Complaints Assessment Committee (CAC) v Witana:
NZ Disciplinary Tribunal Decision 2016/24

Mr Witana was a school principal and, during investigations into his school's financial position, pornography was found on his school issued laptop.

The Complaints Assessment Committee (CAC) investigated and referred him to the New Zealand Teachers Disciplinary Tribunal (NZTDT) in relation to the pornography and aspects of his financial practices at the school.

The NZTDT noted that professional discipline is one of the means by which the statutory purpose of the Education Council is achieved, stating:

"The role of disciplinary proceedings is therefore to maintain standards so that the public is protected from poor practice and from people unfit to teach."

The NZTDT agreed with the CAC's submission that the pornographic material on his laptop was *"offensive, distasteful and degrading of women."* It reached an *"inevitable conclusion"* that his conduct amounted to serious misconduct as it met the criteria for reporting serious misconduct, which includes possession of pornographic material at school, as well as being likely to bring discredit to the profession, to adversely affect the wellbeing and learning of children and reflecting adversely on his fitness to be a teacher.

The NZTDT did not accept that all the charges relating to financial matters were proved. However, it was satisfied that he had pre-signed blank checks and had allowed school funds to be used to pay for personal items and petrol cards for staff members. It found that pre-signing cheques exposed the school to the risk of loss of money. Although on its own it did not amount to serious misconduct, he should have taken more care and it was misconduct.

The financial charges had two aspects: allowing staff to use petrol cards for personal use, and giving them 24 hours to pay back the amount owed.

His personal expenditure was a different matter; Mr Witiana he had a "yellow book" which he recorded purchases he made such as a school pie, his children's stationery or petrol. Unlike other staff, he did not repay amounts within 24 hours, and instead paid the money back to the school bank account, clearing the debt by the end of the year, or soon after. The balance of the amount owing peaked at $10,084.51.

Mr Witana accepted that *"allowing a situation to develop where he used the school as a provider of an interest-free loan to the extent of about $10,000 was serious misconduct."*

The NZTDT agreed it was serious misconduct, saying it had *"no hesitation"* in finding that *"a reasonable member of the public would conclude that the reputation and good-standing of the teaching profession is lowered by this behaviour, and it therefore brings discredit to the profession."*

The NZTDT has imposed a penalty on Mr Witiana, though not the cancellation of his practising certificate, because:

- *there is no evidence any school children were exposed to the pornographic material,*
- *he did not access the material himself*
- *there is evidence of the contribution he has made to his community and to Māori education*
- *and, he had backing from a member of the teaching profession with extensive experience in leadership, governance and the setting and maintenance of professional standards, who spoke on his behalf*

The NZTDT ruled that the financial matters were not sufficiently serious to warrant cancellation of his practising certificate.

Mr Witana was censured, ordered to pay 50% of the CAC and NZTDT costs, and has had conditions placed on his practising certificate that:

- *For two years he is to inform any prospective employer of the professional disciplinary proceedings and to provide that employer with a copy of the decision; and*
- *He is not to hold a position of leadership or financial responsibility until he has satisfied the Manager, Teacher Practice at the Education Council that he understands the responsibilities of a Principal and accounting for school funds.*

The censure and the conditions will be annotated on the Register of New Zealand Registered Teachers for two years.

BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

NZTDT 2016/24

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	**PETER WITANA**
	Respondent

TRIBUNAL DECISION

30 JANUARY 2017

HEARING:	Held at Auckland 17 October 2016
TRIBUNAL:	Theo Baker (Chair)
	Maraea Hunia and Graeme Gilbert (members)
REPRESENATION:	Ms Scott for the CAC
	Ms Andrews for the respondent

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The charge

1. The Complaints Assessment Committee (CAC) has referred to the Tribunal a charge that the respondent behaved in an unprofessional manner amounting to misconduct and/or serious misconduct arising from his employment as Principal at Kawakawa Primary school. The particulars of the charge are that he:

   3.1 *Viewed, accessed or possessed pornographic material on his School computer/computers, namely 1,522 inappropriate pictures or video attached or embedded inside 245 emails in Mr Witana's email account;*

   3.2 *Exercised inappropriate financial practices for the day-to-day management of the School's finances by:*

   3.2.1 *failing to keep records for fundraising accounts;*

   3.2.2 *failing to keep relevant documentation supporting transactions in an ordered fashion;*

> *3.2.3 pre-signing blank cheques;*
>
> *3.2.4 having an inappropriate account system for amounts paid on behalf of and recoverable from staff; and*
>
> *3.2.5 allowing School funds to be used to pay for personal items for Mr Witana and other staff members.*

Evidence before the Tribunal

2. The respondent admitted the allegation contained in particular 3.1, but there was disagreement as to the nature of the images, which were described by Ms Andrews in her submissions on behalf of the respondent as follows:

   While the images may be technically "pornography", it is at the softer end, much of which could have been purchased from the top shelf of a new agent in a plastic wrap. The more extreme images were not classified as "objectionable" and therefore illegal under the PWC classification system.

3. By PWC, Ms Andrews was referring to the audit undertaken by Price Waterhouse Cooper.

4. Ms Scott for the CAC on the other hand argued that the images were offensive, distasteful, demeaning and degrading of women.

