

**BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL**

**NZTDT 2022/26**

**IN THE MATTER** of the Education Act 1989

**BETWEEN** **COMPLAINTS ASSESSMENT COMMITTEE**

Kaiwhiu | Prosecutor

**AND** **DAVID LASCELLES WALLIS**

(Registration no. 156908)

Kaiurupare | Respondent

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**DECISION ON LIABILITY PENALTY AND NON-PUBLICATION ORDERS**

**31 JULY 2024**

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**REPRESENTATION:** R W Belcher and K J Eskildsen for the Complaints Assessment Committee

P Morgan KC, Thackeray Chambers for the respondent

**TRIBUNAL:** C Garvey (Deputy Chair), R McInerney and L Arndt (Members)

## Introduction

1. David Wallis was charged by the Complaints Assessment Committee (CAC) in relation to allegations of misappropriation and/or mismanagement of school finances, or that he engaged in poor financial management practices spanning the period 31 December 2012 to 23 July 2018. The notice of charge was issued on 22 June 2022. The matter was set down for a defended hearing. However, an amended charge and Agreed Summary of Facts (the summary of facts) were filed with the Tribunal in April 2024, and the parties requested a hearing on the papers.<sup>1</sup> The hearing was conducted on 21 June 2024.
2. Mr Wallis served a 47-year career as a teacher and principal, including 22 years as the principal at Manurewa West Primary School (the school) until his retirement on 6 July 2018. He is now aged in his seventies and has no intention of returning to teaching<sup>2</sup>.
3. Mr Wallis accepts the charge of mismanagement and poor financial management practices amounting to serious misconduct but denies that any of his conduct can be categorised as misappropriation.<sup>3</sup>

## The Amended Notice of Charge

4. The amended charge is laid under the Education Act 1989 (the Act). During the relevant period amendments were made to the Act and to the relevant rules and codes of conduct. Counsel for the CAC summarised these changes in a table, a copy of which is annexed to this decision.
5. The charge arises out of a mandatory report to the Teaching Council in November 2019. Details of the investigation and audit process leading to the mandatory report were not included in the material before the Tribunal. The amended charge reads as follows:

### Particulars of the Charge

1. The CAC charges that David Lascelles Wallis, registered teacher, of Papamoa, between 31 December 2021 and 23 July 2018, engaged in misappropriation and/or financial

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<sup>1</sup> A further amended charge was filed by consent dated 1 May 2024.

<sup>2</sup> ASOF at 23] to [7]. He allowed his practising certificate to lapse in October 2023.

<sup>3</sup> Indeed, the submissions for Mr Wallis appeared to suggest that the allegation of misappropriation ought not be published and did not need to be considered by the Tribunal.

mismanagement of School finances and/or engaged in poor financial management practices, including:

- a. Receiving well-being payments from the School, including a clothing allowance, funding for glasses, fitness/gym subscriptions and massages without concurrence from the Ministry of Education;
  - b. Receiving a \$550 support payment to reflect his extra work demands at the end of 2016 without concurrence from the ministry of Education;
  - c. Receiving travel costs from the School, including business class travel, funding for his spouse to travel with him on school trips, and incidental allowances associated with a private trip to Hong Kong; and
  - d. Withdrawing funds from the School's bank account on two occasions in December 2014 and June 2017 for personal use and without the knowledge and approval from the School Board.
2. The conduct alleged in paragraph 1 subparagraphs a. and d. amounts to serious misconduct pursuant to section 139AB of the Education Act 1989 (for that conduct which occurred prior to 1 July 2015) and Rule 9(1)(o) of the New Zealand Teachers Council (Making Reports and Complaints) Rules 2004 (for that conduct which occurred prior to 1 July 2016); or section 378 of the Education Act 1989 (for that conduct which occurred on or after 1 July 2015) and Rule 9(1)(g) and/or (k) of the Teaching Council Rules 2016 (for that conduct which occurred on or after 1 July 2016); or alternatively amounts to conduct which otherwise entitles the Disciplinary Tribunal to exercise its powers pursuant to section 139AW (for that conduct which occurred prior to 1 July 2015) and/or section 404 (for that conduct which occurred on or after 1 July 2015) of the Education Act 1989.
  3. The conduct alleged in paragraph 1 subparagraphs b. and c. amounts to serious misconduct pursuant to section 378 of the Education Act 1989 and Rule 9(1)(g) and/or (k) of the Teaching Council Rules 2016 or alternatively amounts to conduct which otherwise entitles the Disciplinary Tribunal to exercise its powers pursuant to section 404 of the Education Act 1989.

