

BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

NZTDT 2019/67

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**
Complainant

AND **TEACHER Y**
Respondent

DECISION OF THE TRIBUNAL

29 June 2020

HEARING: Held on 12 September 2019 (on the papers)

TRIBUNAL: Rachel Mullins (Deputy Chair)
Sue Ngarimu and Neta Sadlier (members)

REPRESENTATION: Luke Cunningham Clere (R Kòs) for the Complaints Assessment
Committee
Quentin Hix Legal Limited (C Lilley) for the respondent

Hei timatanga kōrero – Introduction

1. The Complaints Assessment Committee ("CAC") has charged the respondent with engaging in serious misconduct and/or conduct otherwise entitling the Disciplinary Tribunal to exercise its powers.
2. The CAC alleges that on multiple occasions between 28 February 2017 and 29 May 2018 while employed at the First Steps Matau ("the Centre"), the respondent
 - (a) Made purchases on the Centre's purchasing card for personal items that were not work related; and
 - (b) Took unauthorised absences while at work at the Centre and wrongly self-recorded those absences in APT as her being in contact with children.
3. The CAC alleges that this conduct amounts to serious misconduct pursuant to section 378 of the Education Act 1989 ("the Act") and Rule 9(1)(g) and/or (k) of the Teaching Council Rules 2016 and/or Rule 9(1)(h) and/or (o) of the Education Council Rules 2016 (as drafted prior to the amendments on 18 May 2018), or alternatively, is conduct which otherwise entitles the Tribunal to exercise its powers pursuant to section 404 of the Act.
4. The matter was heard on the papers.

Ko te hātepe ture o tono nei – Procedural History

5. A Pre-Hearing Conference was held on 1 July 2019 where the parties indicated that an agreed summary was likely to be reached. Orders were made for a hearing on the papers. A further minute was issued on 23 July 2019 following the Tribunal being advised by the CAC that whilst there was agreement on most matters, a number of issues remained in dispute. Further timetabling directions were sought (and ordered) to allow for the CAC to file a brief of evidence.
6. The Deputy Chair also noted in that minute that following the filing of the brief of evidence by the CAC, should the respondent seek a hearing in person, then the hearing on the papers would be vacated and a hearing in person scheduled.
7. An Agreed Summary of Facts ("ASoF") was filed on 8 August 2019. The CAC filed submissions on liability and penalty on 16 August 2019. The respondent filed submissions

on liability and penalty on 4 September 2019 accompanied with a number of character references in support of the respondent.

8. An application for permanent name suppression with a supporting Affidavit was also received on 4 September 2019.
9. The CAC filed reply submissions on 10 September 2019 addressing inferences it submits the Tribunal is able to make based on the evidence before it. The reply submissions also dealt with the application for name suppression.
10. On 17 June 2020, the respondent also filed an email from her [REDACTED] regarding the impact of the length of the proceedings on the respondent.

Kōrero Taunaki - Evidence

Agreed Summary of Facts

11. As noted above, the evidence before the Tribunal was an ASoF. While there was an ASoF, the Tribunal notes that there are matters that are not agreed. The respondent does not accept that her conduct was dishonest or fraudulent, but rather that she made some "honest mistakes".
12. For completeness, the ASoF is set out in full below:

"1. *The respondent, Teacher Y is a fully registered teacher. She obtained full registration in 2007. The respondent was previously employed at First Steps Matau, an education and care centre in Alexandra ("the Centre"). The Centre is a Best Start centre. At the time of the June 2017 Education Review Office Report, the Centre provided education and care for 47 children. The Respondent was the Centre manager which involved managing budgets and finances, as well as teaching.*

Factual Background

Purchases on the company credit card

2. *On 4 April 2015, the respondent applied for a company credit card. Part of this application, signed for by the respondent, reads:*

"This Visa purchasing card is issued to me for use strictly for business purposes. I will not use it or allow it to be used for any personal expenditure. Notwithstanding the following, I acknowledge the use of the Visa purchasing card for personal expenditure is considered to be serious misconduct and may result in my immediate dismissal. Furthermore, proceedings may be instituted against me for recovery of all personal expenditure plus accrued interest."

3. *Between 28 February 2017 and 29 May 2018, the respondent made 49 purchases on the company credit card, totalling \$2,329.13, which were not for business purposes. These purchases include food, party supplies, toys and clothing.*
4. *The respondent had, after purchasing these items, incorrectly recorded them as being work related purchases. For example, on 29 May 2018 the respondent used the Centre's credit card to purchase a dog bed and navy trackpants for \$36 but recorded these on the Centre's records as "replacement cushions for the Tui space". When the Centre asked the respondent why she had wrongly coded these transactions, the respondent explained that she was relying on memory when coding the transactions and sometimes gets this wrong.*

Unauthorised absences from work

5. *On 23 February 2018 Ms Michelle Hamill, the business manager of First Steps Matau, sent a message to the managers of Best Start centres, including the respondent, which stated that it was compulsory for managers to tell her when they left the Centre during the day, for more than half an hour, for safety reasons.*
6. *The respondent did not record accurately the hours she worked in the Centre's software, APT. The respondent recorded that she was at the Centre on APT when she was not. The respondent would adjust her hours at the end of each fortnight on the APT system. The respondent left the Centre and has said to staff that if Ms Hamill rings they should tell her the respondent is in a meeting.*

7. *The respondent made 27 purchases on the company credit card, while she had marked herself as present on the APT system.*