5. The Tribunal received the following evidence on behalf of the CAC:

   a. A statement from Anthony Rutherford, an IT Technician employed by the Education. He explained that he had copied a disc from PWC onto a blank disc for Catalina Olmos (a Case Co-ordinator at the Education Council).

   b. A statement from Julia McCook-Weir, Lead Lawyer at the Education Council. She was asked to select examples of images and videos from a disc of material held on the Peter Witana CAC file. She obtained a disc from Ms Olmos. She viewed the material on the disc and selected a representative sample. She saved those and asked Mr Rutherford to make five copies on discs. She also created a spreadsheet listing the material and produced it.

   c. A disc with a sample of material and spreadsheet.

   d. Brief of evidence of Roger Dephoff, Chair of Kawakawa Primary School Board of Trustees. He described the school investigation and produced a number of documents, including the PWC draft reports and final reports prepared for the

Ministry of Education.

e. Brief of evidence of Catalina Olmos, who described the CAC's investigation and produced a number of documents including statements and submissions made by or on behalf of the respondent.

6. Prior to the hearing the Tribunal viewed the representative sample of video images referred to in the brief of Julia McCook-Weir.

7. The respondent had also provided a brief of evidence and he was sworn in and answered questions. The Tribunal also heard from Mr Pat Newman in support of the respondent.

8. Just before the commencement of hearing, Ms Andrews advised that another witness who is the mother of one of his children had arrived and wanted to give evidence in support of the respondent. Because the CAC had not had notice of this witness, the Tribunal declined to hear from her.

9. At the hearing during evidence-in-chief, the respondent admitted that the material was offensive.

Undisputed facts

10. The following background matters are not in dispute.

11. The respondent was appointed principal of Kawakawa Primary School in 1994. He held this position until 2014 when he was dismissed by the Board of Trustees. In early 2013, following the school's election for Trustees, an almost entirely new Board of five newly-elected members replaced the previous Board which had included some long-serving members. In May 2013 Roger Dephoff was appointed Chair.

12. About a year later, on about 6 June 2014 when Mr Dephoff was at the school to sign some documents, he and the respondent had a conversation about the respondent's work and personal expenses for his attendance at the World Indigenous Principal's Conference in May. This led to the respondent raising an historic event involving a previous school administrator and missing funds in the region of $100,000. Mr Dephoff was shocked to hear of this for the first time.

13. Later that day (Friday) another Board member contacted Mr Dephoff to say he had received a document from a staff member who was the staff representative on the Board of Trustees. The document was from an unnamed person, making numerous

allegations about the respondent's management of school finances. A copy of this was before the Tribunal annexed to Mr Dephoff's statement.

14. An urgent Board meeting was called for Saturday 7 June and the respondent was advised.

15. On Monday 9 June Mr Dephoff provided a copy of the anonymous document to the respondent. In his statement Mr Dephoff described various steps and meetings that followed. The respondent was placed on discretionary leave. When he was advised of this, he asked if he could go and delete certain material off his computer and that he had some inappropriate images on his computer. Mr Dephoff declined.

16. As a result of Mr Dephoff seeking advice from the NZSTA (New Zealand School Trustees Association), Ms Halligan, a local accountant conducted a review of a number of matters, including:

    - Use of a "yellow book" for recording monies the respondent owed the school
    - Issuing and use of fuel cards
    - Set-up of class fund-raising accounts
    - Rate of rent for school house
    - Use of cell phone
    - Financial reports

17. In her report dated 25 June, she expressed concern at the lack of clear policies, procedures, delegations and lines of accountability. Further details are discussed below under the particulars of charge.

18. On 22 August 2014 the Board dismissed the respondent.

19. As a result of Ms Halligan's report, the Board had informed the Director of Education Sector Enablement and Support and the Ministry of Education Whangarei. On 12 September the Ministry engaged PWC to investigate the school's financial position. Mr Dephoff said that there were some delays in providing their report because of the inability to locate all the necessary reports and documentation. In an interim report dated 2 December 2014, PWC said that the Ministry had asked them to undertake an initial forensic search for data on two desktop computers used by the respondent. They located 98 emails which had a total of 193 pornographic images attached.

20. A further interim report on the financial matters was issued in February 2015 and a final

one in July 2015. As a result of this, the Ministry forwarded information to the New Zealand Police who charged a former administrative staff member, Nisha Marsh. In 2016 she was convicted of 13 charges of using a document to obtain a pecuniary advantage and five charges of 5 by a person in a special relationship. The offending covered a period from December 2012 for about a year and resulted in her taking over $30,000.

21. In the meantime the Board resolved to further investigate the inappropriate material on the respondent's school computers. It engaged PWC to forensically analyse the computers. A report dated 12 May 2015 is annexed to Mr Dephoff's statement.

22. According to PWC material which may be determined in appropriate is typically categorised into the following five subsets:

   a. Category One – Calendar: for example, calendars with pictures of models sold in stationery stores

   b. Category Two – Jokes: for example, adult themed jokes

   c. Category Three – Naked: for example, Playboy style pictures

   d. Category Four – Hard Core: for example, restricted material under the Films, Videos and Publications Classifications Act 1993, but not including objectionable material (illegal)

   e. Category Five – Objectionable: for example, pictures that are likely to be objectionable under the Films, Videos and Publications Classifications Act 1993, and hence illegal

23. PWC explained their procedure, which is not described here because the respondent does not deny that the images were found on his school devices. In summary they found 245 emails containing inappropriate pictures or videos sent from 19 email addresses. These are images that in the opinion of PWC would fall into Category Four or Five, that is Hard Core or Objectionable. The emails were sent from the respondent's email address to 208 unique email addresses. In total 2186 emails were sent. The search engine history did not indicate that the respondent had attempted to access inappropriate material on the internet.

