NZTDT 2020/50

BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

UNDER THE	Education Act 1989
IN THE MATTER	a Notice of Referral by the Complaints Assessment Committee of the New Zealand Teaching Council
BETWEEN	**COMPLAINTS ASSESSMENT COMMITTEE**
AND	**[Teacher A] name permanently suppressed]**, registered teacher of Tauranga (registration number)
	Respondent

DECISION OF THE TRIBUNAL

Hearing:	23 June 2021 on the papers
Tribunal:	Jo Hughson (Deputy Chairperson), Nichola Coe, Kiri Turketo (registered teachers)
Counsel:	Mr A Lewis for the Complaints Assessment Committee
	No participation by the Respondent
Decision:	29 June 2021

Introduction

[1] The Respondent, Mr A, is a fully registered teacher. At the relevant time he was a full-time teacher and lead teacher of digital learning at a decile 3 school in the North Island.[1] He had commenced working at the school in 2015 as a beginning teacher [2]and he left his employment there in March 2019. From 2017, in his role as head of the school's IT Department Mr A was responsible for all digital hardware in the school, and he oversaw digital purchasing.

[2] The Complaints Assessment Committee (the CAC) referred to the Tribunal Mr A's two convictions for theft in a special relationship being offences against sections 220 and 223(a) of the Crimes Act 1961. Those convictions were entered on 29 July 2019 in the District Court at Tauranga, after Mr A pleaded guilty to the charges he faced.

[3] The convictions arose from the theft of a significant number of school digital devices (computers including 300 iPads (minis and iPad 2's) and 17 MacBooks (Airs and Pros) by Mr A removing those items from the school and selling them, in the period from 24 June 2018 to 21 January 2019; as well as the theft of three iPhones and 2 Bluetooth speakers, between 3 January 2019 and 8 January 2019. That latter offending involved Mr A using the school's account with an online technology supplier to make personal purchases (iPhones) without reimbursement.

[4] As Mr A did not participate in the proceedings the CAC proceeded by way of formal proof of the Charge. An affidavit from the investigator for the CAC, Mr Thomas (Tom) James Eathorne was produced. Annexed to Mr Eathorne's affidavit was a copy of the Certified Copy or Extract of the Permanent Court Record evidencing the convictions, the New Zealand Police Summary of Facts from the District Court proceedings, and the Notes of Judge I D R Cameron on Sentencing. Other documents relating to the offending were also annexed, as discussed below.

[5] Counsel for the CAC made helpful written submissions on the issues of liability and penalty. On the matter of penalty, the CAC filed an affidavit sworn by the Tumuaki/Principal of the school where Mr A worked at the time of his offending. Annexed to that affidavit was a copy of the Principal's Victim Impact Statement filed in the criminal proceedings. The CAC also filed an affidavit from a process server

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[1] Affidavit of Thomas James Eathorne, CAC Investigator, sworn on 3 May 2021.

[2] Affidavit of School Principal sworn on 16 February 2021 at [3].

who effected service of the proceedings on the Respondent on Saturday, 10 April 2021.[3] The evidence was that Mr A was served with the proceedings at his place of work, which the Tribunal noted was not a school or learning institution.

[6] The Tribunal considered the evidence carefully and having found the conduct established, concluded that an adverse finding was warranted. Having made that finding the Tribunal was entitled to exercise its powers under section 404 of the Education Act 1989. The Tribunal went on to make penalty orders accordingly.

[7] The reasons for the Tribunal's decision are set out below.

Legal Principles - Liability

[8] The onus of proof rested on the CAC.

[9] As to the standard of proof, the appropriate standard in disciplinary proceedings is proof to the reasonable satisfaction of the Tribunal on the balance of probabilities. This is a static standard. However, as the seriousness of an allegation rises, so does the cogency of the evidence required to satisfy the standard[4].

[10] In this case, the Notice of Referral did not arise from a report made under section 397 of the Act (mandatory reporting of convictions). Ultimately it arose from a mandatory report made under section 394 (mandatory reporting of possible serious misconduct) which the Teaching Council of Aotearoa New Zealand (the Teaching Council) had received from the school Principal on 15 February 2019. The mandatory report was made around two weeks after the school had made a 'missing items' report to the Police[5], and four days before the school commenced an employment disciplinary process in relation to Mr A's alleged serious misconduct[6]. Subsequently Mr A was charged by Police and then, having pleaded guilty, he was convicted of the two offences.