## **Evidence: Agreed Summary of Facts**

6. As Principal, Mr Wallis was also Chief Executive to the Board, and the Board relied heavily on his advice when making decisions on expenses.<sup>4</sup> Key to the CAC's allegations in particulars 1(a) and (b) is Mr Wallis' knowledge of concurrence. Mr Wallis was employed under the Primary Principals Collective Agreement. Approval for benefits and allowances outside of that employment agreement required concurrence, meaning approval by the Ministry of Education for those additional payments. Mr Wallis was familiar with the requirements for concurrence<sup>5</sup>, which were published from time to time in circulars issued by the Ministry<sup>6</sup>.
7. With regard to the "wellbeing" payments described in particular 1(a), Mr Wallis advised the Board in February or March 2011 about how these benefits could be claimed without an application for concurrence. The summary of facts records:

Mr Wallis drafted a memorandum note to the Board Chairperson regarding "Recommendations / Strategies for consideration" on the disclosure of "Principal allowances" in a manner "aimed at not specifically conflicting with the intent of the M.O.E circular re concurrence to approve extra salary allowances etc." Mr Wallis's recommendations were:

- a. Add Health & Wellbeing to Budget Code Staff Health & Wellbeing code budget Code-No 33963 (Not shown as Principal Allowance).
  - b. Remove Gym / Recreation subsidy/optical subsidy (\$1300-2011, \$1330-2012) as Leadership Support and Professional Resources to be aligned to Principal's Professional Development Conference attendances.<sup>7</sup>
8. Mr Wallis received approximately \$6,299.00 in reliance on this advice from 2013 to 2017 with yearly Board approval, and with the exception of massages, these payments were recorded in the school's budget as "Principal's Development Resourcing/Support Provisions". All staff were able to claim for massage under a different code.<sup>8</sup> Mr Wallis was aware that concurrence was required for these benefits.<sup>9</sup>

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<sup>4</sup> n2 at [8].

<sup>5</sup> n2 at [16] and [20] – confirms Mr Wallis aware that concurrence was required for the benefits described in 1(a) and (b).

<sup>6</sup> The Ministry of Education circulars relevant to this matter are attached to the Agreed Summary of Facts. They are Education Circular 2008/03 (17 March 2008), Education circular 2011-02 (21 January 2011) and Education circular 2013/27 (8 November 2013).

<sup>7</sup> n2 at [11].

<sup>8</sup> n2 at [12] to [13].

<sup>9</sup> n2 at [15] and [16].

9. Particular 1(b) refers to a one-off payment of \$550 from the school's account made by bank transfer to Mr Wallis. The summary of facts records:

19. Mr Wallis recorded on the expense reimbursement claim form...that "this support has [Board] Chairperson approval to meet 'Good Employer' obligations to key employee for stress related support, and to recognise 'beyond reasonable demands' to apply extra work and effort to meet administrative obligations within the School."

10. Again, Mr Wallis was aware that concurrence was required before this payment could be made to him. It seems to be the type of payment that might be covered, but the Board did not obtain approval and Mr Wallis did not suggest that the Board seek independent advice.<sup>10</sup>

11. Particular 1(c) relies on airfares and incidental allowances paid by the school for Mr Wallis on three occasions, the first being in the context of a school study group tour to Singapore between 9 and 15 July 2016, when he accompanied four other senior staff members. Mr Wallis travelled alone to Kuala Lumpur from 16 to 19 July 2016. According to the summary of facts:

27. The Board approved payment of Mr Wallis' flights, accommodation, and incidental allowances for the total time overseas.

28. At the time the Board approved Mr Wallis' flights, it was not aware that he was flying business class. Instead of providing quotes for the Board to approve, Mr Wallis' return flights from New Zealand to Singapore, with stopovers in Kuala Lumpur each way, were settled by way of contra against a prepaid Flight Centre travel voucher.

12. Mr Wallis undertook a further school-funded trip to attend a conference in Melbourne between 28-30 September 2016, following which he flew to the Gold Coast for a seven-day holiday accompanied by his spouse. Mr Wallis' airfares were purchased using a pre-paid flight voucher which he also used to cover the airfares for his spouse, which the Board did not authorise. Mr Wallis repaid the unauthorised fares after an independent investigation report by FIG Group Limited.<sup>11</sup>

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<sup>10</sup> n2 at [20]

<sup>11</sup> n2 at [29]-[34]. The Tribunal did not have a copy of this report.

13. In 2017 Mr Wallis attended another conference in Singapore and was accompanied by his spouse. The conference was held between 10-13 April 2017, after which Mr Wallis and his spouse flew to Hong Kong for a holiday, returning to New Zealand via Singapore on 21 April 2017. The airfares were paid for by way of a contra offset against a \$5000 prepaid travel voucher purchased by the school. The fares for Mr Wallis' spouse and incidental attendances, totalling \$3,571, were not Board approved. Mr Wallis repaid this sum after the FIG Report.<sup>12</sup>
14. As for particular 1(d), on two occasions Mr Wallis accessed funds withdrawn from the school bank account for his personal use, and without the knowledge or authority of the Board, or the Ministry.<sup>13</sup> In December 2014:
- a. Mr Wallis arranged for NZ\$2,746 of School funds to be used to purchase an AU\$2,500 bank draft. That money was then used to acquire shares issued by Safety Medical Products Ltd.
  - b. Mr Wallis repaid the \$2,746 into the school's account on 30 January 2015, some seven weeks after the initial drawdown.
  - c. no interest was paid on the use of the funds.
  - d. the payment was coded to the Accounts Receivable ledger account.
  - e. the school's end of year financial statements failed to disclose the "Related Party" nature of the transaction.
  - f. Mr Wallis attested to the accuracy of the accounts by signing the Statement of Responsibility, which was then audited by HWI Chartered Accountants.<sup>14</sup>
15. In June 2017 Mr Wallis arranged for \$4,328 to purchase foreign currencies for a planned holiday in Canada, the USA and Fiji. The monies were repaid on 8 August 2017, with no interest payment. The payment was coded as Accounts Receivable.<sup>15</sup>

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<sup>12</sup> n2 at [35]-[40].

