



EDUCATION COUNCIL
NEW ZEALAND | Mātātū Aotearoa

Complaints Assessment Committee (CAC) v McCaskill

New Zealand Teachers Disciplinary Tribunal 2018/15

Teachers have an obligation to both teach and model positive values for their students. In this case, a teacher with a history of dishonesty has had her registration cancelled after failing to disclose her convictions.

Ms McCaskill, an early childhood teacher, was referred to the New Zealand Teachers Disciplinary Tribunal (Tribunal) in relation to five convictions for dishonesty. Three of these were for dishonestly using a document for pecuniary advantage, and the other two were offences of obtaining by deception.

Ms McCaskill's offending over three years involved an overpayment of more than \$57,000 in benefit and income related payments from the Ministry of Social Development (MSD), despite being employed and receiving a teaching salary during this time.

Ms McCaskill admitted she was aware she was required to inform MSD of any change in her employment status that might affect her benefit entitlements, as well as any changes in her financial situation that could alter her social housing arrangements.

In addition to this, Ms McCaskill also failed to report her offending to the Teaching Council as she was required to do.

The Tribunal pointed out this lack of disclosure is regarded as a misconduct that can itself set off disciplinary proceedings.

Ms McCaskill's convictions were only discovered when she applied to renew her practising certificate. As part of this process the Teaching Council obtained a Police vet which revealed her offending. The Tribunal did not accept that Ms McCaskill's omission to mention her convictions in her renewal application was accidental.

Ms McCaskill had previously come before the Tribunal in 2008 for stealing from her then-employer. Ms McCaskill narrowly avoided cancellation of her registration for this offence. She was censured and had her practising certificate suspended for nine months.

The Tribunal has consistently regarded benefit fraud convictions as serious. It accepted that Ms McCaskill's fraudulent activity adversely reflected on her fitness to teach. The Tribunal said, "defrauding the State, and thus the community, is the antithesis of the standard of honesty expected of teachers". The Tribunal considered the substantial amount defrauded, the duration of offending, the relatively short timeframe before Ms McCaskill returned to serious dishonest behaviour, and the measures the Tribunal imposed in 2008 were not enough of a deterrent to prevent her from reoffending.

The Tribunal decided that Ms McCaskill's behaviour was of a nature that brings the teaching profession into disrepute, and deregistration was the most appropriate outcome. Ms McCaskill was censured, her registration was cancelled, and the Register was annotated.

BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

UNDER the Education Act 1989

IN THE MATTER the referral of convictions by the Complaints Assessment Committee to the New Zealand Teachers Disciplinary Tribunal

BETWEEN **THE COMPLAINTS ASSESSMENT COMMITTEE**

Referrer

AND **MARIA RAWINIA MCCASKILL**

Respondent

DECISION OF TRIBUNAL

Tribunal: Nicholas Chisnall (Deputy Chair), Susan Ngarimu and Graeme Gilbert

Hearing: On the papers

Decision: 26 September 2018

Counsel: J Simpson as counsel for the referrer
The respondent in person

Introduction

[1] On 14 August 2017, the respondent was convicted in the District Court on three charges of dishonestly using a document for pecuniary advantage in contravention of section 228 of the Crimes Act 1961 and two charges of obtaining by deception against s 240 of the same Act. Each of the five charges carries a maximum penalty of seven years' imprisonment. The respondent was sentenced to six months' community detention and ordered to complete 200 hours' community work.¹

[2] The matter came to the attention of the Education Council, and the Complaints Assessment Committee (CAC) resolved to refer the convictions to the Tribunal under s 397 of the Education Act 1989 (the Education Act). The CAC asserts that the conduct behind the convictions requires us to reach an adverse finding about the respondent's fitness to teach, thus requiring the Tribunal to exercise its disciplinary powers under s 404 of the Education Act.

The background

[3] The details of the offending were accepted by the respondent at sentencing and we were provided with the summary of facts relied upon by the District Court Judge, as well as the sentencing notes.²

[4] What follows is taken from the agreed statement of facts presented by the parties.

[5] Ms McCaskill was granted an Income Related Rent subsidy on 20 May 2008 and was granted the Domestic Purposes Benefit on 6 October 2012 by the Ministry of Social Development.