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[3] Affidavit of Lara Joy Wilson sworn on 21 April 2021.

[4] *A v A Professional Conduct Committee of the Medical Council of New Zealand* [2018] NZHC 1623 at paras [11] – [16] and as confirmed in *Z v Dental Council Complaints Assessment Committee* [2009] 1 NZLR 1 (SC) endorsing the comments of Dixon J in *Brigginshaw v Brigginshaw* (1938) 60 CLR 336.*M v Medical Council of New Zealand (No. 2)* Unreported, High Court, Auckland, 68/95, 20 March 1996.

[5] Affidavit of Mr Eathorne at [14]

[6] Affidavit of Mr Eathorne at [15]

[11] The CAC proceeded with its investigation and referred the convictions to the Tribunal under section 401(3) of the Act which provides that the CAC may, at any time, refer a matter to the Tribunal for a hearing.

[12] A referral under section 401(3) does not need to be framed as a charge of serious misconduct as defined in section 378, but the Tribunal needs to reach an adverse finding.[7] In particular, the Tribunal needs to decide whether the circumstances of the behaviour that resulted in the convictions reflect adversely on the teacher's fitness to be a teacher/to teach before it may exercise its disciplinary powers.

[13] Although Tribunal is not required to find the respondent teacher guilty of "serious misconduct"[8] before it can exercise its disciplinary powers, it is accepted that the "serious misconduct yardstick" may be useful in determining whether an adverse finding is warranted[9].

[14] The test for serious misconduct is conjunctive[10]. One or more of the three elements in subsection (a) of the definition must be proved *and* the conduct must be of a character or severity that meets the Teaching Council's criteria for reporting serious misconduct. The three elements in subsection (a) are conduct that (i) adversely affects, or is likely to adversely affect, the wellbeing or learning of one or more students; or (ii) reflects adversely on a teacher's fitness to be a teacher; or (iii) may bring the teaching profession into disrepute. The reporting criteria are contained, relevantly, in Rule 9 of the Teaching Council Rules 2016 which require a teacher's employer to immediately report to the Teaching Council if they have reason to believe that the teacher has committed a serious breach of *Our Code Our Standards: Code of Professional Responsibility and Standards for the Teaching Profession* (the Code of Professional Responsibility). Examples of such conduct are given in Rule 9 however this is not an exhaustive list.

[15] To reach the conclusion that an adverse disciplinary finding is warranted the Tribunal must assess the circumstances of the offending that led to the conviction that has been referred and the seriousness of that offending. The assessment must be an objective one made against the accepted professional standards that apply to

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[7] *CAC v Bird* NZTDT 2017/5, 22 June 2017.

[8] *CAC v S* Auckland District Court, CIV 2008-004001547, 4 December 2008, Judge Sharp at [47].

[9] *CAC v Hanrahan* NZTDT 2019-118, 28 May 2020 at [21].

[10] *Teacher Y v Education Council of New Zealand* [2018] NZCA 637.

teachers. The minimum standards are those contained in the Code of Professional Responsibility.

[16] Conduct that brings or is likely to bring discredit to a profession was considered by Gendall J in *Collie v Nursing Council of New Zealand*[11]. At [28] Gendall J defined "bringing discredit to the profession" as:

> *"To discredit is to bring harm to the repute or reputation of the profession. The standard must be an objective standard with the question to be asked [by the Tribunal] being whether reasonable members of the public, informed with the knowledge of the factual circumstances, could reasonably conclude that the reputation and good standing of the nursing profession was lowered by the behaviour of the nurse concerned."*

[17] Whether or not conduct reflects adversely on fitness was considered in the health disciplinary context in *Professional Conduct Committee v Martin*[12] where the Court described "fitness" at [46] as:

> *"Fitness often may be something different to competence…Aspects of general deterrence as well as specific deterrence remain relevant. So, too, is the broader consideration of the public or community's confidence and the upholding of the standards of the nursing profession."*

[18] As it has done in some previous cases, the Tribunal adopted the reasoning of the Medical Practitioners Disciplinary Tribunal in *Dr Zauka* [13] as follows:

> "…..***it is not necessary that the proven conduct should conclusively demonstrate that the practitioner is unfit to practise*** *[emphasis added]. The conduct will need to be of a kind that is inconsistent with what might be expected from a practitioner who acts in compliance with the standards normally observed by those who are fit to practise medicine. But not every divergence from recognised standards will reflect adversely on a practitioner's fitness to practise. It is a matter of degree. What conduct will satisfy the requirements of the rider cannot be decided solely by analysing the words of this subsection. It is, rather, a matter that calls for the exercise of judgment…"*

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[11] [2001] NZAR 74.