24. The respondent had indicated to the CAC that their witnesses were not required for cross-examination.

The respondent's evidence

25. The respondent read a prepared statement and answered questions. His evidence in response to the particular allegations is set out below.

26. The respondent set out his background, including his introduction to teaching training in 1981. He described his passion for teaching and his success in relating to his students and supporting their learning. For the first 10 years of his career he taught at various schools in Auckland and Rotorua, acting as Principal for six months in 1991. In 1994 the respondent was appointed Principal of Kawakawa school, a low decile school in a community with significant social problems. He and his whanau lived in the school house, and so they lost their home when he lost his job.

27. The respondent holds an extension to his practising certificate that requires any Principal who hires him to report weekly to the Education Council on several matters concerning access to school funds and IT. This has made it difficult to get work because of the implications of these conditions. Prospective employers infer that there is a question of his honesty. More recently, he has been teaching new entrants and he told the Tribunal that he has been loving this teaching time.

28. In addition he set out the lessons he has learned and the regrets he has. His aspirations are to be allowed to teach, especially in Te Tai Tokerau where most of the children would be Maori. He feels strongly that he has much more to do to improve education outcomes for Maori.

29. The respondent not only designed the Maori Achievement Collaboration programme that is in place in over 100 schools, but he was successful in getting the Ministry of Education and the New Zealand Principals Federation to adopt it and fund it. He feels there is much more to be done and he aims to have it in place in every school in New Zealand.

30. The respondent apologised to the profession, the school community, his whanau, and his late parents. Finally he apologised to himself for letting his professional standards slip and not ensuring the foundations needed in his school were in place before getting into the "big picture stuff", and for putting his career in jeopardy.

31. We also heard from Mr Pat Newman, whose evidence was very much aimed at keeping the respondent within the teaching profession. He made a heartfelt plea that it was in the interests of students that the respondent was not struck off the register.

32. Mr Newman has been a principal of various schools for over 30 years, and has held the position of principal of Hora Hora School since 1999. He outlined for the Tribunal his considerable governance experience during that time, including positions on the New Zealand Principals Federation, Te Akatea (Maori Principals Association), International Confederation of Principals, the Auckland University Team Solutions Advisory Board. He is current President of the Te Tai Tokerau Principals Association, a position he has previously held. He has also been the Principals Representative on New Zealand Teachers Council, Chair of the Audit and Risk Committee, overseeing Strategy, Finances and Risk, and a Complaints Assessment Committee Member of the NZTC. He is also the current Maori Achievement Collaborative Facilitator in Te Tai Tokerau working with 32 principals, Primary and Secondary in developing leadership's perspectives and actions regarding Maori Education.

33. There are many other bodies that Mr Newman has served on. Suffice it to say that he has extensive experience in leadership, governance and the setting and maintenance of professional standards.

34. In questioning, Mr Newman acknowledged that the pornographic images that the respondent had kept could be termed "hardcore". He felt that men have come a long way in understanding the harm of pornography.

35. Mr Newman has known the respondent for 30 years since he was a young teacher, whom Mr Newman described as being full of passion, energy and ideas, which endeared him to some (and occasionally) alienated others. In Mr Newman's opinion, the respondent has made a large contribution to education in New Zealand, particularly for Maori. He referred to the respondent's tireless efforts in developing and implementing the Maori Achievement Collaborative, as well as going out of his way to support colleagues. Mr Newman has been employing the respondent to teach in his school.

Factual findings

Particular 3.1 Viewed, accessed or possessed pornographic material

36. The evidence in support of this particular is outlined above. The respondent admitted possession of the images, but that although he knew the images were what he called "raunchy", at the time he did not think of them as pornographic. He also said that most the emails were "joke" emails. In his evidence-in-chief, he was asked about the "raunchiness" of the images and said that since his girls have started growing into young women he has started to see things differently. He said that the sexual nature minimises

relationships between men and women and were disrespectful to women and men as well. He said that men can be so much more than a guy who sits behind a computer, and that he was wrong.

37. This was the first time that the respondent had admitted the seriousness of this conduct. This is discussed further below. The Tribunal is in no doubt that the images were pornographic, and accept the categorisation by PWC that they were "hard core and objectionable". The particular is proven.

Particular 3.2 – Financial practices

38. The respondent told the Tribunal that in managing the school finances, he initially relied heavily on the experience of the school secretary who had managed school finances at the school for many years prior to his arrival. When she left, he appointed an Anglican Minister who had experience in running her own business. He received no training in finances as a new principal. The Chair of the Board when he first was appointed principal was an accountant. He felt that if the school accountants were happy with the systems, and they passed the annual audit then things were satisfactory. He also relied on the Board of Trustees being happy with them being correct.

39. We accept that as the CEO of the school, the respondent was responsible for ensuring these matters were in order. However, we also acknowledge the circumstances that led to this state of affairs where there were poor practices. The respondent had indicated to the CAC that no PWC witnesses were required for cross-examination. The Tribunal would have found it helpful to explore some accounting practices with someone from PWC, but perhaps of more relevance, it might have been useful to hear from someone about the standard expected of a principal in the maintenance of financial records and how a principal knows about it.