<sup>13</sup> n2 at [41]-[42].

<sup>14</sup> n2 at [43] a-f.

<sup>15</sup> n2 at [44] a-d.

## Principles - Liability

16. The test for serious misconduct is conjunctive, requiring conduct that engages one (or more) of the limbs of s 378, and one (or more) of the rules for reporting serious misconduct to the Teaching Council. As is the case under s10 of the Education and Training Act 2020, the Act provides three 'gateways' into a misconduct finding, being conduct by a teacher that:
- a. adversely affects, or is likely to adversely affect the wellbeing or learning of 1 or more students;
  - b. reflects adversely on the teacher's fitness to be a teacher;
  - c. may bring the teaching profession into disrepute.
17. The mandatory report was made to the Teaching Council in November 2019, at which time the criteria for reporting serious misconduct were set out in rule 9(1) of the Teaching Council Rules 2016. Mr Wallis' conduct prior to 1 July 2016 was subject to the New Zealand Teaching Council (Making Reports and Complaints) Rules 2004. The charge pleads a breach of:
- a. r9(1)(o) of the 2004 rules – any act or omission that brings, or is likely to bring, discredit to the profession.
  - b. r9(1)(g) of the 2016 rules – acting dishonestly in relation to the teacher's professional role, or committing theft or fraud.
  - c. r9(1)(k) of the 2016 rules – an act or omission that brings, or is likely to bring, the teaching profession into disrepute.
18. It is helpful to refer to the guidance on professional ethics published from time to time by the Council, most recently being the Code of Professional Responsibility that came into force on 30 June 2017. The Code sets high ethical standards for all teachers including those in a management role. Notably, cl 1.3 expects teachers to demonstrate a high level of professional behaviour and integrity. Clause 1.5 expects that teachers will contribute to a professional culture that supports and upholds the Code. This is particularly pertinent

for those in a leadership position. The Code's predecessor, the Code of Ethics for Registered Teachers required teachers to teach and model positive values, a requirement this Tribunal has considered relevant to the expectation of dealing with public funds in an appropriate manner.<sup>16</sup>

19. The charge requires an understanding of the key elements of concurrence, as stipulated in the Ministry circulars.<sup>17</sup> The circulars are directed at boards of trustees who are responsible (in a nutshell) for understanding when concurrence can be sought, applying to the Ministry, and ensuring that all approvals and payments are properly documented. We do not overlook that the Board had obligations, however Mr Wallis was a very experienced principal who provided guidance to his Board on financial matters and who was aware when concurrence was required. The responsibilities of the Board (which it is not our role to consider) do not detract from Mr Wallis' culpability, and he has not advanced that in mitigation.<sup>18</sup>

20. The 2011 circular prescribed payments that may be entitled to concurrence as a payment or benefit additional to the base salary and allowances in the principal's employment agreement and of one of two types:

- a. payments or benefits for additional duties and responsibilities.<sup>19</sup>
- b. 'sensitive payments', for example home phone rental where the phone is used primarily for work purposes, Koru Club membership for school business-related travel where there is a clear work benefit and incidental private benefit, or use of a vehicle.<sup>20</sup>

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<sup>16</sup> Several cases including those cited at footnotes 28 and 30, consider financial mismanagement in breach of this obligation to "Teach and model those positive values that are widely accepted in society and to encourage learners to apply them and critically appreciate their significance."

<sup>17</sup> Above, n 6.

<sup>18</sup> At [50] of the submissions on behalf of Mr Wallis dated 17 May 2024, there is reference to the Board's approval of payments that Mr Wallis knew required concurrence and the description of these in the accounts with the inference that the Board was complicit in Mr Wallis deliberately obtaining these benefits. However, this is read more as an attempt to legitimise the conduct, not a criticism of the Board or attempt to shift blame.

<sup>19</sup> Examples in the circular include a residential/boarding house owned by the board of trustees, significant initiatives that earn extra revenue are additional to the principal's normal role, implementing a significant change process.

<sup>20</sup> The circular clarifies that sensitive payments fall under what the Office of the Auditor General defines as "sensitive expenditure" which is paid by a public entity and provides or has the potential to provide a private benefit to an individual staff member that is additional to the business benefit of the entity.



21. The circular makes clear that, amongst other stipulations:

- a. a Board must apply for concurrence before offering it to the principal and must reapply annually.
- b. the payment must be recorded in the annual accounts and Board minutes.
- c. any payment or benefit made without concurrence is not lawful or legally binding.
- d. concurrence cannot be retrospectively approved.
- e. Boards must be clear about the tax implications, such as Fringe Benefit Tax, and the employment implications of concurrence.
- f. The basic requirements attached to the use of public funds, being accountability, openness, value for money, lawfulness, fairness and integrity apply.

22. The 2011 circular was replaced on 8 November 2013. The types of payment for which concurrence was available did not change, nor the matters described at [21] above, but approval for three-year periods could be obtained.