Teacher's Response

8. *In a letter from her legal representative at the time, dated 14 June 2018, the respondent accepted that she used the company credit card for non-work purposes. The respondent said that the purchases on the company credit card were the result of "honest mistakes". She did not accept that she intentionally or deliberately used the company card for her own benefit.*
9. *The respondent, having looked at the receipts and payments for the purchases on the company credit card, said that she could provide an explanation for some but accepted that some should not have been charged to the Centre. Even so, the respondent indicated that she was prepared to pay a sum of \$2,013.88.*
10. *The respondent reimbursed the Centre \$2,013.88.*
11. *The respondent denied that any of the purchases on the company credit card were actions of dishonesty or intended to defraud.*
12. *The respondent acknowledged that there were times when she was marked in the APT when she was not at the Centre and that, on occasion, she made purchases when she was marked as "in contact" at the Centre.*
13. *The respondent denied that any of the inaccuracies in the APT were intended to defraud or actions of dishonesty.*
14. *The respondent resigned from the Centre, effective 15 June 2018.*
15. *In response to the Teaching Council the respondent stated that she felt under a lot of pressure with the requirements of the job, which meant she did not get her allocated non-contact time. She stated that she had told the Centre on several occasions that she was finding her role hard*

to get everything done and asked for guidance which she either did not receive or received late and the meetings were interrupted.

15. *In July 2018 the respondent advised the CAC that she had been suffering from [REDACTED] and had sought help from [REDACTED]. She provided a letter from the [REDACTED], which identified that she had been assessed in June 2018 as having a history of [REDACTED].*
16. *The CAC referred matters to the [REDACTED]. The [REDACTED] found that the respondent was [REDACTED] at the time the conduct occurred.*
17. [REDACTED]

Ngā Kōrero a te Kōmiti – CAC Submissions

13. The CAC submits that the allegations against the respondent fall into the category of theft or fraud. Referencing the High Court decision in *Collie v Nursing Council of New Zealand*¹, the CAC submits that reasonable members of the public informed of all the relevant facts and circumstances would reasonably conclude that the reputation and good standing of the profession is lowered when a practitioner makes repeated unauthorised purchases on her employer's credit card, or takes repeated unauthorised absences from her workplace and then attempts to obfuscate these actions.
14. The CAC says that each of the allegations in their own right meet the standard of serious misconduct and when considering both incidents together, the strong inference to be drawn must be that the respondent has acted fraudulently and dishonestly.

¹ *Collie v Nursing Council of New Zealand* [2001] NZAR 74 (HC) at [28].

15. The respondent used the company credit card for non-business purposes for over a year, making a total of 49 purchases at a cost of \$2,329.13. The CAC submits that this amounts to theft or fraud. The extended period over which the card was used makes the case analogous to the case of *CAC and Fletcher*². In that decision, a Principal used the school fuel card to purchase fuel for his personal use to the value of \$5,926.70. He also claimed reimbursement for travel to a professional course he did not attend and failed to pay rent for the schoolhouse for a period of five weeks. In that case the Tribunal found that the Principal's conduct amounted to serious misconduct and that it was *"deliberate, intentional, and systematic and extended over a three year period and it involved theft from the school via a number of different methods"*.³
16. The CAC submits that the teacher's conduct in regard to the use of the company credit card adversely reflects on her fitness to teach. Whilst the respondent has admitted that a number of the transactions should not have been coded to the Centre, she has asserted that the incorrect coding of some of the items was due to her making mistakes in relying on memory when doing the coding process. The CAC say that *"fundamentally the respondent must have taken an extremely careless approach to her use of the company credit card to make these mistakes repeatedly over an extended timeframe"*.⁴
17. Further, the CAC also says that the respondent's unauthorised absences and erroneous time recording should also be considered fraud and amount to serious misconduct.
18. The CAC refers the Tribunal to the case of *CAC v Clark*⁵ where the Tribunal discussed the meaning of fraud. It referred to the Concise Oxford Dictionary definition of "fraud" which is:
- (a) Criminal deception;
 - (b) The use of false representations to gain an unjust advantage;
 - (c) A dishonest artifice or trick;

² *CAC v Fletcher*, NZTDT 2018-17, 21 November 2018.

³ Above n 2 at [36]

⁴ Refer CAC submissions at [34]

⁵ *CAC v Clark*, NZTDT 2017-4, 18 September 2017 at [28].

- (d) A person or thing not fulfilling what is claimed or expected of it, not only criminal simple deceit;
 - (e) Not requiring the perpetrator of fraud to benefit in any way, or an inducement of another to act to the advantage of the fraudster.
19. Despite previously being informed by the Business Manager of the Centre that she needed to notify her when she was going to be absent, the respondent continued to take unauthorised leave from work. The CAC submit that these unauthorised absences are exasperated by the respondent's subsequent adjustment of the hours in the APT system to make it appear that she was on-site. This is further compounded by the fact that the respondent told the staff that if the Business Manager were to call, then staff were to tell her that the respondent was in a meeting.
 20. The respondent maintains that the inaccuracies in the APT were not intended to defraud or were done so dishonestly. However, the CAC submit that the respondent obtained an unjust advantage in the sense that the respondent was taking unauthorised time off work without it being accounted for in any way. The CAC say that if the respondent knowingly took unauthorised absences from work and made changes to the APT, then it is difficult to conclude that she did not act dishonestly.
 21. The CAC referred the Tribunal to the cases of *CAC v Teacher*⁶ and *CAC v Leach*⁷. *CAC v Teacher*⁸, was a case involving a teacher providing false attendance records of both children and staff. The Tribunal made a finding of serious misconduct, censured the teacher and made a condition that the teacher would not, for five years, hold any position that required registration and a practising certificate as a teacher that involved managerial responsibility until she had taken and completed appropriate course to improve her managerial skills.
 22. In *CAC v Leach*⁹ the teacher carried out her own performance appraisal and signed it with her husband's electronic signature. A Joint Memorandum was filed which showed an acceptance by the teacher that her actions amounted to serious misconduct and that the

⁶ *CAC v Teacher*, NZTDT 2013/20, 19 April 2013.