[6] As a beneficiary, Ms McCaskill was required to immediately advise the Ministry of any change in circumstances that may affect entitlement to benefits, or the rate of benefit received. As a person who was let social

¹ *Ministry of Social Development v McCaskill* [2017] NZDC 28554, Judge Clark.

² As we have said previously, we have no jurisdiction to look behind the convictions, and are bound to accept as proved the facts upon which the Judge sentenced the respondent.

housing, Ms McCaskill was required to promptly advise the Ministry of any change in circumstances.

[7] A data matching exercise between Inland Revenue and the Ministry of Social Development revealed that Ms McCaskill was employed and receiving both the Domestic Purposes Benefit and Income Related Rent for three years, between February 2013 and January 2016.

[8] Ms McCaskill stated she was aware of her obligations and gave no reason for failing to meet her obligations.

[9] The total amount of benefits overpaid to Ms McCaskill as a result of her actions was \$57,593.28. Ms McCaskill arranged to start repaying the overpayment.

[10] Ms McCaskill did not report her convictions to the Education Council as she was required to do.

[11] Ms McCaskill is an early childhood teacher, with a full practising certificate that expires on 28 July 2020. Ms McCaskill is currently working as a relief teacher. She applied for renewal of her practising certificate in April 2017. When a Police vet was obtained by the Education Council, the charges and convictions were discovered.

[12] Ms McCaskill was before the Disciplinary Tribunal in 2008 in relation to an allegation of theft of \$7,026.20 from her employer.³ At the conclusion of the hearing, Ms McCaskill was censured and had her practising certificate suspended for nine months.

The relevant law

[13] This case involves the referral to the Tribunal of the fact the respondent has been convicted of criminal offences.⁴ The test that therefore applies is whether the circumstances of the behaviour that resulted in the convictions

³ NZTDT 2008/12, 15 October 2008.

⁴ All convictions punishable by three months' imprisonment or more must be reported to the Education Council, both by the teacher under s 397 of the Education Act 1989 and by the employer under r 9(1)(n) of the Education Council Rules 2016.

reflect adversely on the fitness of the respondent to practice as a teacher.⁵ It is only by reaching an adverse conclusion that we are empowered to exercise one or more of the powers contained in the Education Act.

[14] The District Court, in *CAC v S*, made it clear that we are not required to find the respondent guilty of serious misconduct before we can exercise the disciplinary powers available to us in the Education Act.⁶ That being said, regardless of whether a matter reaches the Tribunal for adjudication by way of notice of referral, or by notice of charge of serious misconduct, our function is to decide if the behaviour of the teacher concerned reflects adversely on his or her fitness to teach. This explains why it is helpful, but not mandatory, to scrutinise the offending against the serious misconduct yardstick.⁷

[15] Section 378 of the Education Act defines “serious misconduct” as behaviour by a teacher that has one or more of three specified outcomes.⁸ The test under s 378 is conjunctive. As such, as well as having one or more of the adverse professional effects or consequences described, the conduct concerned must also be of a character and severity that meets the Education Council’s criteria for reporting serious misconduct, which, for the purposes of this proceeding, are those found in the Education Council Rules 2016. That which most precisely applies in the respondent’s case is r 9(1)(h), which applies when a teacher has engaged in “theft or fraud”. Also relevant is r 9(1)(o), which encompasses “any act or omission that brings, or is likely to bring, discredit to the profession”.

⁵ *Complaints Assessment Committee v S*, Auckland DC, CIV 2008 004001547, 4 December 2008, Judge Sharp, at [47].

⁶ At [48]. We also said in *CAC v Campbell* NZTDT2016/35, at [14], that a referral to the Tribunal does not need to be framed as a charge of serious misconduct.

⁷ As we said in *CAC v Lyndon* NZTDT 2016/61 at [18] and recently in *CAC v Sefton* NZTDT 2017/35 at [12]. In *Sefton*, we said at [21] that, “We should be careful that in using the serious misconduct test as guidance, we do not limit ourselves in our disciplinary response. The wording of s 404 does not require a finding of serious misconduct in order to impose a penalty. We simply must hear a ‘charge of serious misconduct or any matter referred to it by the Complaints Assessment Committee’.”