### **Submissions-Liability**

23. We deal first with the issue of the respondent's submissions introducing factual matters that go beyond the summary of facts, said to be by way of explanation for Mr Wallis' conduct.<sup>21</sup> Mr Morgan KC's submissions include some assertions of fact that are not supported by the succinct summary of facts. Where an agreed summary of facts is filed and it addresses all matters relevant to the factual foundation of the charge, that summary provides the basis on which the Tribunal should make its determination on liability. Any matters not agreed should be addressed by way of affidavit and/or documents in the bundle. It is not uncommon for the Tribunal to accept additional factual material for penalty purposes, but we agree with counsel for the CAC's submission that "*to allow a respondent to introduce additional factual material about the conduct itself, and therefore their liability, is inappropriate.*"<sup>22</sup> We have not given weight to the additional matters in considering

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<sup>21</sup> Submissions on behalf of Mr Wallis 17 May 2024 at [3.2].

<sup>22</sup> CAC Reply Submissions 27 May 2024 at [11].

liability, and where we do refer to the explanations given in the submissions, this is clearly stated.

24. The CAC submit that Mr Wallis' conduct separately or cumulatively amounts to serious misconduct, being "*at the very least*" financial mismanagement or poor financial management. The CAC allege that the airfares purchased for Mr Wallis' spouse on two occasions may amount to misappropriation. This term is not defined in the Act, or the Teaching Council Rules or the Crimes Act 1961.

25. The CAC outlines a "*prolonged*" course of misconduct by Mr Wallis including:

- a. that he obtained additional financial benefits without concurrence and in the full knowledge that concurrence was required and had not been obtained.
- b. he advised the Board in early 2011 to re-code benefits so that they could be paid without concurrence.
- c. he failed to provide relevant information to the Board about using prepaid flight vouchers to purchase business class fares and airfares for his spouse.
- d. he used school funds as an informal loan without paying interest or obtaining Board approval.

26. In support of the allegation of misappropriation the CAC submit the following matters are significant:

- a. the use of prepaid flight vouchers rather than his own funds for his spouse, and the failure to make a transaction that would appear on the school accounts in a way that would be identified at audit.
- b. the absence of Board approval, which the CAC submits "*would be expected in a legitimate and transparent transaction*".
- c. that there were two instances of using pre-paid vouchers improperly and the quantum of the airfares (totalling over \$4000), suggesting that the conduct was intentional.

- d. the overall pattern of conduct, not only the airfares but the interest-free use of school money to fund personal purchases. The CAC submit Mr Wallis would not have repaid these but for an audit uncovering the payments.<sup>23</sup>
27. Mr Wallis accepts that his overall conduct amounts to serious misconduct and can be characterised as financial mismanagement or poor financial management but that particular 1(d) is “*the most minor of the allegations*” and on its own, would not warrant any disciplinary sanction. This is on the basis of a submission that there was no disadvantage to the school.
28. Mr Morgan KC submits that it is unnecessary for the Tribunal to consider misappropriation, given Mr Wallis’ admission of serious misconduct on alternative grounds. He also refers to the framing of the charge, asserting that misappropriation is “*merely a particular which is denied, but it is immaterial and no finding is required.*”<sup>24</sup>
29. Responding to the allegation further, Mr Morgan KC submits (noting that these introduce some explanatory matters not covered in the summary of facts):
- a. the prepaid travel vouchers “*needed to be used*” and it was “*a matter of convenience*” to use one method of payment for Mr Wallis and his spouse. Rather, “[*t*]he fundamental problem is that he didn’t repay the school immediately at the time of the trip and this only emerged in 2018.”<sup>25</sup>
  - b. Mr Wallis did not need Board approval to use the flight vouchers as the trip was approved.
  - c. the fact there were only two transactions using the school account, a year apart, does not result in the inference that the conduct was intentional.

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<sup>23</sup> CAC submissions dated 1 May 2024 at [36] a to c.

<sup>24</sup> Respondent’s Submissions dated 17 May 2024 at [40.0].

<sup>25</sup> The timing of and impetus for repayment is not a matter that is sufficiently addressed in the evidence for us to reach any views on this, other than it is clear it was not immediate.

- d. the school was regularly audited<sup>26</sup> and Mr Wallis only failed to repay the relevant sums promptly because he was not invoiced for them<sup>27</sup>. It is acknowledged that Mr Wallis should have had a better system in place to ensure repayment was not overlooked.
  - e. Mr Wallis denies that he acted dishonestly or committed theft or fraud.
30. Counsel for the CAC referred us to cases involving similar allegations involving the misuse of school finances or property by a principal, and in which the Tribunal found serious misconduct. We address these briefly.<sup>28</sup>
- a. in *CAC v Fletcher*<sup>29</sup> the respondent used a school-issued fuel card to purchase fuel for personal use over a three-year period. He made misleading claims for reimbursement for professional development that he did not attend and failed to meet rent payments on a school-owned property. The teacher was found guilty and to have committed theft or fraud in breach of rule 9(1)(h) of the 2016 Rules. Mr Fletcher did not attend the hearing but did repay the funds and accept wrongdoing. His registration was cancelled. The Tribunal discussed the allegation of fraud, and the absence of a singular definition of this. The Tribunal considered that gaining an advantage through dishonesty might amount to fraud (in that instance, falsely completing claim documentation and obtaining free petrol).
  - b. in *CAC v Witana*<sup>30</sup> again the respondent was a principal; the charge addressed several types of misconduct including poor financial practices arising from the use of school funds for personal expenditure and recording this expenditure for later repayment in a book, owing at one time over \$10,000. In mitigation, the principal argued he was inexperienced and relied heavily on others for advice on management of school finances. The Tribunal was critical of Mr Witana's use of the school account in this manner and considered it was an abuse of his position