⁷ *CAC v Leach*, NZTDT 2016/66, 26 April 2017.

⁸ Above n 6

⁹ Above n 7

appropriate penalties were censure, annotation of the register and cancellation of the teacher's registration.

23. The CAC noted that due to the timing of the conduct, both the Education Council's Code of Ethics for Certified Teachers ("Code of Ethics") and the Teaching Council's Code of Professional Responsibility and Standards for the Teaching Profession ("Code of Professional Responsibility") are both applicable. Both the Code of Ethics and the Code of Professional Responsibility have at their core the requirement that a teacher demonstrates their commitment to the profession, learners, whānau, family and society. Both Codes require that teachers conduct themselves in fair, honest, ethical and just ways.
24. The respondent's conduct also covers a period in which there was an amendment to the Rules. For the respondent's conduct from 1 July 2016 to 18 May 2018, it is alleged that she was in breach of Rule 9(1)(h) and/or Rule 9(1)(o) of the Rules.
25. The amended Rules from 18 May 2018 cover a short period of the respondent's conduct and it is alleged during this time that she acted in breach of Rule 9(1)(g) and/or Rule 9(1)(k).

CAC Submissions on Penalty

26. In regard to penalty, the CAC refers the Tribunal to the decision of *CAC and McMillan*¹⁰ which highlights the overlapping purposes of professional disciplinary proceedings as being the protection of the public through the provision of a safe learning environment for students and maintenance of both professional standards and the public's confidence in the profession.
27. The CAC submits that in discharging its responsibilities, the Tribunal must arrive at an outcome that is fair, reasonable and proportionate in the circumstances.
28. The CAC submits that the starting point for penalty should be cancellation of the respondent's registration. The unauthorised use of the Centre's credit card for over a year and unauthorised absences which were subsequently altered on the Centre's time

¹⁰ *CAC v McMillan*, NZTDT 2016/52 at [16] to [26].

recording software, as well as asking staff members to cover for her, justifies such an outcome.

29. The CAC acknowledges the respondent has reimbursed some of the money and taken positive steps to improve her [REDACTED]. Further, the CAC acknowledges the findings of the [REDACTED] that the respondent was [REDACTED] at the time of the conduct and is currently managing [REDACTED].
30. The CAC notes however that the respondent continues to maintain that she did not intentionally or deliberately use the credit card for her own benefit and that the inaccuracies in the time recording were not actions of dishonesty. The CAC submits that in the circumstances the Tribunal may be reluctant to find that acceptance of responsibility is a strong mitigating factor in this case. The CAC's position is that if the Tribunal concludes that a penalty less than cancellation is appropriate, then censure, annotation and conditions on the respondent's practising certificate would be required.
31. In terms of the conditions, the CAC submit that they should include a requirement on the respondent to inform current or prospective employees about the decision and a prohibition on her holding positions that involve either managerial or financial responsibility. Further, the CAC submit that the respondent should undertake a professional development course focused on management.

Ngā kōrero a te Kaiurupare – Respondent's submissions

Using the Company Credit Card for Personal Expenditure

32. The respondent submits that she reimbursed the Centre once she learned of her errors and that her purchases were honest mistakes. Due to the time pressures at both work at home, the respondent says that at various times she would shop for both work materials and personal items. She would separate the two and pay in two transactions, but there have been occasions where she did not do this accurately. By way of further explanation, she said that her personal credit card and the company credit card had the same PIN and that there may have been times when she used the wrong card in error. She then later wrongly coded receipts relying on memory and had not properly separated out personal receipts from work related receipts.

Unauthorised Absence from the Centre and Incorrect Recording on the APT System

33. The respondent submits that incorrect recording was an error and denies that she did so fraudulently. By way of explanation she said that there would be times when she would leave the Centre to get supplies or materials and forgot to change her recording in APT. She would often complete the APT at the end of the week working off memory. She said that there was a period where administration staff were sick for eight weeks which further increased her workload and stress.

The Test for Serious Misconduct

34. The respondent has provided detailed information as to the stress she was experiencing at both work and in her personal life at the time of the incidents and how her [REDACTED] suffered as a result. It was explained that she struggled with the responsibilities of the Manager's role and had reported these struggles to the company.
35. The respondent submits that there is no evidence to suggest that there was any intention to steal or act dishonestly, rather they were careless mistakes at a time when she was mentally impaired. She has taken responsibility for her actions, made repayments for the purchases and resigned from her employment. The respondent has sought [REDACTED] and has continued to engage with [REDACTED].
36. It is submitted that the respondent's conduct did not affect the learning of the children or impact on her fitness to teach.
37. It was further submitted that the teaching profession could not be brought into disrepute as a result of the respondent's actions in these circumstances due to the lack of intention to steal or act dishonestly.
38. The respondent says that her actions can be distinguished from the cases identified by the CAC. It was submitted that *CAC v Fletcher*¹¹, *CAC v Hill*¹² involved situations where the teacher had knowledge of their actions and intended to deceive. By contrast the respondent's submission is that her actions were not with any knowledge or intention to

¹¹ Above n 2

¹² *CAC v Hill* NZTDT 2015/59, 7 June 2016

deceive, but rather were honest mistakes during a period in which he was suffering under an impairment.