40. We heard that some matters were raised by the auditor following the annual audit. Mr Dephoff said that by July 2014 the Board had reviewed the auditors' reports and was concerned that the auditors had repeatedly made strong recommendations since 2008 to change financial practices. Audit reports for the five years from YE 31 December 2008 to YE 31 December 2012 were produced as exhibit RDD08. These reports are addressed to the Chair of the Board at the time, who at the time of the last one was Mr Dephoff.

41. Of relevance to the present charge, we note in the audit report dated 27 May 2009 for

YE December 2008, the auditor strongly recommended that the practice of signing blank cheques be discontinued, pointing out that the procedure totally negated the purpose of having two persons signing cheques, a control that was in place to ensure that the school's funds were not at the disposal of any single individual. There was no reference to this practice in subsequent reports. It also strongly recommended that advances to employees be discontinued, but it is not clear what the nature of these advances was.

42. The audit report dated 3 July 2013 for the YE December 2012 highlighted the practice of staff using the school account to purchase fuel but not reimbursing the school. It was thought to be an infringement of s 73 of the Education Act 1989 (which restricts a Board's acquisition of security).

43. In addition to these matters, the CAC highlighted the other recommendations which were made, but these are not included in the charge of serious misconduct.

44. Overall, in each case the auditor concluded that the financial control environment was considered to be good.

45. We have first considered the evidence in support of each particular to decide whether the facts support the allegation. The question of the respondent's culpability and the seriousness of each of these is then discussed under the heading Serious Misconduct.

3.2.1 failing to keep records for fundraising accounts

46. The essence of this allegation is that instead of including the class fundraising accounts for things such as school trips with the school accounts, each classroom had its own account and it was managed separately. The funds were not included in the school's audited statements.

47. In her report of 25 June 2014 to Mr Dephoff (exhibit RDD5), local accountant, Karen Halligan explained that there were a number of bank accounts held for the purpose of student fundraising. They were set up in the specific classroom name and all fundraising proceeds got credited to those accounts, the signing authorities being the individual class teachers. The balances of the accounts were not included in the accounts of the school. She said that the funds should form part of the local funds raised by the school and reported in the school accounts, with separate ledger accounts maintained for each classroom. Ms Halligan added that there should be clear guidelines or procedures to follow for fundraising, student or sporting activities. These should be documented so that staff know what procedures need to be followed for any recoverable

expense or activity.

48. PWC recommended that the number of fundraising accounts should be strictly controlled and that fundraising accounts should be included in the general ledger in financial statements to ensure that proper records are maintained for reconciliation and auditing of transactions.

49. The respondent said that about 10 years ago he and the then Chair of the Board decided to set up each class with a bank cheque account, separate from the school's accounts. The rationale was that it was easier for paying for incidentals when away (on trip or camp) and no signatory was available. Each bank account required two signatories: the class teacher and either the respondent or the deputy-principal (DP). The respondent or DP would sign some cheques, and then the teacher could counter-sign the cheque when used. At the end of the trip receipt books and cheques were checked by the DP and office.

50. We have some sympathy for the respondent. The practice was started with the Chair's knowledge, if not encouragement. Subsequent Board members would have known that fund-raising activities were taking place, and there was ample opportunity for the Board to ensure they were included in the accounts. We acknowledge that in early 2013 the Board was made up of almost all newly elected members.

51. While we fully agree with Ms Halligan's and PWC's advice, we are not satisfied that the CAC has proven this sub-particular. Records of the fundraising accounts were kept. The problem was that they were not kept in accordance with good accounting practice and included in the accounts presented to the Board or the auditor. This was very poor practice, but the respondent has not been charged with this failing. We find that he did keep records of fund-raising accounts in the form of bank statements and receipts. Accordingly this sub-particular is not proven.

3.2.2 failing to keep relevant documentation supporting transactions in an ordered fashion

52. The respondent says that transactions were documented, receipted and ordered chronologically, and that previous Boards and auditors had not queried it. He therefore does not accept this allegation.

53. The CAC referred to the PWC report dated 24 July 2015, referred to above in paragraph 20. A copy of this was produced by Mr Dephoff as exhibit RDD18. At paragraph 11 of

that report, it was noted that the school's recordkeeping was poor and disorganised, making it difficult to locate supporting documentation, and in many cases it was not to be found. At paragraph 74 PWC said that control over the school's financial operations and cash was poor as evidenced by the failure to keep relevant documentation supporting transactions in an ordered fashion.

54. However, these practices were allowed to continue for several years, with the approval or acquiescence of the Board of Trustees, the accountants and auditors. Although the auditors highlighted some issues, they did not raise this matter. The Tribunal would have been assisted by more evidence of the standard required of a principal and how the respondent failed to meet that standard. Accordingly we are not satisfied that the CAC has established that the respondent failed to keep relevant documentation in an ordered fashion. Even if it had been proved to the requisite standard, we agree with Ms Andrews that this would more likely be a competence issue than misconduct.

3.2.3 pre-signing blank cheques

55. PWC raised this issue in their report. It had also been raised in the auditor's report in 2009. The respondent acknowledges that on occasion he pre-signed blank cheques, if he was going away so that they were available in case of emergency. This particular is therefore proven.