[12] Unreported, Gendall J, High Court Wellington, CIV-2006-485-1461, 27 February 2007)

[13] *CAC v Dr Zauka* MPDT 236/03/103C. That case considered a conviction for an offence constituting a breach of section 58(1) of the Land Transport Act 1998 (driving a motor vehicle under the influence of drink or drugs in circumstances where the person was incapable of having proper control of that vehicle).

[19] The Tribunal considered Mr A's two convictions individually and then cumulatively in terms of its assessment of whether the convictions reflect adversely on his fitness to practise as/be a teacher.

[20] The purpose of the Tribunal's exercise of its disciplinary powers in respect of a conviction is not to punish the teacher a second time.[14] Rather, the primary purpose of the exercise of disciplinary powers in respect of convictions is to ensure safe and high-quality leadership, teaching and learning through raising the status of the teaching profession. As was said in *CAC v Fuli – Makaua,* disciplinary proceedings further this purpose by protecting the public through the provision of a safe learning environment for students and maintaining professional standards and the public's confidence in the profession.[15] This is achieved through holding teachers to account, imposing rehabilitative penalties where appropriate, and removing them from the profession when required.[16]

Facts

[21] The Tribunal was satisfied the following facts relevant to the two convictions it reviewed, are established on the evidence that was produced by the CAC[17]:

(a) From 2017, in his role as head of the IT Department at the school, Mr A had access to all the school's electronic devices, including classroom iPads used by the students for their day-to-day learning. His role also included purchasing electronic equipment on behalf of the school, and using accounts set up by the school with various IT supply companies. These accounts were to be used for school related purchases only.

(b) Towards the end of June 2018, Mr A took two iPad Minis used by the students for their day-to-day schoolwork and, after wiping all the school-related applications, he took the iPads home.

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[14] *Z v Dental Council Complaints Assessment Committee* [2008] NZSC 55*, CAC v Korau* NZTDT 2017/17, 26 August 2017 at [3].

[15] *CAC v McMillan* at [23], *CAC v Korau.*

[16] *CAC v Bird* NZTDT 2017/15, 3 July 2017 at [32].

[17] NZ Police Summary of Facts, Sentencing Notes and Mr Eathorne's affidavit.

(c) Using a Facebook “Buy Swap & Sell” page, Mr A placed those two iPads for sale. He had no authority from the Principal, or any other person from the school, to sell any of their IT equipment.

(d) After selling the two iPads, Mr A communicated with the buyer and proposed further sales with the buyer.

(e) Over several months, Mr A wiped, or cleaned, numerous school iPads, removed them from the school, sometimes up to 10 at a time, and sold them to his associate.

(f) In November 2018 Mr A sold MacBook Pros and MacBook Airs to his associate.

(g) In December 2018, Mr A sold a MacBook Pro to his associate.

(h) The MacBook Pro he sold in December 2018 was destined for a new teacher at the school who was starting in January 2019. At the same time Mr A sold his associate 10 iPads and 15 iPad Gen 2s. He sold those for a total of $2800.

(i) On 3 January 2019 while at home, Mr A went online and accessed the website of an IT supply company, which held an account with the school and would often supply the school with equipment. At the time that company was selling the latest iPhone X. Any sales of the iPhone included a free Bluetooth speaker. Using his school email address as a login Mr A purchased a 256-gigabyte iPhone XS. He also purchased a glass screen protector and a protective case for the phone. The total value of the purchase was $2475.74. [18]

(j) On 8 January 2019 while staying with his partner [in a different town] Mr A again logged into the IT supply company’s website and accessed the school’s account. He purchased a 128-gigabyte iPhone XR and a 256-gigabyte iPhone XR that again came with a free Bluetooth speaker. The total invoice for this purchase came to $3201.99. Despite giving the impression that Mr A had paid for the phones at the time of their purchase, Mr A made no attempt to pay either invoice. One iPhone was recovered

[18] Sentencing Notes at [7].

from Mr A and a further phone was recovered from his partner. Mr A never received or asked for authorisation from the school principal to purchase the phones for his personal use (as the school required him to).[19]

(k) In January 2019 Mr A sold to his associate a total of 35 iPads and the two Artisan Blizzard Wireless Bluetooth speakers[20] that he had received free as a result of one of the iPhone purchases he had made through the school account, which should have been given to the school.