39. It was submitted that as there was no intention to deceive and the respondent did not have any knowledge of her actions, due to the fact that she was mentally impaired at the time, her conduct cannot be in breach of Rule 9(1)(h). Her mistakes were genuine mistakes and there was no evidence of ill-intent.
40. Given the respondent has taken responsibility for her actions and taken steps with [REDACTED], she has therefore always upheld the Code of Ethics and the Code of Professional Responsibility.
41. Further, the respondent does not accept there is a relationship or connection between leaving the Centre and using the company credit card for personal use. As already noted, she distinguishes her behaviour from the cases referred to by the CAC submitting that those cases involve knowledge and an intent to deceive which is not evident in her case.
42. The respondent's position is that her actions occurred at a time when she was [REDACTED] and submits that the Tribunal would require evidence of dishonest acts or an intention to deceive in order to make findings of misconduct. She further submits that an inference of such intention is not enough and that there must be an evidential basis for such findings.
43. Counsel for the respondent submits that the Education Council Investigator concluded there was no evidence to support that the spending on the company credit card was intentional.
44. It is further submitted that the respondent's actions do not adversely affect her ability to teach and that since becoming aware of her mistakes, she has taken her recovery very seriously and engaged with [REDACTED].
45. Counsel for the respondent refers to her excellent employment history with no similar incidents being reported. Since the resigning from her employment, the respondent has spent 12 weeks relief teaching and made full disclosure of these proceedings. She received an excellent reference after her time spent there. The various character references she provided are all extremely positive.

Respondent's Submissions on Penalty

46. Counsel for the respondent submitted that if the Tribunal were to make a finding of serious misconduct that a penalty short of cancellation would be appropriate. In considering a penalty, the Tribunal should focus on rehabilitative prospects and take into account the respondent's own efforts to address [REDACTED].

Ngā Kōrero Whakahoki a te Kōmiti – Reply Submissions

47. The CAC also filed submissions in response to particular aspects of the respondent's submissions as well as setting out the CAC's position on name suppression.
48. The CAC summarises the respondent's position as being that she cannot have committed serious misconduct under section 378(1)(a)(iii) of the Act in the absence of an intention to steal or act dishonestly because her conduct would not meet the threshold of discrediting the teaching profession.
49. In response, the CAC acknowledges that the evidence the respondent acted dishonestly is circumstantial. However, it disputes that it is inappropriate to rely on inferences in establishing intent. The CAC submits that otherwise in absence of admissions from respondents a dishonest state of mind would be impossible to establish.
50. Regarding the "findings" of the Teaching Council's investigator, the CAC notes that the investigator's report is not part of the evidence before the Tribunal and is therefore irrelevant and the submission in that regard should be ignored.
51. Counsel for the CAC submits that over a year the respondent used the company credit card for personal purposes for approximately 49 purchases to the value of \$2,329.13. This conduct all points towards the respondent acting dishonestly. Further, as set out in the ASoF, the respondent recorded personal items as being for business purposes. Although the respondent has maintained that she later wrongly coded receipts relying on memory, the CAC submits it is open to the Tribunal to instead find that the respondent was making a deliberate effort to conceal her personal spending on the company credit card.
52. Similarly, the CAC submits that in respect to the respondent's absences from work there is sufficient evidence from her subsequent recordings in the APT system, and her

instructions to staff as to what to do if the Business Manager called to infer she had dishonest intent.

53. With respect to the respondent's submission that there is no relationship between leaving the Centre and using the company credit card for personal use, the CAC responds that there is an obvious connection in that the respondent made 27 purchases on the company credit card while she had marked herself present in the APT system.
54. Further, the CAC submits that even if the Tribunal found that the respondent did not act dishonestly in respect to either her misuse of the company credit card or in regard to unauthorised absences, this conduct can still amount to misconduct. The reason being that the respondent's conduct was prolonged, and even on the respondent's interpretation, involved a cavalier approach to timekeeping and management of Centre funds. This conduct, the CAC submits, would fall far short of the high standard of professional conduct expected from teachers. Further, the CAC submits that this conduct would reflect adversely on the respondent's fitness to teach and may bring the teaching profession into disrepute within section 378(1)(a) of the Act.

Te Ture - The Law

55. The CAC allege that the respondent's conduct amounts to serious misconduct pursuant to section 378 of the Act and Rules 9(1)(h) and/or (o) of the Education Council Rules (as drafted prior to the May 2018 amendment), and of Rules 9(1)(g) and/or (k) of the Teaching Council Rules 2016¹³ or alternatively, amounts to conduct otherwise entitling the Disciplinary Tribunal to exercise its powers pursuant to section 404 of the Act.
56. Whilst the respondent accepts responsibility for her actions, she denies that she intended to deceive her employer but rather that she made careless and genuine mistakes at a time when she was mentally impaired.¹⁴
57. Section 378 of the Act defines serious misconduct:

serious misconduct means conduct by a teacher –

(a) that –

(i) *adversely affects, or is likely to adversely affect, the wellbeing or*

¹³ The respondent's conduct covers a period during which there was an amendment to Rule 9

¹⁴ Refer Respondent submissions at [38].

- learning of 1 or more students; or*
- (ii) reflects adversely on the teacher's fitness to be a teacher; or*
 - (iii) may bring the teaching profession into disrepute; and*
- (b) that is of a character or severity that meets the Teaching Council's criteria for reporting serious misconduct.*

58. The test under s 378 is conjunctive¹⁵, meaning that as well as meeting one or more of the three adverse consequences, a teacher's conduct must also be of a character or severity that meets the Teaching Council's criteria for reporting serious misconduct.

59. Rule 9 sets out the criteria for reporting serious misconduct and lists behaviour that amounts to serious misconduct:¹⁶

Education Council Rules 2016 for conduct between 28 February 2017 – 18 May 2018

- (a) Rule 9(1)(h) – theft or fraud;*
- (b) Rule 9(1)(o) – any act or omission that brings, or is likely to bring, discredit to the teaching profession.*

Teaching Council Rules 2016 for conduct between 19 May 2018 and 29 May 2018

- (c) Rule 9(1)(g) – acting dishonestly in relation to the teacher's professional role, or committing theft or fraud;*
- (d) Rule (1)(k) – an act or omission that brings, or is likely to bring, the teaching profession into disrepute.*

60. On applying for the business credit card in April 2015, the respondent also signed and agreed to the following¹⁷:

*This Visa purchasing card is issued to me for use strictly for business purposes.
I will not use it or allow it to be used for any personal expenditure.
Notwithstanding the following, I acknowledge the use of the Visa purchasing
card for personal expenditure is considered to be serious misconduct and may*

¹⁵ *Teacher Y v Education Council of Aotearoa New Zealand* [2018] NZDC 3141, 27 February 2018 at [64]

¹⁶ These Rules came into force on 1 July 2016 as the Education Council Rules 2016 and had a name change to the Teaching Council Rules 2016 in September 2018. Rule 9 and specifically Rule 9(1)(e) was amended in September 2018, but as the alleged conduct occurred in January 2018, we will deal with this case in accordance with the Rules that were in force at that time.