3.2.4 having an inappropriate account system for amounts paid on behalf of and recoverable from staff;

3.2.5 allowing School funds to be used to pay for personal items and other staff members.

56. The evidence in support of sub-particulars 3.2.4 and 3.2.5 was similar, with 3.2.4 being encapsulated by 3.2.5. Ms Scott confirmed that the "amounts paid on behalf of and recoverable from staff" and personal items for other staff members referred to petrol cards.

57. The respondent explained to the Tribunal that some staff were issued with school petrol cards. The petrol account came in each month and the staff and board members' payments were identified. They then had 24 hours to pay the amount owed. The school did not pay the account until after that time and so the respondent thought it was reasonable. If the staff member was late, the office administrator informed the respondent. He recalls cutting one card up as a result of late payments.

58. The respondent's personal expenditure fell into a different camp, with the use of the

"Yellow Book". He told us that this practice was instituted by the staff member who was an Anglican Minister and Police Chaplain. It was developed to cover the odd thing that he paid for when he had no cash on him, such as a raffle ticket for a child or things that his own children needed at school.

59. He explained that everything that he "purchased without payment at the time" such as a school pie, his children's stationery, or petrol was entered into the Yellow Book by the office staff. This included the amount he owed on the petrol card. He would transfer some funds to repay the debt every now and then and he always ensured that the debt was cleared in full by the end of the year or soon after. While the staff had to repay their petrol cards within 24 hours, the respondent did not. Although not the specified in any particular of the charge, the respondent had also issued petrol cards for his wife and his mother. It appears that this was included in his own personal expenditure.

60. Ms Scott referred us to PWC's findings that the following balances were recorded in the Yellow Book:

    a. YEFY 10 ($5,429.86)

    b. YEFY 11 ($2,775.70)

    c. YEFY 12 ($5,895.06)

    d. YEFY 13 ($1,280.68)

61. We also heard that just prior to the 2013 closing date the respondent cleared about $9,000 worth of debt. PWC said that the balance peaked at $10,084.51. As the respondent acknowledged, "it got out of hand". He explained some of the circumstances that had led to the debt getting so large.

62. The PWC recommendations were that staff members should not be permitted to make purchases via school systems or supplies and that any amounts due by staff members should be properly recorded.

63. The respondent had indicated to the CAC that no PWC witnesses were required for cross-examination and therefore we mean no criticism of Ms Scott, but we were left a little confused by the apparently contradictory nature of these two statements, and therefore the two last sub-particulars. On the one hand the respondent did not have an appropriate system for recording debt owed by staff, and on the other hand, such debt should not be allowed in any event. The individual petrol cards were identifiable on the

account. We are reluctant to make a finding on 3.2.4 because we do not know what an appropriate account system would be for a practice that we do not condone. Staff should not have been using school petrol cards for personal purchases. Accordingly particular 3.2.4 is not proven, but particular 3.2.5 is.

Serious misconduct

64. Section 139AB of the Education Act 1989 (now repealed) 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; and*
>
> *(b) that is of a character or severity that meets the Education Council's criteria for reporting serious misconduct.*

65. The criteria for reporting serious misconduct are found in rule 9 of the New Zealand Teachers' Council (Conduct) Rules 2004,[1] and the CAC rely on r 9(1)(k) and (o):

> *(k) viewing, accessing, or possessing pornographic material while on school premises or engaged on school business:*
>
> ...
>
> *(o) any act or omission that brings, or is likely to bring, discredit to the profession.*

66. In consideration of r 9(1)(o) we are assisted by the following decision from the nursing disciplinary regime. In *Collie v the Nursing Council of New Zealand* (HC, Wellington AP 300/99, 5 September 2000), the High Court considered what was meant by "brings or is likely to bring discredit on the nursing profession" under the Nurses Act 1977. Gendall J said:

> *To discredit is to bring harm to the repute or reputation of the profession. The standard must be an objective standard for the question to be asked by the Council being whether reasonable members of the public, informed and with knowledge of all 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.*

[1] These rules apply to this proceeding under the transitional rules in the Education Council Rules 2016, which came into force on 1 July 2016

67. Ms Andrews submitted that sub-particular 3.2.3 is a matter of competence rather than misconduct. For guidance on disciplinary threshold, she referred us to definitions of professional misconduct and misconduct contained in the health and legal disciplinary jurisdictions. Ms Andrews also referred the Tribunal to the two-stage test articulated in Health Practitioners Disciplinary Tribunal (HPDT) decisions. We accept that reference to other jurisdictions is useful, but caution is important in adopting dicta without distinguishing the statutory regimes. The definition of professional misconduct contained in the Health Practitioners Competence Assurance Act 2003 (HPCA Act) is not relevant to our determination because the respondent faces a charge of serious misconduct as defined in the Education Act and related rules. For the same reason, we find nothing pertinent in the fact that the legal profession is governed by its own disciplinary regime in which misconduct is specifically defined.

68. Ms Andrews refers to the two-stage test set out in the 2006 decision of *Director of Proceedings v Patel.*[2] In fact it was a test that was articulated in the former Medical Practitioners Disciplinary Tribunal (under the Medical Practitioners Act 1995) and was espoused by the newly-formed HPDT in its first decision *Director of Proceedings v Tonga.*[3] If the PCC or DP has established professional misconduct as defined in the HPCA Act, the HPDT then considers whether a disciplinary sanction is required for the purposes of protecting the public and/or maintaining professional standards and/or punishing the health practitioner.