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<sup>26</sup> This is expected practice for school accounts but was not specifically part of the evidence before the Tribunal, either as to the nature and timing of the audits,

<sup>27</sup> Again the evidence before the Tribunal is not sufficient for us to make any findings on this.

<sup>28</sup> In addition, counsel also referred to *CAC v Coldstream* NZTDT 2019/18, 10 February 2021.

<sup>29</sup> *Complaints Assessment Committee v Fletcher* NZTDT 2018/17, 21 November 2018.

<sup>30</sup> *Complaints Assessment Committee v Witana* NZTDT 2016/24, 30 January 2017.

for the personal benefit of him and his whānau. The Tribunal considered the poor financial practices amounted to misconduct (allegations related to possession of pornographic material on a school computer were considered serious). The teacher was censured, and conditions imposed addressing the concerns with his lack of financial ability.

- c. in *CAC v Parsons*<sup>31</sup> the respondent used school funds to purchase an iPad and television for personal use and without permission from the Board. He received a formal Police warning for theft, although in the absence of any admission of dishonesty. The Tribunal found that Mr Parsons was dishonest in making the purchases and his subsequent conduct when confronted. By a narrow margin, rather than cancellation he was suspended for 12 months and censured, and had conditions placed requiring disclosure of the decision and precluding him from holding a position of financial responsibility. The Tribunal considered his actions to be an abuse of Mr Parsons' position and referred to the obligation on teachers to model positive values, noting that a high standard of probity is expected of principals.

### **Discussion-Liability**

- 31. We have no hesitation in finding that Mr Wallis' conduct, both separately and cumulatively, amounts to serious misconduct.
- 32. Receiving, over four years, benefits or allowances which Mr Wallis knew required concurrence was a breach of his trusted position. The 2011 advice Mr Wallis wrote to the Board suggests he intended to continue to receive benefits that may have been difficult to obtain in accordance with Ministry requirements. Mr Wallis was also aware concurrence was required for the payment of \$550 in December 2016. An application may have been successful had the Board made one, but that is irrelevant.
- 33. Mr Wallis' conduct in travelling business class and using school funds to purchase fares (and claiming expenses for) his wife without approval or ensuring prompt repayment and accurate transactions within the school accounts, suggests a sense of entitlement and

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<sup>31</sup> *Complaints Assessment Committee v Parsons* NZTDT 2019/50, 2 September 2020.

taking advantage of his trusted position. The sums involved were not insignificant, and in our view not so small, or their nature so commonplace as to be easily overlooked.

34. We disagree with the submission that particular 1(d) separately does not warrant discipline. There were only two instances across three years, so this is not at the highest end. However, access to school funds comes with the responsibility to only use those funds for legitimate purposes, which does not include uses solely for personal benefit. This is so regardless of whether the school experienced any loss of benefit before the amounts were repaid.

35. Turning then to the limbs of s378, we find:

- a. although detriment to students is not the main concern in this case, school funds are ultimately for the benefit of students, and to support teachers and other staff to fulfil their functions. The use of school funds requires transparency. Mr Wallis' decision to use funds or receive benefits either without specific Board approval or concurrence, for primarily personal benefit, means there was a risk that funds were diverted from learners that could have been put to a legitimate use. We find s378(1)(a)(i) is engaged.
- b. Mr Wallis' actions reflect adversely on his fitness as a teacher: s378(1)(a)(ii). For a principal, who holds responsibility for a broad range of leadership, financial and administrative functions within a school, 'fitness' necessarily spans competence and a high standard of professional conduct across all spheres. As outlined by Mr Morgan KC, Mr Wallis served a long and successful career in education. The corollary of his expertise and authority was the need to act with integrity, knowing that others would rely on him. The conduct described showed a lack of professionalism and allowed his integrity to be questioned.
- c. For similar reasons, we find a breach of s378(1)(a)(iii). Noting Mr Wallis' standing and experience, and the use of public funds, an objective member of the public, informed of the relevant facts, would likely consider the reputation of the profession to be lowered by this conduct.

36. As for the second step for serious misconduct, a breach of the rules, we summarise our findings as follows:

- a. Particulars 1(a) and (d) with regard to conduct up to 30 June 2016: r 9(1)(o) of the 2004 Rules refers to an act or omission that brings or is likely to bring, discredit to the profession. For the reasons set out at [35] above, we consider this met.
- b. Particulars 1(a), (b), (c) and (d) conduct arising after 30 June 2016: r 9(1)(k) of the Teaching Council Rules 2016 refers to an act or omission that brings or is likely to bring the profession into disrepute. Again, for reasons summarised at [35] above we consider this rule engaged.
- c. Particular 1(c) is also said by the CAC to engage r 9(1)(g) of the 2016 Rules, which refers to a teacher acting dishonestly in relation to their professional role or committing theft or fraud. The respondent opposes this, and we discuss it in more detail.