¹⁷ The Tribunal has not been given any detail as to what document this statement is recorded in. We are assuming it is part of the respondent's employment contract with the Centre. The nature of the document is not significant, the point is that the respondent signed this statement showing she was aware of and agreed to its contents.

result in my immediate dismissal. Furthermore, proceedings may be instituted against me for recovery of all personal expenditure plus accrued interest.

61. In *CAC v Leach*¹⁸ it was accepted by the Tribunal that it could be assisted in cases involving alleged dishonesty, by comparing a respondent's conduct against the elements of the offence of obtaining by deception under s 240 Crimes Act 1961. This section provides:

240 Obtaining by deception or causing loss by deception

- (1) *Everyone is guilty of obtaining by deception or causing loss by deception who, by any deception and without claim of right,—*
- (a) *obtains ownership or possession of, or control over, any property, or any privilege, service, pecuniary advantage, benefit, or valuable consideration, directly or indirectly; or*
 - (b) *in incurring any debt or liability, obtains credit; or*
 - (c) *induces or causes any other person to deliver over, execute, make, accept, endorse, destroy, or alter any document or thing capable of being used to derive a pecuniary advantage; or*
 - (d) *causes loss to any other person.*
- (1A) *Every person is liable to imprisonment for a term not exceeding 3 years who, without reasonable excuse, sells, transfers, or otherwise makes available any document or thing capable of being used to derive a pecuniary advantage knowing that, by deception and without claim of right, the document or thing was, or was caused to be, delivered, executed, made, accepted, endorsed, or altered.*
- (2) *In this section, **deception** means—*
- (a) *a false representation, whether oral, documentary, or by conduct, where the person making the representation intends to deceive any other person and—*
 - (i) *knows that it is false in a material particular; or*
 - (ii) *is reckless as to whether it is false in a material particular; or*
 - (b) *an omission to disclose a material particular, with intent to deceive any person, in circumstances where there is a duty to disclose it; or*

¹⁸ Above n 7

(c) *a fraudulent device, trick, or stratagem used with intent to deceive any person.*

62. In *CAC v Clark*¹⁹ the Tribunal considered the meaning of the term “fraud” and referred to the Concise Oxford Dictionary definitions for assistance. The Tribunal considered the most appropriate to be “*a false representation to gain an unjust advantage*”.
63. Further, in the recent decision of *CAC v Jenkinson*²⁰ we agreed with submissions from the CAC that a professional practitioner is expected to be honest and candid when faced with conduct allegations. The Tribunal went on to say that “*there is not a material distinction between the duty of candour that teacher owes his or her professional body vis-à-vis that in respect to an employer. Moreover, we accept that this expectation of cooperation and honesty applies notwithstanding that the practitioner considers the allegation to be spurious.*”²¹

Kōrerorero – Discussion

64. This matter proceeded on the papers. While there was an ASoF, there were still matters in dispute, namely that the respondent did not accept that her actions were intended to deceive but rather made genuine mistakes due to being ██████████ at the time.
65. It is unusual that this matter did not proceed to a hearing-a-tinana to allow the Tribunal the opportunity to hear further from the parties. As a result, the Tribunal are being asked to make a factual finding based only on the ASoF as to whether in simple terms, the respondent has acted dishonestly, or whether as is her position, she simply made honest mistakes ██████████.
66. We agree with the CAC that the Teaching Council Investigator’s report is not before the Tribunal as evidence and therefore we have not considered the respondent’s submissions in that regard.

¹⁹ Above n 5

²⁰ *CAC v Jenkinson* NZTDT 2018/14

²¹ Above n 20 at [22]

67. Whilst it is understood that the respondent agreed that the matter proceed on the papers, we would ask the CAC in the future to consider more carefully the progression of cases with disputed facts.
68. The following are the determining facts for the Tribunal:
- (a) The length of time over which the incidents occurred – 15 months;
 - (b) The number of purchases made that were not for business purposes - 49;
 - (c) The number of purchases made on the company credit card during times when the respondent marked herself as being present in the APT system - 27;
 - (d) The failure by the respondent to adhere to the reasonable instruction from the Business Manager to advise her when she was leaving the Centre for more than half an hour;
 - (e) The direct instruction to staff by the respondent to lie to the Business Manager if she contacted the Centre while the respondent was out; and
 - (f) The miscoding of receipts of purchases on the company credit card – e.g. on 29 March 2018 the respondent purchased a dog bed and navy trackpants for \$36 and recorded these as “replacement cushions for the Tui space”.
69. We do not accept that the respondent made honest mistakes and her actions were not intended to deceive. An honest mistake would happen once, possibly twice, not 49 times over a period of 15 months.
70. An honest mistake with no ill intent, is not telling staff to cover for you while you deliberately defy a reasonable instruction from your employer. An honest mistake is not coding a personal purchase of a dog bed and navy trackpants, as “*replacement cushions for the Tui space*”.
71. That conduct is deliberate, calculated and intended to deceive.