69. We are reluctant to simply adopt this test which has been extrapolated from a history of medico-legal jurisprudence and exists within quite a different statutory framework and purpose from the Education Act 1989. The emphasis of the protection of the public as a separate and distinct purpose has been articulated in decisions of the Health Practitioners Disciplinary Tribunal, with reference to s 3 of the Health Practitioners Competence Assurance Act 2003, which clearly articulates a statutory purpose to "protect the health and safety of members of the public of by providing for mechanisms to ensure that health practitioners are competent and fit to practise their professions." Similarly, the purposes of the Lawyers and Conveyancers Act 2006 include "to maintain public confidence in the provision of legal services and conveyancing services"[4] and to

[2] 59/Med06/36D
[3] 18/Med04/01D
[4] Section 3(1)(a)

protect the consumers of legal services and conveyancing services".[5]

70. The disciplinary functions of the Education Council and Disciplinary Tribunal are found in Part 32 of the Education Act 1989. The purpose of the Education Council is set out in s377:

The purpose of the Education Council is to ensure safe and high quality leadership, teaching, and learning for children and young people in early childhood, primary, secondary, and senior secondary schooling in English medium and Māori medium settings through raising the status of the profession.

It provides for protection of the public in the sense that it must ensure safe and high quality leadership, teaching and learning for the children and young people, in other words, the "users" of teaching services. As with the other professional regulatory acts, professional discipline is only one of the means by which this purpose may be achieved.

71. In the legal authorities, there is apparent overlap between the protection of the public, the maintenance of professional standards and accountability and the maintenance of public confidence in the profession, as demonstrated in this excerpt from *Dentice v Valuers Registration Board*:[6]

Such provisions exist to enforce a high standard of propriety and professional conduct; to ensure that no person unfitted because of his or her conduct should be allowed to practise the profession in question; to protect both the public and the profession itself against persons unfit to practise; and to enable the professional calling, as a body, to ensure that the conduct of members conforms to the standards generally expected of them;

72. And this passage from *Young v PCC*:[7]

The protection and maintenance of professional standards is an important part of the protection of the public. It is through the maintenance of high professional standards that the public is protected. Deterrence is in the same category. This is intended to discourage others from acting in the same way reflected in the severity of the punishment imposed."

73. The role of disciplinary proceedings is therefore 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

[5] Section 3(1)(b)
[6] [1992] 1 NZLR 720
[7] Wellington HC, CIV 2006-485-1002, 1 June 2007, Young J

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.

74. It is accepted that even where it is found that a teacher's conduct falls below expected standards, not every single shortcoming necessarily constitutes serious misconduct. There are various mechanisms for addressing matters of impairment, competence and misconduct short of serious misconduct. At the same time, we must bear in mind s 377. It is in a context of raising the status of the profession that by ensuring safe and high quality leadership, teaching and learning that the Tribunal exercises its powers.

Particular 3.1

75. In cross-examination of the respondent, Ms Scott asked why it had taken him this long to acknowledge the seriousness of the material. He said that he accepted that he should not have had the images, that whatever they were, he accepted whatever Ms Scott said about them, he had no excuse. Ms Scott said that they were offensive, distasteful, demeaning and degrading of women. We agree. We had no hesitation in reaching that conclusion and are perplexed that either the respondent or his representative would have suggested otherwise.

76. The respondent said that with his daughters growing up, he did not like to think of anyone looking at his daughters in that way. We are surprised that he would be comfortable with anyone looking at any other human being that way.

77. The videos were of a sexual nature, but none of the ones viewed by the Tribunal had have anything to do with "relationships between men and women". Ms Scott described some in her submissions which we would term highly offensive and disgusting. In most of the images women were treated as objects, and as Ms Scott said, if not "objectionable" in the statutory sense under the Films, Videos and Publications Classifications Act 1993, many people would use that term to describe them.

78. Ms Hunia asked the respondent about his respect for other women in his life. He acknowledged that in viewing this material he had shown disrespect for his wife. He agreed with Ms Hunia that he had also dishonoured his mother and his grandmothers.

79. There was no evidence that the respondent sought the images by searching sites, and

so he did not "access" the images, but he received and retained the images on the school devices. In evidence, he said that the emails simply went to a folder and he had not deleted them. We are not sure that we agree with Ms Scott that by saving the material he chose not to delete it deliberately, but he certainly did not delete it or ask the senders not to discontinue, and his enjoyment of these emails was not as passive as the intimated. As noted above, PWC found that the emails were sent from the respondent's email address to 208 unique email addresses. Also, on the day he was asked to take leave, the respondent told his Board Chair that he had rude emails on his computer and he asked to remove them and delete personal information off his computer. This indicates that he was well aware of the stash of emails and that they should not have been on school equipment.

80. The respondent argued that the images were only accessible to the respondent and there was no risk that students could have been harmed. The CAC noted that he had four school-issued devices that his emails were synchronised to, and that he admitted that he exchanged pornographic images by email with other members of staff. We accept Ms Scott's submission that this increased the risk of students being exposed to it. As Ms Scott says, the reason for r (9)(1)(k) is because bringing the material into the school environment creates a risk of such exposure.

