capable of amounting to serious misconduct, even if dishonest intent is not established. Questions of the general reliability and trustworthiness of the teacher come into play, even if they do not rest on a finding of dishonesty. Such conduct can reflect adversely on fitness to be a teacher, and may bring the teaching profession into disrepute.
26. Where the conduct fits on the spectrum of serious misconduct, however, will be determined to a significant degree by whether there was a deliberate and dishonest intent to gain benefit by depriving the school of its property. But the absence of a dishonest intent will not of itself prevent the behaviour from amounting to serious misconduct if there has been an unauthorised dealing with school property.
27. It is not suggested by his Counsel that the respondent's conduct was not volitional in the sense that he did not know what he was doing or was acting unconsciously. The Tribunal finds that it is most probable that the respondent's conduct was the result of distorted thinking resulting from the psychological conditions which were diagnosed subsequent to the incident. The material the Tribunal has to support that finding is however limited to unsworn statements by the respondent, and medical reports resulting from examination of him after the events in question which diagnose a major depressive disorder and a generalised anxiety disorder.

28. In these circumstances the Tribunal concludes that the respondent's actions do reflect adversely on his fitness to be a teacher and do so to the required degree of severity under the Rules. There was inappropriate and unauthorised dealing with school property. The reasons given for it by the respondent are bizarre - it is hard to see how taking the money could conceivably have assisted in catching a thief. The respondent states that he took the envelope and placed it in a spare office in order to catch the person who had been stealing, but he advanced no explanation of how that was to be achieved - was he going to watch the other office 24/7?
29. The Tribunal finds that the CAC has not established that there was any dishonest intent on the part of the respondent. The inappropriate and unauthorised dealing with school property, with no plausible explanation for doing so, seems most likely to have resulted from a significant psychological disorder. But the reasons for the behaviour recounted by the respondent themselves raise significant concerns as to his fitness. They bring his reliability in dealing with and handling school property, and his reliability and capacity to discharge other aspects of his duties, into serious question.
30. We do not agree with Counsel for the respondent that an ordinary member of the public would not consider that the respondent's actions bring the teaching profession into disrepute, assuming that it is accepted that those actions were the result of a significant psychological disorder. Behaviour raising questions of reliability and trustworthiness is capable of bringing discredit to the teaching profession even though it does not flow from dishonest motives.
31. We find serious misconduct established, but at the lowest end of the spectrum, on the basis of conduct that adversely on the respondent's fitness to be a teacher.

Penalty

32. The Tribunal ordinarily seeks the least punitive outcome that will meet the seriousness of the case and enable the Tribunal to discharge its obligations as set out below. It must consider all available options as set out in section 404(1) of the Education Act. It takes into account considerations of the protection of the public, the maintenance of professional standards, maintaining public confidence in the profession, and, to a lesser extent, the appropriate punishment. It will where

appropriate prefer a rehabilitative outcome where the evidence presented and the information about the respondent suggests appropriate rehabilitation possibilities.

33. In the present case considerations of the protection of the public, the maintenance of professional standards, and rehabilitative possibilities, predominate. The respondent clearly had a significant vulnerability at the relevant time, and while treatment and a change of circumstances are said to have resulted in a significant recovery, he may still have a degree of vulnerability. Should he choose to resume teaching, some safeguards to ensure that his recovery is stable are appropriate. Maintaining standards in the profession as to how school property is dealt with and as to reliability of behaviour in that and all other respects is important. There is also a need to support the respondent to rehabilitate should he wish to resume teaching.
34. We have considered in particular the approach of the Tribunal in NZTDT 2015/20. This was a case where a teacher utilised the school's internet system to access pornography sites. It was established that he was labouring under serious psychological difficulties at the relevant time and there was evidence that the behaviour was a reaction to that, and out of character. The Tribunal in that case reached the conclusion that the respondent did not present an ongoing threat to the public or children and that deregistration was not necessary. But the Tribunal did consider it was necessary to put a regime in place to assist the respondent with his recovery. The Tribunal concluded that the least punitive outcome it could impose would require censure and the imposition of conditions on the respondent's practising certificate requiring him to receive supervision for 18 months from the date of the decision.
35. In these circumstances an order censuring the respondent and imposing some limited conditions for a period after he resumes teaching is appropriate. The register needs to be annotated only to record that conditions apply.
36. The Tribunal orders as follows:
 - (a) The respondent is censured;
 - (b) The following conditions are to be imposed on the respondent's practising certificate for a period of one year from the date upon which he resumes employment as a teacher:

- (i) The respondent's future employer is to appoint a mentor to meet with him at least once per month, or more if required, during term time, with the mentoring relationship to focus on ensuring that the respondent is and remains well enough to be at work and discharge his duties in a reliable manner.
 - (ii) The respondent is to notify the Teaching Council of the name of his mentor and to consent to his mentor providing the Teaching Council with information about any concerns she or he has relating to the respondent's health and/or reliability.
- (c) The register is to be annotated to the effect that conditions apply. The annotation is to be removed one year after the date on which the respondent resumes employment as a teacher.

37. Necessarily, any future employer of the respondent as a teacher will need to be advised of the mentoring condition for so long as it applies.

Non-publication orders

38. The respondent applied for a permanent non- publication order prohibiting publication of his name and any details capable of leading to his identification.

39. Submissions from counsel for the respondent referred to the relevant sections of the Education Act, noting the open justice principle embodied in section 405 (3). Submissions also noted the 2-step approach described in NZTDT 2016/27 of, firstly, a decision as to whether it is "proper" having regard to the various interests identified in section 405 (6) to make a suppression order. If it is, then at the second stage the Tribunal may exercise its discretion and make the order sought.

40. The CAC also helpfully articulated in its submissions the principles applicable in a number of cases including CAC v Finch NZTDT 2016/11.

41. The CAC says that it has a neutral stance on the respondent's application. It noted that the ordinary stress and anxiety which any teacher will suffer as the outcome of disciplinary proceedings is not itself sufficient to displace the principle of open publication. But in some cases orders for non-publication may be made where it

can be shown that publication of a teacher's name will be detrimental to their mental health so as to make it proper for an order to be made.

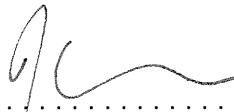
42. In the present case the Tribunal has the psychiatrists report from November 2016 diagnosing a major depressive disorder and a generalised anxiety disorder. This assesses the risk of intentional harm to self or others as "currently low", but risk of "impulsive harm is moderate". The medical certificate from the respondent's general practitioner 17 October 2018 says that the doctor confirms that publication of the respondent's name would have an adverse outcome on his mental health. It records that the respondent has known depression and is medicated for this condition.
43. This evidence is borderline, but in its totality and given the other material about the respondent's psychological condition we consider it gets over the line to make it "proper" for the tribunal to make a non-publication order. The respondent clearly has an established mental health condition. There does appear to be a risk that publication could affect him adversely, in a way significantly greater than the ordinary distress and humiliation which might be suffered by any teacher whose details are published in association with a disciplinary decision. While we would have preferred to have evidence from a mental health specialist more recent than November 2016 we consider it is proper to make a nonpublication order and exercise the Tribunal's discretion to do so.
44. The Tribunal orders that there is to be no publication of the name of the respondent or any details capable of identifying him. This decision is to be redacted accordingly.

Costs

45. The CAC sought an order for costs and submitted that in line with recent decisions of the Tribunal where there has been an agreed statement of facts and the respondent has cooperated with the CAC, a 40% contribution was appropriate.
46. Counsel for the respondent made no specific submissions on costs other than to say that if a finding was made that this was not serious misconduct, no costs should be awarded.

47. The Tribunal orders that the respondent pays a contribution of 40% of the CAC's costs. A schedule was submitted showing total CAC costs of \$4819.88. 40% of that sum is \$1927.95 . The respondent is ordered to pay \$1927.95 towards the CAC's costs.
48. The respondent is also ordered to pay 40% of the Tribunal's costs. The schedule provided showed estimated Tribunal costs of \$1145. 40% of that sum is \$458. The respondent is ordered to pay \$458 towards the Tribunal's costs

Date: 6 March 2019



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JGH Hannan
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 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.