The Test for Serious Misconduct

72. We do not have any evidence about whether, when the respondent left the Centre, this impacted on the ratios, and there were insufficient staff on the floor. It may be that during those times the staff/student ratios were all in order. Counsel for the respondent in submissions said that at all times when the respondent left the Centre, the children and staff were safe. But we have no evidence of that, just a comment from Counsel. Therefore, it is conceivable that the respondent's absences could have adversely affected the wellbeing of the students for which she was responsible.
73. Even if we are incorrect about that, using the company credit card for personal use over a 15 month period, miscoding of purchases in an attempt to make them appear to be business purchases, deliberately defying a reasonable instruction from your employer, asking staff to cover for your absences, and recording yourself as being present at the Centre when you were not, is all conduct that reflects adversely on the respondents fitness to be a teacher and would most definitely bring the teaching profession into disrepute as per the test in *Collie*²².
74. Turning now to the second limb of the test for serious misconduct which is to consider whether the respondent's conduct meets the Teaching Council's criteria for reporting serious misconduct. As the respondent's conduct covered a period during which there was a change in the Rules, the CAC pleadings correctly include the Rules pre and post the amendments. We only need to find a breach of one Rule pre and post amendment for this limb to be satisfied. We do not have the specific dates of all the purchases and absences, so we have treated the conduct as a continuum.

Education Council Rules 2016 for conduct between 28 February 2017 – 18 May 2018

75. The CAC alleges that the respondents conduct was in breach of:
- (a) Rule 9(1)(h) – theft or fraud;
 - (b) Rule 9(1)(o) – any act or omission that brings, or is likely to bring, discredit to the teaching profession.

²² Above n 1

76. Rule 9(1)(h) is the most case specific so our focus will be on that and refer to the cases of *CAC v Clark*²³, *CAC v Fletcher*²⁴, *CAC v Leach*²⁵ and *CAC v Jenkinson*²⁶ for assistance. We agree with the Tribunal in *CAC v Leach*²⁷, that section 240 of the Crimes Act is helpful in determining the meaning of the term “fraud”, and aligns with the dictionary definition of the same discussed in *CAC v Clark*²⁸.
77. Using the company credit card for personal purchasing and recording yourself as being onsite when you were not, are clear examples of the respondent gaining an unjust advantage through dishonesty. The conduct is viewed even more unfavourably by the fact that it was not a “one off”, but rather a regular occurrence over a 15-month period.
78. The respondent’s conduct meets the threshold of Rule 9(1)(h) as we are satisfied it amounts to fraud. Whilst we are not required to turn our minds to Rule 9(1)(o) as we have already found there to be a breach of Rule 9(1)(h), for completeness we also find that the respondent’s conduct is such that it brings discredit to the teaching profession.

Teaching Council Rules 2016 for conduct between 19 May 2018 and 29 May 2018

79. The CAC alleges that the respondents conduct was in breach of:
- (a) Rule 9(1)(g) – acting dishonestly in relation to the teacher’s professional role, or committing theft or fraud;
 - (b) Rule 9(1)(k) – an act or omission that brings, or is likely to bring, the teaching profession into disrepute.
80. Again, our focused kōrero will be on Rule 9(1)(g) which captures a wider range of behaviour than its predecessor Rule 9(1)(h). Rule 9(1)(g) requires that a teacher’s conduct need not reach the threshold of being fraudulent, but simply they acted dishonestly in their professional capacity.

²³ Above n 5
²⁴ Above n 2
²⁵ Above n 7
²⁶ Above n 20
²⁷ Above n 7
²⁸ Above n 5

81. For the reasons set out in paragraphs 76 to 78 above, we are satisfied that the respondent's conduct fits within Rule 9(1)(g) and (k).

82. Counsel for the respondent submitted at paragraphs 38 – 39 of the submissions that:

38. *The respondent accepts responsibility in her actions but denies she intended to deceive her employer or any other person. Her actions of both unauthorised spending and incorrectly recording contact time were genuine mistakes at a time when Teacher Y was impaired. It is submitted the Tribunal would require evidence of dishonest acts or an intention to deceive in order to make any findings of misconduct. It is further submitted, an inference or such intention is not enough and that there must be an evidential basis for such findings.*

39. *Furthermore, the Investigator on behalf of the Education Council concluded there was no evidence to support that the spending on the Company credit card was intentional.*

83. In response the CAC submitted:

8. *The CAC acknowledges that the evidence that the respondent acted dishonestly is circumstantial. The CAC disputes that it is inappropriate to rely on inferences in establishing intent. The CAC submits that, otherwise, in absence of admissions from respondents, a dishonest state of mind would be impossible to establish.*

9. *The CAC understands that the reference, in the respondent's submissions, to the "Teaching Council's Investigator" refers to a passage from the Teaching Council investigator's Report, which is not part of the evidence before the Tribunal as it is irrelevant. Accordingly, this submission should be ignored.*

84. We agree with the CAC that the Tribunal is entitled to rely on inferences to establish intent. There is seldom evidence of direct intention and the respondent's submission in that regard is misconceived. Whilst much of the evidence is circumstantial, it is the combination of all pieces of evidence together that is important.

85. When viewing circumstantial evidence in criminal cases the rope analogy is often used – each strand of evidence gains strength from the other. While individual strands may be insufficient, together they may well be strong enough.
86. In this case, while there is no direct evidence of dishonest intent, there are a number of “strands of rope” (refer paragraph 68 (a)-(f)) that on their own may not prove dishonest intent, but when combined leads the Tribunal to the conclusion that the respondent did have an intention to deceive. The probative value of all those pieces of evidence together pointing towards dishonest intent, is greater in combination than the sum of the parts.²⁹
87. Accordingly, as already noted we have no hesitation in finding that the respondent’s conduct amounts to serious misconduct.

Kupu Whakatau – Decision

88. Having determined that this case is one in which we consider exercising our powers, we must now turn to consider what is an appropriate penalty in the circumstances.