81. We reach the inevitable conclusion that the conduct found in particular 3.1 amounts to serious misconduct. It is conduct which is of a character and severity that meets the Education Council's criteria for the reporting of serious misconduct under both rr 9(1)(k) and (o), and it is likely to adversely affect the wellbeing and learning of children and it reflects adversely on the respondent's fitness to be a teacher.

Particular 3.2

82. The Tribunal found the following sub-particulars were proved:

3.2.3 – pre-signing cheques

3.2.5 – allowing school funds to be used to pay for personal items for Mr Witana and other staff members

83. Ms Andrews submits that pre-signing cheques was a matter of competence rather than misconduct. We do not agree. This is in a different category from the allegations contained in sub-particulars 3.2.1 and 3.2.2. We consider pre-signing of cheques exposed the school to the risk of loss of money. This is a matter of common sense rather

than expertise in accounting. The respondent should have taken more care. On its own, we would not find that it constitutes serious misconduct, but it is misconduct and, cumulatively with particular 3.2.5, it amounts to serious misconduct.

84. The respondent accepts that allowing a situation to develop where he used the school as a provider of an interest-free loan to the extent of about $10,000 was serious misconduct. Ms Andrews described it as an overuse of a "privilege that had been extended to him". She submitted that he ensured that the transactions were recorded by the office staff ensure transparency, and he always paid the money back.

85. We do not find those submissions compelling. Clearly had the respondent not paid the money back, he would have faced a different charge. We find it was an abuse of his position. It was not a practical solution to his lack of cash for buying a raffle ticket. No-one extended this "privilege" to him. He and a previous office staff member had started it. The book was kept in a drawer, and relied on his telling someone to record in it. The difference between 3.2.5 and the other allegations is that rather than being examples of sloppy practice or based in ignorance of accounting matters, it was of direct personal benefit to him and his whanau. We have no hesitation in finding that reasonable members of the public would conclude that the reputation and good-standing of the teaching profession is lowered by this behaviour, and it therefore brings discredit to the profession.

Penalty

86. For the CAC, Ms Scott submitted that cancellation was appropriate, but if the Tribunal considered that the Tribunal could discharge its duties to the public and profession short of cancellation, suspension, censure, annotation and conditions on practice were appropriate. Suspension was thought appropriate because of the combined serious misconduct in both particulars and the fact that the conduct went on so long as well as the aggravating features.

87. Ms Scott set out a number of factors to take into account on penalty, many of which were part and parcel of the charge and have been covered above. We accept that the respondent failed to take advantage of financial training opportunities including the NZSTA conferences he attended, and he failed to change the practice for repayment on fuel cards after the auditor's report of 2013. We are not sure that he misled the new Board about existing practices, but overall, he was complacent and did not appear to take his financial responsibilities seriously. We recognise that the respondent was very

committed to the school and his community, but in some ways his personal life was so entwined with his work that financial boundaries became blurred.

88. For the respondent, Ms Andrews referred us to *Patel v Complaints Assessment Committee*,[8] an appeal from a decision of the Dentists Disciplinary Tribunal (DDT) under the Dental Act 1988. She submitted that the Tribunal should consider the least punitive outcome to meet the needs of:

    a. Protecting the public

    b. Maintaining professional standards

    c. Punishment, relevant to the conduct

    d. Rehabilitation.

89. Ms Andrews conceded that the aggravating features of the respondent's conduct were:

    a. As a Principal, a higher standard of probity is expected.

    b. Both the receipt of the emails and the yellow book credit system went on over a long duration .

    c. The amount owing to the school was signification at times – up to about $10,000.

90. In mitigation, Ms Andrews said:

    a. The respondent's serious misconduct was rooted in naivety, not malice. He thought the pornography was "just raunchy" and that if he was honest about the credit arrangements at the school, it was alright. He now realises that these misplaced self-justifications are wrong.

    b. He did not get training in financial management when he became a principal.

    c. The pornographic images were at the low to mid-range, none of it illegal.

    d. Children were not exposed to, or at risk of exposure to the images because of the security systems on the respondent's computer.

    e. The images were received over a long period of time, resulting in an average of about 18 per year.

    f. The respondent has participated fully in the CAC process, flying at great expense from Whangarei to Wellington to attend the CAC meeting.

[8] HC Auckland CIV 2007-404-1818

g. He has had difficulty finding work.

h. The media attention has been painful for him and his family.

91. Ms Andrews submitted that an appropriate penalty would be:

a. Censure

b. Condition requiring the respondent to do a course in financial management

c. Possibly annotation to the register.

92. Ms Andrews re-iterated that the respondent's conduct did not put students at risk, and that the respondent's understanding suggests that he will not be a risk to the public in the future. She said that cases similar to his he not resulted in suspension or cancellation. She added that because of his long period of unemployment, he has effectively been suspended. The financial burden of this has been a substantial punishment, which should be taken into account in imposing a penalty for the financial matters.

93. Ms Andrews also referred to the respondent's substantial contributions to the teaching profession and in particular the Maori community. She said that cutting his career short would be a loss to many people.