(l) Mr A's conduct came to the attention of the school after it received, on 7 January 2019, two invoices from the IT supply company for three iPhones purchased by A through a school account totalling $2,475.74. On 8 January 2019, a further invoice from the company was located for $3,201.99 that had not been paid despite having a notation on the invoice "*[A]personalPAID'*.[21]

(m) The school's executive office (EO) contacted Mr A asking him to pay the invoices. Mr A told the EO that he had paid the invoices already. Further inquiries revealed that the invoices had not been paid.[22]

(n) On 8 January 2019, the Principal received a request from a teacher to get her laptop early to prepare for the beginning of classes for 2019. Mr A was responsible for the storage of laptops in his classroom over the holidays. The Principal could not locate the laptop in Mr A's classroom and found all the school's digital devices in a disorganised state.[23]

(o) On 21 January 2019, Mr A emailed the Principal to resign from his employment at the school. The reasons he gave for resigning were "mainly a growing mental illness due to my marriage breakup and accumulated

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[19] Sentencing Notes at [8].

[20] Affidavit of Mr Eathorne, PB Technologies Invoices, exhibit TJE 1.

[21] Exhibit TJE1, Affidavit of Mr Eathorne.

[22] Affidavit of Mr Eathorne at [8].

[23] Affidavit of Mr Eathorne at [9].

stress"[24]. The school declined to accept the resignation and instead Mr A was placed on leave.

(p) On 22 January 2019, the Principal searched for school iPads but was unable to locate any in the school or Mr A's classroom. Mr A was asked where they were. Despite Mr A advising where the iPads should be, they could not be located.[25]

(q) Mr A advised other staff at the school, on 29 January 2019, that there must have been a break in. The break in was not reported to the Police or the Principal at the time.[26]

(r) On 30 January 2019, a 'missing items' report was made to the Police who began an investigation. The investigation led to the criminal charges laid against Mr A.[27]

(s) As part of the employment disciplinary process initiated by the School, Mr A wrote to the school on 19 February 2019.[28] Mr A stated that he had a "very serious mental disability" and that he believed the school was discriminating against him due to that "mental impairment". Mr A indicated he was considering seeking advice to pursue "a legal case" against the school on the ground of "discrimination due to a disability".

(t) As part of the employment investigation, in March 2019, the IT supply company confirmed that the reference "*[A]personalPAID*" was made by the person who had made the order.[29]

(u) On 25 March 2019 a teacher at the school read a blog post written by Mr A (under a different but similar name) titled "Bipolar & Money" on the blog 'Living with the Unseen' and provided a copy to the Principal.[30] In this blog

[24] Exhibit TJE 2, Affidavit of Mr Eathorne.

[25] Affidavit of Mr Eathorne at [11].

[26] Affidavit of Mr Eathorne at [12].

[27] Affidavit of Mr Eathorne at [13].

[28] Exhibit TJE 2, affidavit of Mr Eathorne at [14].

[29] Exhibit TJE 4, affidavit of Mr Eathorne at [15].

[30] Exhibit THE 5, affidavit of Mr Eathorne at [16].

post Mr A disclosed that he had previously (about 15 years earlier) stolen a significant amount of technology from a previous employer when he was a manager in charge of technology of an outdoor education company (in his home country).

(v) When Mr A took over as Head of IT, a comprehensive stock list of the school's iPads and other Apple equipment had been passed onto him from the previous Head of Department.

(w) Once Mr A's offending came to the light, a stock take was conducted based off the stock list.

(x) The stock take revealed that since Mr A had taken over as Head of Department a total of 300 iPads and 17 MacBook Air computers had gone missing from the school's asset register.

(y) As of 12 April 2019, 54 iPads had been recovered, along with 3 Apple MacBooks.

(z) In explanation for taking the school's iPads and MacBooks, Mr A told Police that he was in a manic mood at the time and that he sold the iPads and MacBooks to fund an extravagant lifestyle, to impress his friends and associates. He disputed that he had taken all the missing iPads and other missing Apple products. He stated that he thought he took no more than 150 iPads plus the recovered ones.