⁸ Behaviour that: adversely affects, or is likely to adversely affect, the well-being or learning of one or more children; or that reflects adversely on the teacher’s fitness to be a teacher; or that may bring the teaching profession into disrepute.

Should we make an adverse finding regarding the respondent's fitness to teach?

[16] While we are mindful of the consequences for the respondent that will result, we accept that we are required to reach an adverse conclusion. We repeat what we said in *CAC v O'Sullivan*:⁹

The Tribunal has dealt with a significant number of referrals of convictions of benefit fraud. It must be clear beyond doubt that the Tribunal treats such convictions as serious, and that any teacher convicted of benefit fraud must face the prospect of the Tribunal reaching an adverse [conclusion].

[17] Using the applicable limbs of the definition of serious misconduct in the Education Act as a reference point, we accept that the respondent's fraudulent activity adversely reflects on her fitness to teach. Practitioners have an obligation to both teach and model positive values for their students.¹⁰ Defrauding the State, and thus the community, is the antithesis of the standard of honesty expected of teachers. Second, there can be no doubt that the respondent's behaviour is of a nature that brings the teaching profession into disrepute when considered against the objective yardstick that applies.¹¹

Penalties

[18] The primary motivation regarding the establishment of penalty in professional disciplinary proceedings is to ensure that three overlapping purposes are met. These are to protect the public through the provision of a safe learning environment for students, and to maintain both professional standards and the public's confidence in the profession.¹² We are required to arrive at an outcome that is fair, reasonable and proportionate in the circumstances in discharging our responsibilities to the public and profession.¹³

⁹ *CAC v O'Sullivan* NZTDT 2015/51, at [20].

¹⁰ This obligation is contained in clause 3(c) of the Code of Ethics for Registered Teachers, which applied at the time the respondent offended.

¹¹ *Collie v Nursing Council of New Zealand* [2001] NZAR 74, at [28].

¹² The primary considerations regarding penalty were helpfully discussed in *CAC v McMillan* NZTDT 2016/52.

¹³ See *Roberts v Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354, at [51].

[19] It is not the purpose of a professional disciplinary proceeding to punish the teacher a second time for the same behaviour where he or she has been convicted of a criminal offence. Rather, as we said in *CAC v McMillan*,¹⁴ the Tribunal's mandate is to protect the public through the provision of a safe learning environment for students, and to maintain both professional standards and the public's confidence in the profession.¹⁵

[20] The outcome in the District Court cannot be a dispositive factor regarding the penalty we impose, as different considerations are in play in this disciplinary proceeding. That being said, it is apparent from the combination of sentences imposed that the Judge viewed the offending as serious, and her Honour held that the starting point was a term of imprisonment. We observe that the respondent avoided a more restrictive sentence because the Judge concluded that it was preferable that Ms McCaskill remain in employment to enable her to meet her reparatory obligations to the Ministry.

[21] In *CAC v Fuli-Makaua*¹⁶ we recently endorsed the point that cancellation is required in two overlapping situations, which are:

- (a) Where the offending is sufficiently serious that no outcome short of deregistration will sufficiently reflect its adverse effect on the teacher's fitness to teach and/or its tendency to lower the reputation of the profession;¹⁷ and
- (b) Where the teacher has insufficient insight into the cause of the offending and lacks meaningful rehabilitative prospects. Therefore, there is an apparent ongoing risk that leaves no option but to deregister.¹⁸

¹⁴ *CAC v McMillan* NZTDT 2016/52, at [16] to [26]., citing *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1 (SC) and *Ziderman v General Dental Council* [1976] 1 WLR 330.

¹⁵ See, too, *CAC v White* NZTDT 2017/29, at [19] and *CAC v Sefton* NZTDT 2017/35 at [19].

¹⁶ *CAC v Fuli-Makaua* NZTDT 2017/40, at [54], citing *CAC v Campbell* NZDT 2016/35 at [27].

¹⁷ Referring to the sixth of eight penalty factors described by the High Court in *Roberts v Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354, at [50].

¹⁸ See *CAC v Teacher* NZTDT2013/46, 19 September 2013 at [36].