404 Powers of Disciplinary Tribunal

- (1) *Following a hearing of a charge of serious misconduct, or a hearing into any matter referred to it by the Complaints Assessment Committee, the Disciplinary Tribunal may do 1 or more of the following:*
- (a) *any of the things that the Complaints Assessment Committee could have done under section 401(2):*
 - (b) *censure the teacher:*
 - (c) *impose conditions on the teacher’s practising certificate or authority for a specified period:*
 - (d) *suspend the teacher’s practising certificate or authority for a specified period, or until specified conditions are met:*
 - (e) *annotate the register or the list of authorised persons in a specified manner:*
 - (f) *impose a fine on the teacher not exceeding \$3,000:*

²⁹ Refer Bayes’ Theorem

- (g) *order that the teacher's registration or authority or practising certificate be cancelled:*
 - (h) *require any party to the hearing to pay costs to any other party:*
 - (i) *require any party to pay a sum to the Education Council in respect of the costs of conducting the hearing:*
 - (j) *direct the Education Council to impose conditions on any subsequent practising certificate issued to the teacher.*
- (2) *Despite subsection (1), following a hearing that arises out of a report under section 397 of the conviction of a teacher, the Disciplinary Tribunal may not do any of the things specified in subsection (1)(f), (h), or (i).*
- (3) *A fine imposed on a teacher under subsection (1)(f), and a sum ordered to be paid to the Teaching Council under subsection (1)(i), are recoverable as debts due to the Teaching Council.*

89. The case of *CAC v MacMillan* identified the key considerations for the Tribunal when determining an appropriate penalty.³⁰

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 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.

90. The Tribunal must turn its mind to whether the proposed penalty is fair, reasonable, and proportionate in the relevant factual circumstances and is consistent with similar cases.³¹

91. We are concerned at the respondent's lack of insight and ability to be genuinely reflective about her actions. Further, there appears to be no remorse for the impact of her actions on others. Whilst she has accepted that she did what was alleged, she does not accept

³⁰ *CAC v MacMillan* NZTDT 2016/52 at [23]

³¹ *Roberts v Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

that she acted dishonestly. We find that position difficult to reconcile with the evidence of numerous personal purchases over a long period, deliberate disregard for instructions from her employer, asking staff to lie for her and intentional miscoding of purchases.

92. We acknowledge the findings of the [REDACTED] that the respondent was [REDACTED] at the time of the conduct and that she has taken proactive steps towards enhancing her wellbeing. We also note the [REDACTED] assessment that the respondent's [REDACTED] is currently being managed appropriately.
93. With regards to the references provided by the respondent, while they all speak very highly of the respondent's character and her passion for teaching, which is noted, none appear to have a detailed knowledge of her managerial skills.

Our decision on penalty

94. As already noted, the Tribunal is challenged by the respondent's lack of insight. In any other circumstances we would have ordered cancellation of her registration. However, we accept that the respondent was suffering under an [REDACTED] at the time of the conduct and we are prepared to stop short of cancellation as a result.
95. We must impress on the respondent however that this is only by the narrowest of margins. We would encourage her to think carefully about the expectations that are rightly placed on teachers given the privileged and influential position they have in society; one of nurturing and growing our rangatira mo apopo/leaders of tomorrow. She must take that position of privilege very seriously.
96. In light of the above, the Tribunal orders as follows:
- (a) Censure under s 404(1)(b) of the Act;
 - (b) Pursuant to s 404(1)(c) of the Act the following conditions are to be placed on the respondent's practising certificate:
 - (i) The respondent is not to hold a managerial position or a position involving the management of finances for a period of five years;

- (ii) The respondent is to attend professional development on understanding what Our Code, Our Standards looks like in practice. Proof of completion is to be sent to the Teaching Council;
 - (iii) The respondent is to provide her current and future employer with a copy of the full decision for a period of three years from the date of this decision, with proof of disclosure to the Teaching Council.
- (c) Annotation of the register of all the above for two years under s 404(1)(e) of the Act.

He Rāhui tuku panui – Non-publication

97. The respondent has sought name suppression upon the following grounds:

- (a) Publication of her name will further impact on the respondent's [REDACTED];
- (b) The public has no real interest in the conduct referred to in this particular notice;
- (c) The respondent's response to the conduct will include private and confidential information about her health;
- (d) In this case publication would serve no real purpose.

98. The respondent has filed an affidavit in support of her application for name suppression which speaks of her struggles with [REDACTED]. It attaches medical evidence from her doctors, [REDACTED]

99. The respondent's GP in a letter dated 30 July 2019 states:

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

100. The respondent speaks of the embarrassment suffered by her and her whānau living in a small community where many were aware of what had happened. They have subsequently relocated as a result, and this has been a huge adjustment for her children.

101. In more recent correspondence from the respondent's current [REDACTED], the Tribunal has been made aware that the respondent's [REDACTED] has suffered as a result of the investigation and Tribunal process. The [REDACTED] has noted a significant impact on the respondent's [REDACTED]. Further there have been changes to the respondent's [REDACTED].

102. Whilst the CAC does not say it is opposed to name suppression it does say:

...the nature of the respondent's conduct already appears to be widely known in the community in which it occurred. In circumstances where much of the details of the respondent's conduct is already public (one character reference also raises concerns about rumours in relation to the respondent's conduct), the CAC submits that name suppression will have little utility and, in respect of any incorrect rumours, may be counter-productive.

103. Section 405(3) of the Act provides that hearings of this Tribunal are in public. This is consistent with the principle of open justice. The provision is subject to subsections (4) and (5) which allow for whole or part of the hearing to be in private and for deliberations to be in private. Subsection (6) further provides:

(6) *If the Disciplinary Tribunal is of the opinion that it is proper to do so, having regard to the interest of any person (including (without limitation) the privacy of the complainant (if any)) and to the public interest, it may make any 1 or more of the following orders:*

...