Discussion

94. Ms Andrews' summary of the legal principles is not quite accurate. Although we recognise that the proposition that the least punitive outcome should be considered, in *Patel* His Honour, Lang J discussed the need for a Tribunal to explain reasons for cancellation and why a penalty short of removal has not been imposed. He said:

> *"...before a Tribunal makes an order removing a practitioner's name from a professional register, it will generally be required to carefully consider the alternatives that are available to it short of removal. In the event that it elects to remove the practitioner's name from the register, it is incumbent on the Tribunal to explain why the lesser alternatives are not being adopted in the circumstances of the case."*

95. Second, we do not understand that the *Patel* decision espouses punishment as one of the purposes of disciplinary powers. His Honour referred to the Dentists Disciplinary Tribunal's intent to protect the public rather than punish the practitioner. The authorities are divided on the role of punishment in the exercise of disciplinary functions. It is clear

from the authorities that it is not the primary purpose.[9] This is particularly clear where a conviction has been referred to a disciplinary tribunal and a penalty has already been imposed by a court in its criminal jurisdiction.[10]

96. But even where there has been no criminal conviction there are specific statements that disciplinary proceedings are not meant to be punitive,[11] significantly, by the Supreme Court in 2006[12] and in 2008 in *Z v Dental Complaints Committee,*[13] where the majority said:

It is well established that professional disciplinary proceedings are civil and not criminal in nature. That is because the purpose of statutory disciplinary proceedings for various occupations is not to punish the practitioner for misbehaviour, although it may have that effect, but to ensure that appropriate standards of conduct are maintained in the occupation concerned.

97. The extremely rare imposition of a fine in the penalties imposed in this jurisdiction is evidence that punishment has not been viewed as a significant purpose of this Tribunal. And so we use the term "penalty" to cover the range of responses available under s 404.

98. As outlined above at paragraph 68, we do not accept that children were not at risk of exposure to the videos. We do not accept Ms Andrews' submission that the videos were low to mid-range. The PWC report described them as Categories 4 and 5, that is hardcore or objectionable. It is not our role to determine the legality of the images, but as outlined above we have no doubt that most people would find them highly offensive. The images were sent to the respondent, and although the rate at which he received them was perhaps only one or two a month, he retained them and forwarded on. We also do not accept that the respondent's understanding suggests that he will be not be at risk to the public in future. Any understanding that he has gained seems to have taken long time. Despite various opportunities to acknowledge the offensive nature of the material that he had retained and forwarded to others, he did not do so until the hearing in October 2016.

99. We accept that the respondent probably had little training and guidance in financial matters when he became principal. We also take Ms Scott's point that there were

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[9] *Patel v Complaints Assessment Committee* HC Auckland CIV 2007-404-1818;

[10] *Ziderman v General Dental Council* [1976] 1 WLR 330 at p 333 (PC); *S v Wellington District Law Society* [2001] NZAR 465; *PCC v Martin* HC Wellington CIV-2006-485-1461, 27 February 2007]

[11] *In re a Medical Practitioner* [1959] NZLR 784; *Dentice v Valuers Registration Board* above, n 2

[12] *C v Complaints Assessment Committee* SC 27/2005 [2006] NZSC 48

[13] [2008] NZSC 55, [2009] 1 NZLR 1

opportunities to upskill but in circumstances where he was not aware of his shortcomings, it is not surprising that he did not focus his energies here.

100. Cancellation was ordered in *NZTDT 2011/11* where a teacher had been convicted of 12 charges of possession of objectionable publications of children. We do not find the present case falls into that category. Children were not the subjects if the videos the respondent viewed. In *NZTDT 2015/20* the Tribunal did not cancel registration of a teacher who had disabled the security settings on a school computer and then accessed pornography from sex sites. Assisted by a psychological report as to the respondent's emotional state at the time of the conduct (a relatively short period of 8 weeks), the Tribunal censured and imposed conditions on practice. As the Tribunal observed in that decision, although all of these cases of possession or accessing pornographic material at school clearly constitute serious misconduct, the range of penalties imposed reflects the distinct nature of each case.

101. We have decided not to cancel the respondent's registration for the following reasons:

   a. Although there was a risk of children seeing the images on the respondent's devices or those of his staff to whom he had sent the emails, there is no evidence that they were actually exposed to this material.

   b. The respondent did not access the material himself.

   c. We acknowledge the considerable contribution the respondent has made to his community and to Maori education in New Zealand, and hope that he will continue his work.

   d. We have given significant weight to Mr Newman's backing in this regard.

   e. The financial matters were not sufficiently serious to warrant cancellation.

102. We have also decided that suspension will serve no useful purpose at present. The respondent has had some time with no work, and has now secured a teaching position. We consider the interests of the students can be met by the imposition of conditions.

103. We therefore make the following orders:

   a. The respondent is censured under s 404(1)(b)

   b. Under s 404(1)(c), the following conditions are imposed on the respondent's practising certificate:

i. For a period of two years the respondent is to inform any prospective employer of this professional disciplinary proceeding, and to provide that prospective employer with a copy of this decision.

ii. The respondent is not to hold a position of leadership or financial responsibility until he has satisfied the Manager, Teacher Practice that he understands the responsibilities of a Principal and accounting for funds.

c. The matters in paragraphs a. and b. will be annotated on the register for two years (s 404(1)(e)).

d. The respondent will pay costs of 50% pursuant to s 404(1)(h) and (i).

104. Counsel for the CAC is to provide the respondent with a schedule of costs within 10 days of the date of this decision. The secretary will also provide a schedule of the Tribunal costs. The parties may then file submissions as to costs within a further 10 days. The Tribunal delegates to the Chairperson the power to make orders as to costs.

105. There are no orders for non-publication of any aspect of this decision.

Theo Baker

Chair