37. It was submitted for Mr Wallis that the Tribunal may not be required to consider or refer to misappropriation in its deliberations and decision, because of Mr Wallis accepting that he is guilty of serious misconduct on other grounds. The charge is framed in the usual manner for a charge in this jurisdiction, setting out alternative grounds for reaching the threshold for serious misconduct, and then particularising the conduct on which those allegations are based. We consider it is proper to address the allegation, on the basis of the conduct described in the charge potentially giving rise to such a finding. We also consider that the allegation having been made, it is in Mr Wallis' interests that we address it.

38. Neither counsel attempted to define misappropriation. Counsel for the CAC suggested that we might be assisted by reference to ss 219 (theft or stealing) and 220 (theft by a person in a special relationship) of the Crimes Act 1961. Misappropriation was inferred by reference to r 9(1)(g), the allegation that Mr Wallis was dishonest or guilty of theft or fraud.

39. An allegation of misappropriation has arisen in a handful of cases in this jurisdiction. In *CAC v Shortcliffe*<sup>32</sup> the Tribunal found mismanagement of school finances and poor

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<sup>32</sup> *Complaints Assessment Committee v Shortcliffe* 2018/72P, [2018] NZTDT 729, 17 June 2021

management practices (primarily with the intention of providing benefit to students, and for business-related expenses). The Tribunal was not satisfied that the conduct was dishonest and did not accept the allegation of misappropriation, despite a lack of record keeping and transparency.

40. In *CAC v Harmer*<sup>33</sup>, the respondent, Tumuaki of a Kura kaupapa Māori, used her work Visa card without Board authorisation and without accounting for the expenditure, including for personal purposes and for paying staff wages in advance. The conduct persisted over three years and totalled almost \$30,000. The charge alleged misappropriation and/or financial mismanagement and/or poor financial management practices. The Tribunal found serious misconduct, with a breach of r 9(1)(a)(g) – theft – and referred to the “*funds that [Ms S] had misappropriated.*” The Tribunal was not convinced by the respondent’s denials of an intention to steal or defraud.
41. In this case, there is clear evidence of poor practice and financial mismanagement by Mr Wallis in respect of the particulars. Those findings are serious in themselves, but we see the allegation of misappropriation as requiring cogent evidence of a dishonest intention to take and retain school funds, for personal benefit. The need to ensure evidence in disciplinary proceedings meets the weight of an allegation was discussed at length by the Supreme Court in *Z v Dental Complaints Assessment Committee*. The majority of the Court held:

[103] ...Balance of probabilities still simply means more probable than not. Allowing the civil standard to be applied flexibly has not meant that the degree of probability required to meet this standard changes in serious cases. Rather, the civil standard is flexibly applied because it accommodates serious allegations through the natural tendency to require stronger evidence before being satisfied to the balance of probabilities standard.

...

[105] The natural tendency to require stronger evidence is not a legal proposition and should not be elevated into one. It simply reflects the reality of what judges do when considering the nature and quality of the evidence and deciding whether an issue has been proved to “the reasonable satisfaction of the tribunal.” A factual assessment has to be made in each case. That assessment has regard to the consequences of the facts to be proved. Proof to a

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<sup>33</sup> *Complaints Assessment Committee v Harmer* [2022] NZTDT 56, 4 December 2023.



tribunal's reasonable satisfaction will, however, never call for that degree of certainty which it is necessary to prove a matter in issue beyond reasonable doubt.<sup>34</sup>

42. Based on the evidence in the summary of facts and the limited additional material in the bundle, which does not include the audit reports, most source documentation or any affidavit evidence, we are not satisfied to the requisite standard that the serious allegation of misappropriation is proved.

### **Penalty**

43. Having found the charge of serious misconduct proved (on the basis of mismanagement of school finances and poor financial practices), a penalty may be imposed pursuant to s404 of the Act. The parties both submit that cancellation is appropriate.
44. The well-established principles of penalty in disciplinary proceedings are to protect the public, the maintenance of professional standards and of the public's confidence in the profession. We are required to impose the least restrictive penalty that is fair, reasonable and proportionate in the circumstances, being mindful of consistency with similar cases. Cancellation of registration is the most serious penalty available and should only be imposed where no other penalty is appropriate.<sup>35</sup> Where a respondent is no longer in the teaching profession, has no intention of returning and does not hold a practising certificate, the penalties available are limited.
45. Given the position taken by the parties, we do not need to set out our reasoning extensively. Because Mr Wallis is retired and surrendered his practising certificate, there was no prospect of suspension or the imposition of conditions, and we were not required to consider these penalties as we might otherwise have done, by addressing insight, and rehabilitative factors. In any event, given that the conduct occurred over a number of years, with the breach of trust we have described, we consider that cancellation is appropriate.
46. Mr Wallis' cooperation by attending the CAC's investigation meeting, reaching an agreed summary of facts and permitting this matter to proceed on the papers are mitigating factors. However, they do not detract from our penalty decision.