(aa) In respect of Uniden radios, Mr A told Police that he just forgot to return them to the school, and by the time they requested then in January 2019, he was starting to feel ashamed to return them after having them for so long.[31]

[22] At the time of his sentencing on the two theft charges, Mr A had not previously appeared before the Court.

[23] Mr A was convicted and sentenced to five months of home detention on the conditions that he resided at a certain named address and that he undertook, and completed, appropriate assessment, treatment/counselling as directed by and to the

[31] NZ Police Summary of Facts, page 4.

satisfaction of a probation officer. Six months' post-detention conditions were also imposed. Mr A was ordered to pay reparation in the sum of $71,209.50 payable "*at this point*" at $10 per week commencing on 5 August 2019. He was granted permanent name suppression (unopposed by Police) on the grounds that if his name were published this would likely cause Mr A extreme hardship. Reference was made to Mr A's "*mental health issues*" which related to a "*recent diagnosis of bipolar and [Mr A] was manic at the time of his offending*".[32]

Respondent's explanations

[24] Mr A provided the following response during the CAC investigation on 20 April 2020[33]:

> *…I would like to start the impairment process as I was mentally impaired during the time of the offending for which I have extensive medical reports. What else do you need from me? Do you require me to provide you with a statement about it? If so I will write one below (Its only short).*
>
> *I, [Mr A] committed a serious offence and fully accept the repercussions that I received as a result.*
>
> *Everything I did is already detailed and in your possession.*
>
> *Earlier that year I went through a divorce and a major turn in my mental health.*
>
> *During the offending I was manic, bordering on psychotic and didn't understand what I was doing at the time.*
>
> *I am diagnosed with Bipolar Disorder, Antisocial Personality Disorder and Borderline Personality Disorder.*
>
> *Let me know if there is anything else you need.*
>
> *Thanks,*
>
> *[Mr A]*

[32] Sentencing Notes at [20].

[33] Affidavit of Mr Eathorne at [20]. There is reference in the Sentencing Notes at [10] to Mr A's pre-sentence report in which were described "some mental health issues". The Court was concerned that Mr A's mental health needs would be adequately managed under a sentence of home detention. It was noted that this concern arose from a recent diagnosis that Mr A "suffers from bipolar" and was manic at the time of the offending. Material relating to the diagnosis was noted to have been submitted in psychiatric reports filed by the defence, however that material was not before the Tribunal.

[25] On 13 October 2020 Mr A sent a text message to the CAC's investigator saying that he voluntarily wished to be struck off the register for his conduct.[34] He declined to participate in a voluntary impairment process.[35]

Discussion and liability finding

[26] The Tribunal considered the evidence carefully.

[27] The Tribunal was satisfied that the CAC had proven on the balance of probabilities that the two convictions, considered individually and cumulatively, warrant an adverse disciplinary finding.

[28] The issue was whether the circumstances of Mr A's two convictions reflect adversely on his fitness to be a teacher.

[29] In determining that question the Tribunal focussed on the circumstances of the offences and then determined whether those circumstances revealed matters which reflect adversely on Mr A's fitness to practise.

[30] When considering the conduct that resulted in the convictions and whether there should be an adverse finding, the Tribunal reached the view that such a finding was warranted based on the following factors that were submitted by Counsel for the CAC to be relevant:

(a) Mr A pleaded guilty to the two theft charges.

(b) The charges related to the theft of a significant number of school computers and technology, occurring over an extended period of time of 7 months, and it was premeditated conduct.

(c) Mr A abused his position of authority and control over school technology for personal gain.

(d) The sentencing Judge noted the Principal's statement in her Victim Impact Statement (written on behalf of the students, staff, Board of Trustees and the school community)[36] that she was "horrified" with Mr A's actions describing them as a "*complete betrayal of trust*"; and that by his actions he had hurt students, their staff and the community. Further, the Judge

[34] Exhibit TJE 9, Affidavit of Mr Eathorne at [21].

[35] Submissions on behalf of the Complaints Assessment Committee at [23].

[36] Principal's Affidavit, exhibit "1".

noted that Mr A's offending "*has been incredibly selfish*" and was motivated by greed on his part[37].

(e) Mr A attempted to cover his tracks in relation to the theft of 2 cellphones by noting on the invoice "*[A]personalPAID*", knowing that could be missed by a busy school office.