[22] We must seek to ensure that any penalty we institute is comparable to those imposed upon teachers in similar circumstances. With that principle of consistency in mind, in *Lyndon* we recently reviewed a number of this Tribunal's earlier decisions that concerned fraud convictions.¹⁹ We have also considered three other decisions relied upon by counsel for the CAC: NZTDT 2015/27,²⁰ *CAC v O'Sullivan*²¹ and *CAC v Perez*.²²

[23] The first point we note is that Ms McCaskill's fraud netted a more substantial amount than in any of the other cases to which we were referred. While we accept that the relative gravity of the offending should not be assessed by reference only to the quantum involved, its duration is another obvious aggravating feature. This is, arguably, a paradigm "clear-cut example" of the worst kind of misconduct by a practitioner for which the

¹⁹ At [26] and fn 11. The five cases referred to us were *CAC v Teacher* NZTDT 2013/9, (2) *CAC v Teacher* NZTDT 2013/42, *CAC v Teacher* NZTDT 2014/5 NZTDT 2014/6 and *CAC v Gregory* NZTDT 2015/23.

²⁰ The teacher failed to declare to Work and Income that she was employed and earning an income over a two and a half year period during which she received an unemployment benefit. She entered guilty pleas to five charges alleging that she was overpaid \$36,953.47 and was sentenced to nine months' supervision and 300 hours of community work. In determining penalty, we acknowledged that the teacher had engaged fully with the Committee process and had an otherwise unblemished history. The offending had occurred under "harrowing" domestic circumstances, where the teacher's partner was abusive and provided no financial support. We were satisfied that the teacher had shown sincere remorse and was unlikely to offend again. We imposed censure, annotation, conditions to notify prospective employers of the matter for three years and conditions requiring counselling and mentoring.

²¹ *CAC v O'Sullivan* NZTDT 2015/51, where the teacher failed to declare to Work and Income that she was employed and earning an income over a four year period when she was receiving an unemployment benefit and various supplements. She entered guilty pleas to five charges alleging that she was overpaid \$19,653.34. We took into account the teacher's explanation that the offending occurred in difficult personal circumstances, that she had engaged proactively with Work and Income to commence repayments and that was an element of confusion about her disclosure obligations. The teacher had displayed genuine remorse and cooperated with the Council process. We imposed censure, annotation and a candour condition towards any prospective employer.

²² *CAC v Perez* NZTDT 2015/48, where the teacher failed to declare to Work and Income that she was employed and earned income over a three year period, during which she received an unemployment benefit. She also failed to declare funds given to her by her father. She entered guilty pleas to charges alleging that she was overpaid \$35,483.83. The teacher had self-reported the convictions, had cooperated fully with the Committee's investigation and had started repaying Work and Income. We accepted the teacher's candid explanation that the offending had occurred when she was under significant financial pressure, and that she genuinely misunderstood that the funds from her father, which she thought was a gift, needed to be disclosed. We imposed censure, annotation, conditions to disclose the matter to any prospective employer, and a condition to continue with repayment efforts.

maximum penalty of cancellation is reserved; thus falling into the first category described in *Fuli-Makaua*.

[24] As we said in *Lyndon*, knowing the genesis of the fraud helps explain what motivated the offending, and what degree of risk of repetition there is.²³ Unfortunately, as the 2008 proceeding in this Tribunal demonstrates, the respondent's offending cannot be described as out of character, as she repeatedly stole from her then-employer between 2005 and 2007. In 2008, the respondent narrowly avoided cancellation of her registration. We said:

The Tribunal regards this as a serious case. A teacher, even although she may have been in difficult financial circumstances, has, in a calculated way, stolen money from her employer, potentially to the detriment of her employer, the parents and caregivers of children attending the employer's institution and the children themselves. This, in the Tribunal's view, is a serious breach of trust, and the Tribunal regards the respondent's admission of serious misconduct as being an appropriate one for her to have made.

[25] Ms McCaskill invites the Tribunal to adopt a penalty short of cancellation on the basis:

I believe I have completed my sentence for the convictions and I will disclose this with any future employers. I need to need to be employed to enable me to repay the debt. As I stated above, I am passionate about teaching and I agree that I have breached the Code of Responsibility. However, I believe that through this whole situation, my own self-reflection and korero to my tamariki and whanau, I have gained a sense of who I am and why I did what I did. Becoming open and honest with others has enabled me to be a better person and provided an opportunity for me to show unreserved integrity in all that I do.