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<sup>34</sup> *Z v Dental Complaints Assessment Committee* SC 22/2007. [2008] NZSC 55 at [103] and 105], internal footnotes omitted.

<sup>35</sup> See also *Complaints Assessment Committee v Fuli-Makaua* NZTDT 2017/40 as to the matters to be considered in determining whether cancellation is appropriate.

## Non-Publication Orders

47. Mr Wallis does not seek orders for permanent non-publication of his name or identifying particulars. No application has been made by the school and this is not a case where individual learners might be identified or adversely affected by publication of the name of the respondent or the school. Interim non-publication orders were made ahead of the hearing, at the request of the parties.<sup>36</sup>

48. Although Mr Wallis does not seek suppression of his name, Mr Morgan KC submits that pursuant to s501(6)(b) of the Education and Training Act 2020 (to which s 405(6)(b) of the Act is identical) the Tribunal should not publish any of the material produced, being the charge, the summary of facts, the submissions and the bundle. It is submitted that it is unnecessary to publish this material because the media have the opportunity to publish the decision. The submission states:

[71.0] The reason such an order is sought is this issue of “misappropriation” referred to in the submissions...

[72.0] Mr Wallis’ apprehension is that any media reporting of the Amended Notice of Charge dated 1 May 2024 would focus on the particular of misappropriation, whether or not the Tribunal finds it necessary to determine the issue at all and what that determination is.<sup>37</sup>

49. The Tribunal may make an order for non-publication if it is of the opinion it is “proper” to do so. This is not a test that requires exceptional circumstances. We are required to balance the public interest in open justice, including open reporting and transparency in relation to the matters that come before the Tribunal, against the private interests of any person, in this case Mr Wallis. Any adverse consequences alleged to flow from publication of his name in relation to these proceedings must be likely to follow – that is, a real or appreciable risk of the harm asserted.

50. The nature of harm that Mr Wallis considers is likely to arise from publication of the documents is not articulated. No supporting affidavit has been filed. It is not difficult to

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<sup>36</sup> Minute dated 29 May 2024.

<sup>37</sup> Submissions of counsel on behalf of Mr Wallis, 17 May 2024.

imagine that Mr Wallis is concerned for reputational harm, and this can be inferred from the apprehension that publication will focus on the allegation of misappropriation. However, for an order to be “proper”, the alleged harm needs to reflect something more than the ordinary consequences that may arise from publicity of an adverse disciplinary finding. We have no evidence that the risk of harm asserted is anything more than the expected and understandable risk of embarrassment and upset caused by the misconduct for which Mr Wallis has expressed culpability and remorse, becoming public.

51. If the details of the charge and the summary of facts are omitted from publication, this will impact transparency and the ability to inform members of the profession of matters that constitute serious misconduct. The particulars of the charge are fundamental to understanding the allegations made, as is the summary of facts fundamental to understanding the basis for our findings.
52. Finally, we have not found the allegation of misappropriation proved. We would expect any publication about the decision to make this clear, if that allegation is reported.
53. For the above reasons, the application for non-publication of the documents before the Tribunal is declined.

### **Costs**

54. The Tribunal may order costs in favour of any party and in favour of the Tribunal.<sup>38</sup> The CAC seeks a contribution totalling 40% of its costs in relation to the CAC investigation meeting with Mr Wallis, and of external counsel, in accordance with the Practice Note<sup>39</sup>. The schedule of costs totals \$39,387.94, of which 40% is \$15,755.
55. Mr Morgan KC describes the CAC’s costs as “*extravagant*”, downplaying the complexity of the case, noting the ability to rely on pre-prepared audit reports, and that the matter proceeded on the papers. It is submitted that the length of time the proceedings have been on foot should not be reflected in costs, as some of the delay in 2022 and 2023 was due to counsel needing time to understand, with Mr Wallis, what the matter involved. Note is also made of the fact that Mr Wallis has repaid the sums involved, including sums received with Board approval. Counsel submits that costs should be “*very modest to reflect the*

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<sup>38</sup> S 501(1)(h) and (i) of the Education and Training Act 2020; s404(1)(h) and (i) of the Education Act 1989.

<sup>39</sup> Practice Note 1 costs dated April 2022.

*huge saving in costs Mr Wallis has enabled by accepting what he does over what is the receipt of \$9,234.00 to which he wasn't entitled, a substantial portion of which he always intended to repay being his wife's travel costs and incidental expenses.*"<sup>40</sup> The submission concludes:

Costs in the vicinity of what is now sought is utterly disproportionate to the wrong doing and the outcome.