(f) The value of the items stolen by Mr A was $71,209.50, for which a reparation order was made by the sentencing Judge.

(g) There is evidence in the blog post that Mr A had engaged in similar conduct in the past.

(h) Mr A's conduct was contrary to the Code of Professional Responsibility for teachers. He did not demonstrate a high standard of professional behaviour and integrity in circumstances where teachers are role models for learners and therefore have considerable influence in and beyond the learning environment.

(i) Mr A only briefly engaged with the CAC during the investigation, and he had ignored the Tribunal process.

(j) There was a significant adverse effect on the learning of students at the school while the school was deprived of the electronic devices for student learning, particularly over the COVID-19 lockdown when learning needed to be undertaken remotely. Given the level of deprivation in the school area, loan electronic equipment should have been available to enable students to be able to continue their learning away from the classroom. [38]The conduct would also be considered by members of the public to have lowered the standing of the teaching profession.

(k) The thefts are captured by Rule 9(1)(g) of the Teaching Council Rules 2016, so that both limbs of the definition of serious misconduct are met.

(l) An adverse finding in the circumstances of this case would be consistent with similar convictions in *CAC v Teacher*[39] and *CAC v Wallace*. In *CAC v*

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[37] Sentencing Notes at [9].

[38] Principal's Affidavit and annexed Victim Impact Statement.

[39] *CAC v Teacher* NZTDT 2012-29 (11 December 2012) and *CAC v Wallace* NZTDT 2017-21 (12 January 2018).

Teacher the Tribunal made a finding of serious misconduct in relation to the pawning of a laptop and the failure to return the laptop to the school when asked. The *CAC v Wallace* decision related to a conviction of a former school employee who failed to return his school keys and laptop to the school following a disciplinary process. The teacher then used the keys and knowledge of the school's alarm code to steal 18 iPads, three laptops, a guitar, a drum kit, two microphones and various cables.

[31] In summary, Mr A's conduct when he offended against the law involved serious lapses of judgement and was completely unacceptable. The conduct significantly undermined Mr A's professional commitment in the Code to maintain public trust and confidence in the teaching profession, and as such it was a significant falling short of accepted standards for teachers. The conduct was, put simply, disgraceful and the Tribunal formed the opinion that it indicates that Mr A is not a fit and proper person to be a teacher. The Tribunal was in no doubt that the conduct was sufficiently serious to warrant an adverse disciplinary finding, to protect the public, and maintain the standards of, and public confidence in, the teaching profession.

Penalty

Relevant principles

[32] The following principles relevant to the Tribunal's sentencing exercise here, may be summarised as follows[40]:

(a) There are three overlapping purposes of penalty in the context of this Tribunal, namely, to protect the public through the provision of a safe learning environment, maintain professional standards and maintain public confidence in the profession.

(b) The Tribunal, when imposing penalties, must arrive at an outcome that is fair, reasonable, and proportionate in the circumstances and which is comparable with those imposed on teachers in similar circumstances.

(c) Cancellation would be required in two overlapping situations: where the offending is sufficiently serious that no outcome short of deregistration could sufficiently reflect the adverse effect on the teacher's fitness to teach or its tendency to lower the reputation of the profession; and the teacher

[40] The relevant principles as set out in *Roberts v Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354, at [44]-[55], adopted by this Tribunal in previous decisions.

had not taken adequate rehabilitative steps to address his or her issues which contributed to the offending that led to the convictions.

CAC's submissions

[33] It was submitted for the CAC:

(a) The following factors aggravate the level of offending for the purposes of considering penalty:

33.a.1 The offending occurred in the school environment, abusing the trusted position to which the Respondent was appointed.

33.a.2 The decile level of the school, and the deprivation level of the school (as outlined by the Principal in her affidavit and Victim Impact Statement), made the effects on students and the school community so much greater. Mr A denied students access to technology to assist learning. The Victim Impact Statement refers to students needing devices to capture learning and to share it with parents.

33.a.3 The theft was on an "*incredible scale*" with over 300 devices stolen that was valued for reparation purposes at $92,216.12.

[34] It was submitted for the CAC that in mitigation, the following points may be made:

(a) Mr A pleaded guilty and appeared to express some remorse in his brief response to the CAC's investigator.