[26] In 2008, the respondent attributed her behaviour to financial pressure. She said that being caught had been welcome, as it had enabled her to be honest with her family about the stress she was under. The respondent said that she had sought out budgeting advice, which had alleviated her financial burden. The respondent described herself as remorseful. Yet, within a relatively short space of time, the respondent again resorted to serious dishonest behaviour. She again attributes her behaviour to the fact she was financially over-committed and ashamed to confide in those close to her. Ms McCaskill has substantively repeated what she told us in 2008 - that she knew what she was doing was wrong and she is "totally remorseful and

²³ See NZTDT 2013/9, at 6.

regrets [her] actions”, but she “couldn’t see any other way out of [her] situation”. And, again, the respondent told us that she had sought financial assistance from a registered budgeting service to minimise the risk of repetition.

[27] The short point is that the penalty of suspension that the Tribunal imposed in 2008 did not deter Ms McCaskill from committing further dishonest acts, on a greater scale, when faced with the same type of financial pressures that formed the genesis of the earlier thefts.

[28] We acknowledge that there are factors that militate against cancellation of the respondent’s registration. These are:

- (a) Her acknowledgment of wrong-doing by pleading guilty to the charges in the District Court and the fact that she is repaying the money she misappropriated; and
- (b) The respondent’s cooperation with the disciplinary process.

[29] In the balance, however, is the added aggravating factor that the respondent did not meet her obligation under s 397 of the Education Act to report her convictions to the Council. The failure to do so is, in and of itself, “misconduct that may give rise to disciplinary proceedings”.²⁴ As we said in *Fuli-Makaua*, this factor can be more or less aggravating depending on the circumstances:

[47] [For] example, at the bottom end of the scale is a teacher who is unaware of his or her obligation to report relevant convictions. This is still an aggravating feature: as the Tribunal held in *CAC v Korau*, it is “incumbent on members of the profession to be cognisant of the requirement that rests on every holder of a practicing certificate who is convicted of an offence punishable by imprisonment ... to report.”²⁵

[30] The respondent asserts that she was unaware of the reporting requirement and that she simply “ticked the wrong box” when she renewed her registration in 2018. Given the respondent’s track-record, we do not accept that the omission during re-registration was accidental.

[31] There may be circumstances in which a teacher’s particular skills and experience mean that, with appropriate conditions and support, it is in the

²⁴ Education Act 1989, s 397(2).

²⁵ *CAC v Korau* NZTDT2017/17 26 August 2017 at [9].

interests of the education community that he or she retains registration. We accept that the respondent has positive professional attributes. Equally, we appreciate the societal value that flows from the respondent retaining a place in the profession so that she can repay the funds she dishonestly obtained. However, the counterpoint is that teachers are expected to maintain public trust and confidence by demonstrating a high standard of professional behaviour and integrity. On two occasions Ms McCaskill has committed flagrant acts of dishonesty that undermine these values and expectations. Simply put, we do not have any confidence in the respondent's assurance that she will not appear before the Tribunal again.

[32] We therefore conclude that nothing short of cancellation of the respondent's registration will meet the obligations owed to the public and the profession.

Costs

[33] Under s 404(2) of the Education Act, the Tribunal is not empowered to order a teacher to contribute to the CAC's costs and those of the Tribunal following a hearing "that arises out of a report under section 397 of the conviction of a teacher". As such, we do not order costs.

Orders

[34] The Tribunal's formal orders under the Education Act are as follows:

- (a) Pursuant to s 404(1)(b), the respondent is censured.
- (b) The respondent's registration is cancelled under s 404(1)(g).
- (c) The register is annotated pursuant to s 404(1)(e).



Nicholas Chisnall
Deputy Chairperson

NOTICE

- 1 A person who is dissatisfied with all or any part of a decision of the Disciplinary Tribunal under sections 402(2) or 404 of the Education Act 1989 may appeal to a District Court.
- 2 An appeal must be made within 28 days of receipt of written notice of the decision, or within such further time as the District Court allows.
- 3 Section 356(3) to (6) apply to every appeal as if it were an appeal under section 356(1).