(c) *an order prohibiting the publication of the name, or any particulars of the affairs, of the person charged or any other person.*

104. Therefore, in deciding whether to make an order prohibiting publication, the Tribunal must consider the interests of various affected parties, as well as the public interest. If we think it is proper to do so, we may make such an order.

105. In *M v Police* (1991) 8 CRNZ 14 Fisher J discusses the importance of open justice:

In general, the healthy winds of publicity should blow through the workings of the Courts. The public should know what is going on in their public institutions. It is important that justice should be seen to be done. That approach will be reinforced if the absence of publicity might cause suspicion to fall on other members of the community, if publicity might lead to the discovery of additional evidence or offences, or if the absence of publicity might present the defendant with an opportunity to re-offence.³²

106. The presumption in favour of open justice is again articulated by the Court of Appeal in *R v Liddell* [1995] 1 NZLR 538 at 546:

... the starting point must always be the importance in a democracy of freedom

³² *M v Police* (1991) 8 CRNZ 14 at [15]

of speech, open judicial proceedings, and the right of the media to report the latter fairly and accurately as “surrogates of the public”...The basic value of freedom to receive and impart information has been re-emphasised by s 14 of the New Zealand Bill of Rights Act 1990.

107. The principle of open justice therefore exists regardless of any need to protect the public. The nature of s 405 of the Act is consistent with s 95(2)(d) of the Health Practitioners Disciplinary Act 2003, which was considered in *Dr A v Director of Proceedings*³³ by Panckhurst J, who said:

The scheme of the section means, in my view, that the publication of names of persons involved in the hearing is the norm, unless the Tribunal decides it is desirable to do order otherwise. Put another way, the starting point is one of openness and transparency, which might equally be termed a presumption in favour of publication.

108. In *Director of Proceedings v I*,³⁴ Frater J found that any differences between the Courts and medical disciplinary processes (under the Medical Practitioners Act 1995) were ones of emphasis and degree. The most significant difference was the threshold to be reached before the balance was tipped in favour of name suppression. Unlike the courts, where “exceptional” circumstances are commonly required, the criterion for cases before the Medical Practitioners Disciplinary Tribunal (and its successor, the Health Practitioners Disciplinary Tribunal), is whether suppression is “desirable”.
109. In this jurisdiction, the threshold of whether it is “proper”, is the same as under the Lawyers and Conveyancers Act 2006. In *CAC v Mackay*³⁵ we said that we agreed with the NZLCDT that “proper” sits somewhere between “exceptional” as is the case in the courts and “desirable” as is required in the HPDT.
110. We note from the evidence that the details of this matter are already in the public domain.
111. We have considered the interests of the respondent’s whānau as well as the public interest. We have considerable sympathy for the respondent’s whānau. They have been through an incredibly challenging time in the past few years.
112. The Tribunal have carefully considered the medical evidence and whether there is

³³ High Court, Christchurch, CIV 2005-409-002244, 21 February 2006, Panckhurst J.

³⁴ [2004] NZAR 635

³⁵ Above n 33

sufficient detail to justify a departure from the principle of open justice. We need to be convinced that the impact on the respondent would be more than what would ordinarily be expected following such proceedings.

113. We note the decision of NZTDT 2016/27 where the Tribunal noted that:

“[63] we start by addressing the ground that there the respondent’s [REDACTED] may be jeopardised if suppression is not ordered. Without wishing to sound unsympathetic to its sufferers, [REDACTED] is not an unexpected consequence of a proceeding involving allegations as serious professional misconduct. It is important that the nature and effects of any such condition are carefully scrutinised when it is put forward as a ground for name suppression. A bare assertion that a condition exists or that it may render an applicant seeking suppression more vulnerable to harm will not suffice.

*[64] [REDACTED]
[REDACTED]
[REDACTED] However, the lack of detail in the letter is somewhat unsatisfactory, as it does not address precisely what the respondent suffers from, the likely duration of the condition or its associated risks.*

114. We make the comment here that it took us some time to reach a decision on the issue of name suppression. However, after careful consideration we are satisfied that the medical grounds advanced by the respondent do persuade us that the principle of open justice is displaced and that it is proper in the circumstances to order non-publication of the respondent’s name. We also order no-publication of the parts of the decision that discuss the respondent’s medical background.

Utu Whakaea – Costs

115. The CAC seeks an award of costs of 40%.

116. Counsel for the respondent submits that the respondent should not be liable for due to the fact that she was suffering under an [REDACTED] at the time of the incidents. Further it was submitted that the respondent has incurred significant medical and relocation costs.

117. The Tribunal is minded to order 40% costs.

118. The CAC is to file and serve a copy of its cost schedule. Under section 404(1)(h) the respondent is ordered to pay 40% of the costs shown in the CAC schedule unless the respondent files and serves submissions as to costs within 10 days of the date the CAC has sent the cost schedule. If these submissions are received the Tribunal delegates to the Deputy Chair the task of fixing the amount of the CAC's costs.
119. The respondent is also ordered to pay 40% of the Tribunal's costs. This matter was dealt with on the papers and the schedule submitted by the Tribunal shows \$1,145.00 of total costs. The respondent is to pay \$458.00 pursuant to section 404(1)(i). Any objection should be filed within 10 days of receipt of the decision and referred to the Deputy Chair.



Rachel Mullins
Deputy Chair

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

1. This decision may be appealed by teacher who is the subject of a decision by the Disciplinary Tribunal or by the Complaints Assessment Committee.
2. An appeal must be made within 28 days after receipt of written notice of the decision, or any longer period that the court allows.
3. Section 356(3) to (6) applies to every appeal under this section as if it were an appeal under section 356(1).