(b) Mr A was accepted by the sentencing judge to have some mental health issues, which were managed as part of the sentencing conditions.

[35] The Tribunal accepted that those were the relevant aggravating and mitigating factors.

[36] It was submitted for the CAC that in the light of those factors, an appropriate penalty should be cancellation of Mr A's registration as a teacher and a censure. It was noted that Mr A himself sought cancellation, as evidenced by his text communication to the CAC's investigator in October 2020. It was submitted that cancellation was appropriate given that there is nothing to give the Tribunal any reassurance he is a fit and proper person to be entrusted with the education, influence or care of any

children or young people; and that the Tribunal had little alternative but to cancel his registration.

Penalty – Discussion and Findings

[37] The Tribunal accepted the submissions that were made for the CAC, as recorded above.

[38] It considered that the least restrictive penalty outcome that could fairly and reasonably be imposed and that was proportionate in the circumstances, were the penalty orders suggested by the CAC.

[39] The offending that led to the convictions was objectively at the most serious end of the spectrum in terms of the level of seriousness of conduct that comes before the Tribunal. It follows that to protect the public, maintain the standards of the teaching profession (and deter other teachers from conducting themselves in the manner Mr A has), the most serious penalty outcome is necessary.

[40] There was no evidence (independent or otherwise) produced to the Tribunal as to any rehabilitative steps Mr A may have taken to address his mental health issues, after the completion of his sentence (if any). Mr A's current mental health status is unknown. Because of that the Tribunal was unable to consider a rehabilitative penalty (were it to have concluded that a period of suspension followed by conditions on practice was a proportionate penalty) and proceeded on the basis that Mr A is a risk to the public and the teaching profession.

[41] The Tribunal concluded that cancellation of Mr A's registration was the least restrictive penalty outcome that could fairly and reasonably be imposed. Given the objective gravity of the offending, cancellation of registration would not be disproportionate in the circumstances.

[42] A censure is necessary also, to express the Tribunal's significant disquiet about Mr A's offending which led to his two convictions in 2019. The offending reflects extremely poorly on Mr A and there can be no doubt that it reflects adversely on his fitness to be a teacher.

[43] In addition, the Register is to be annotated to reflect the cancellation and censure orders.

Costs

[44] Section 404(2) of the Act provides that following a hearing that arises out of a report under section 397 of the conviction of a teacher the Tribunal may not require any party to pay costs to any party or to the Teaching Council in respect of the costs of conducting the hearing.

[45] As noted, this case did not arise out of a report under section 397. Rather, it arose from a mandatory report of possible serious misconduct that the Teaching Council had received from the school Principal, prior to the convictions that were later entered. It is noted that Mr A did not self-report the convictions to the Council, as he was obliged to pursuant to section 397 of the Act.[41].

[46] The Tribunal as it was constituted in this case considered that as these proceedings originated from a section 394 report rather than from a report under section 397, costs may be ordered against Mr A.[42]. The Tribunal did not consider it fair or reasonable that the teaching profession (as a whole) should be expected to meet all the associated costs of these proceedings.

[47] Counsel for the CAC produced to the Tribunal a Schedule of the CAC's costs. Total costs were indicated as being $6,858.59, excluding GST. The Tribunal considered those costs were reasonable.

[48] The costs incurred by the Teaching Council associated with the hearing were estimated to be $1145.00 excluding GST.

[49] The general principles which need to be taken account of when considering costs orders[43] are well settled and have been referred to in previous decisions of the Tribunal.

[50] In essence the issue for the Tribunal is determining what proportion of the total costs should be borne by the teaching profession as a whole and what proportion should be borne by the teacher who has been responsible for those costs being incurred in the first place.

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[41] Section 397(2), Education Act 1989. A failure to self-report a conviction in and of itself is misconduct that may give rise to disciplinary proceedings It is noted that the CAC did not bring a charge of misconduct in relation to Mr A's failure to self-report his convictions.

[42] The Tribunal in *CAC v Ngata* (NZTDT 2020/50) had signalled this as a possibility.

[43] *Vatsyayann v PCC* [2012] NZHC 1138.

[51] The general principles include that:

a. The full cost of investigating and prosecuting a teacher should not fall on the teaching profession (as a whole).
b. Members of the profession who appear on disciplinary charges should make a proper contribution towards the costs of the investigation, prosecution, and the hearing[44].
c. Costs are not to punish[45].
d. A teacher's means, if known, are to be taken into account[46].
e. A teacher has a right to defend himself or herself and should not be deterred by the risk of a costs order[47]; and
f. In a general way 50% of reasonable costs is a guide to an appropriate costs order subject to a discretion to adjust upwards or downwards[48].