56. The CAC submits in reply that the determinative question on quantum is whether the costs are "*reasonable*." Reliance is had on the recent exposition on costs in disciplinary proceedings in *Professional Conduct Committee v Brown*<sup>41</sup>, an appeal against a decision of the Health Practitioners Disciplinary Tribunal (HPDT). To summarise the principles confirmed in *Brown*, which specifically refers to the Practice Note in this Tribunal as well as the HPDT's similar guidance:

- a. the general principle is that costs in disciplinary proceedings should not be wholly borne by the profession, and people who come before disciplinary bodies must be expected to make a proper contribution to costs.
- b. costs are not intended to be part of a penalty, and as such, factors pleaded in mitigation on penalty are not relevant to costs.
- c. the usual starting point for a contribution is 50%.
- d. care needs to be taken to avoid "*double accounting*" as the level of cooperation will be reflected in the quantum of costs against which the 50% starting point is taken. If a practitioner has admitted a charge and fully cooperated in bringing the matter to an expedient end the appropriate reduction is in the region of 10% in most cases.
- e. costs are discretionary and not suited to a "*granular comparison*" between cases.<sup>42</sup>

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<sup>40</sup> Respondent's Submissions 17 May 2024 at [64].

<sup>41</sup> *Professional Conduct Committee v Brown* [2024] NZHC 990.

<sup>42</sup> n41, summarising the costs discussion at [86]-[94].

57. The CAC submits that proportionality with the sums involved in the charge is not a proper consideration for costs, and maintains that a 40% contribution is appropriate on the grounds that the costs incurred are reasonable:
- a. the costs reflect the CAC investigation meeting and external counsel only, excluding witness briefing.
  - b. the CAC was required to consider 1500 pages of evidence that formed the basis of the FIG audit report and to disclose those documents.
  - c. the CAC was required to analyse the source documents to ensure that there was sufficient evidence to support the charge, and, given the charge was to be defended, to identify relevant witnesses and exhibits.
  - d. the criticism of the time spent by the CAC ignores that Mr Wallis' counsel requested lengthy adjournments in order to understand the case.
  - e. a 10% reduction reflects Mr Wallis' cooperation.
58. We are not satisfied that there is a basis to reduce the contribution towards costs sought by the CAC. This matter has a long history, and notwithstanding it came to a hearing on the papers, we accept that the CAC was required to consider the evidential material as described and, for a significant period, to approach this matter as a defended hearing. The adjournment requests by the respondent support that the matter had some complexity. Inevitably when there are delays, there is some need for parties to refamiliarise themselves with the case. We also acknowledge the work required to prepare an agreed summary and detailed written submissions for the purposes of a hearing on the papers.
59. The submission that costs should be proportional to the monetary sums involved is problematic. Most cases before the Tribunal do not involve financial matters. It is more appropriate that such issues are addressed through liability and penalty findings.
60. Finally, Mr Wallis has not provided any evidence of his financial means and his ability to pay costs. The bare assertion that he is retired does not provide a means-based reason to reduce the costs ordered.
61. The Teaching Council is also entitled to receive costs. The manner in which this is calculated is very modest and does not reflect the actual costs incurred to bring the matter

to a hearing, deliberations and decision writing. A contribution in this manner is also aimed at ensuring that the burden of proceedings is not borne entirely by the profession. We will order Mr Wallis to pay a sum reflecting 40% of the 'fee' claimed on behalf of the Tribunal.

### **Orders**

62. Accordingly, having found the charge of serious misconduct proved and having dealt with the applications for costs and non-publication, the Tribunal makes the following orders:

- a. Mr Wallis is censured, pursuant to section 404(1)(b) of the Act.
- b. Mr Wallis' registration is cancelled pursuant to section 404(1)(g) of the Act.
- c. Mr Wallis is ordered to pay a contribution to the costs of the CAC, in accordance with s404(1)(h) of the Act, in the sum of \$15,755.00.
- d. Mr Wallis is to pay a contribution of the costs of the Tribunal pursuant to s404(1)(i) of the Act, in the sum of \$582.00.

63. The interim non-publication orders made on 29 May 2024 are to remain in place until the expiration of the appeal period, at which time they will lapse.



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**Catherine Garvey**  
**Deputy Chair**

Notice of Charge Particular and dates of conduct	Education Act 1989 provisions	Relevant Rules	Relevant Code
<b>1(a)</b> 31 December 2012 to 23 July 2018	Section 139AW (conduct up to 30 June 2015)  Section 404 (conduct on or after 1 July 2015)	New Zealand Teachers Council (Making Reports and Complaints) Rules 2004 (conduct up to 30 June 2016)  Teaching Council Rules 2016 (conduct on or after 1 July 2016)	Code of Ethics for Registered Teachers (conduct up to 29 June 2017)  Code of Professional Responsibility (conduct on or after 30 June 2017)
<b>1(b)</b> December 2016	Section 404	Teaching Council Rules 2016	Code of Ethics for Registered Teachers
<b>1(c)(i)</b> 6-19 July 2016	Section 404	Teaching Council Rules 2016	Code of Ethics for Registered Teachers
<b>1(c)(ii)</b> 28-30 September 2016	Section 404	Teaching Council Rules 2016	Code of Ethics for Registered Teachers
<b>1(c)(iii)</b> 10-21 April 2017	Section 404	Teaching Council Rules 2016	Code of Ethics for Registered Teachers
<b>1(d)</b> December 2014 and 14 June 2017	Section 139AW (conduct up to 30 June 2015)  Section 404 (conduct on or after 1 July 2015)	New Zealand Teachers Council (Making Reports and Complaints) Rules 2004 (conduct up to 30 June 2016)  Teaching Council Rules 2016 (conduct on or after 1 July 2016)	Code of Ethics for Registered Teachers