[52] In this case the Tribunal noted that the process server who was instructed by the CAC to serve the proceedings on Mr A, deposed that she had affected service on Mr A at his place of work (on a Saturday in April 2021). As noted, the workplace was not a school or learning institution. It appeared to the Tribunal that Mr A is currently employed in a role outside the education system, and therefore it cannot reasonably be suggested that he does not have financial means to contribute to the costs associated with these proceedings currently and into the future (assuming he is able to retain his employment). The Tribunal took account of the fact that Mr A has an ongoing commitment to pay $10 each week towards the reparation order made by the Court, but the Tribunal considered that was a token amount noting that it was set at a time when Mr A was to be sentenced to a period of home detention which may have meant he was unable to work.

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[44] *G v New Zealand Psychologists Board* Gendall J, 5 April 2004, HC Wellington, CIV-2003-485-217; *Vasan v Medical Council of New Zealand* 18 December 1991, AP43/91 at page 15.

[45] *Gurusinghe v Medical Council of New Zealand* [1989] 1 NZLR 139 at195.

[46] *Kaye v Auckland District Law Society* [1988] 1 NZLR 151.

[47] *Vasan* above fn. 77 and *Gurusinghe* above fn. 78.

[48] *Cooray v Preliminary Proceedings Committee* Unreported, High Court Wellington Registry, AP/23/94, 14 September 1995, Doogue J, at page 9.

[53] When considering costs, the Tribunal took account of the fact that Mr A had taken no part in the proceedings at any point, despite having been on notice of them and encouraged to participate in them[49].

[54] In those circumstances the Tribunal concluded that Mr A should be ordered to meet 50% of the CAC's costs and expenses (being payment of the sum of $3,429.30) and 50% of the costs associated with the hearing (being payment of the sum of $572.50). There will be orders accordingly.

[55] This means the orders of the Tribunal are that Mr A is to pay $4001.80 for costs.

[56] It is noted that section 404(3) of the Act provides that a sum ordered to be paid to the Teaching Council under section 404(1)(i) (the costs associated with the hearing) is recoverable as a debt due to the Council.

Non-publication orders

[57] There is a permanent order in place in the criminal proceedings, prohibiting publication of Mr A's name and the name of the school or any identifying particulars pursuant to the Criminal Procedure Act 2011.[50]

[58] So as not to render redundant or undermine that order, the Tribunal considered that it is proper that permanent orders are made in these proceedings mirroring the District Court's order, pursuant to section 405(6) of the Act.

Result and Orders

[59] The Tribunal was satisfied the established circumstances of Mr A's two convictions reflect adversely on his fitness to be a teacher. Accordingly, an adverse disciplinary finding is warranted.

[60] The following formal orders are made under the Education Act 1989[51]:

(a) Mr A is censured, pursuant to section 404(1)(b).

(b) Mr A's registration is cancelled, pursuant to section 404(1)(g).

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[49] Minutes (of the Deputy Chairperson) of Pre-hearing Conferences.

[50] CRI-2019-070-001610 [2019] NZDC 14595.

[51] Clauses 2 and 3, Schedule 1, Education and Training Act 2020 noted.

(c) The Register is to be annotated in relation to the matters in (a) and (b), pursuant to section 404(1)(e).

(d) Mr A is to pay costs in the sum of $3,429.30 to the CAC, pursuant to section 404(1)(h).

(e) Mr A is to pay costs in the sum of $572.50 to the Teaching Council in respect of the costs of conducting the hearing, pursuant to section 404(1)(i).

(f) There is to be a permanent order prohibiting from publication the name of Mr A and any identifying particulars, pursuant to section 405(6). For the avoidance of doubt, that the convictions were entered in the District Court at Tauranga, may be published.

(g) There is a permanent order prohibiting from publication the name of the school where Mr A was employed at the time of his criminal offending, and any identifying particulars, pursuant to section 405(6).

Dated at Wellington this 29 h day of June 2021

Jo Hughson
Deputy Chairperson

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 1989may 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 Section 356(3) to (6) apply to every appeal as if it were an appeal under section 356(1).