

**BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL**

**NZDT 2021/59**

**IN THE MATTER** disciplinary proceedings pursuant to part 32 of the  
Act

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

Referrer

**AND**

  
Respondent

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**TRIBUNAL DECISION**

**Dated: 25 November 2022**

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**TRIBUNAL:** Ian Murray, Simon Williams and Nikki Parsons

**HEARING:** Held on 18 November 2022 (on the papers)

**REPRESENTATION:** R W Belcher and A J Brosnan, Counsel for the CAC

M C Harris and A G F Bradley, for 

## Charge

1. The Complaints Assessment Committee (CAC) has referred a charge of misconduct to the Tribunal. The CAC charges that [REDACTED], registered teacher, of Whangarei, between 1 April 2019 and 23 August 2019, while working at Bright Stars:
  - a. Signed timesheets that contained inaccurate information about the number of hours she had worked; and/or
  - b. Used unprofessional language in text communication with another staff member.

## Evidence and hearing

2. Originally, the respondent faced a charge of serious misconduct, and the case was set down for a three-day in person hearing commencing 4 October 2022. Shortly before the hearing, the parties reached an agreement to progress the case without the need for an in-person hearing.
3. The parties agreed that the conduct amount to misconduct rather than serious misconduct, and an amended notice of charge and agreed summary of facts were prepared to recognise that. At a pre-hearing conference it was agreed that an on the papers hearing would be substituted.
4. When the Tribunal came to hear the case on the papers there still appeared to be a measure of disparity between the parties. [REDACTED] asked us to consider whether the conduct actually amounted to misconduct (notwithstanding her concession that it was). There was also significant amount of factual material provided that went beyond the ASF. That left the Tribunal in something of a quandary as to how to proceed with the case.
5. In the end, in accordance with *CAC v SineI*<sup>1</sup>. We adopted the same pragmatic approach where we considered the summary of facts at the liability stage but considered all of the material at the penalty stage in the same approach. This was the approach adopted in *SineI*:

The parties agreed that the matter could proceed "on the papers." In advance of the hearing, we received written submissions from Counsel for the CAC and the respondent. Subsequently, Counsel for the CAC objected to material filed, which it was submitted, was

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<sup>1</sup> *CAC v SineI* NZTDT 2019/6, 2 June 2020

contradictory to the agreed summary of facts. Two days before the hearing, a teleconference was convened to address this issue. The outcome of that teleconference was that it was confirmed that the Tribunal would only have regard to the agreed summary of facts, the respondent's reflective statement and the Ministry guidelines when considering whether the charge was made out.

If the Tribunal were to go on to consider the issue of penalty, it would consider the material filed on behalf of the respondent, but care would be taken to avoid any consideration of factual material that was contradictory to the agreed summary of facts.

6. Before the hearing the parties conferred and submitted and Agreed Summary of Facts (**ASF**), signed by the respondent and counsel for the CAC. The ASF is set out in full below:

### **Background**

1. The respondent, [REDACTED] [REDACTED] [REDACTED] is an early childhood education teacher who was registered on 21 April 2004.
2. [REDACTED] practising certificate expired on 28 August 2022.
3. [REDACTED] was employed as Centre Manager of the Bright Stars Early Childhood Education Centre ("the Centre") from 13 August 2017 until she resigned from the Centre on 28 August 2019.
4. [REDACTED] is currently unemployed.
5. [REDACTED] experience as a teacher has been primarily at four kindergartens and daycare centres in Auckland and Whangarei (including the Centre). She has often held leadership roles.

### **Signing Off Incorrect Time Sheet Information**

6. The Centre's Staff Handbook states that employees at the Centre are required to sign in and out of the Centre for their hours worked on a time sheet provided.
7. The Staff Handbook states the break times all employees are required to take based on the hours they work on a given day:

- a. Beyond 2 hours - 1 x 10-minute paid rest break;
  - b. Beyond 4 hours - 1 x 10-minute paid rest break and an unpaid 30-minute lunch break;
  - c. Beyond 6 hours - 2 x 10-minute paid rest breaks and an unpaid 30-minute lunch break;
  - d. Beyond 8 hours - 3 x 10-minute paid rest breaks and an unpaid 30-minute lunch break.
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8. The Staff Handbook states that absenteeism or lateness and absence from work during rostered hours are examples of misconduct. Falsification of timesheets is considered to be serious misconduct.
  9. The Centre generated timesheets approximately every fortnight for staff to review and confirm for accuracy. An example of a time sheet signed by [REDACTED] is shown below:

Bright Stars						
Staff Register						
Week 17/06/2019 to 30/06/2019						
Name	Date	Start	End	Hours	Break	Leave
[Redacted]	Cat) Fri 21/06/19	07:30 am	12:30 pm	5.00		Contact
		12:30 pm	01:00 pm		0.50	Lunch
		01:00 pm	04:00 pm	3.00		Contact
Week Total				37.25		
[Redacted]	Mon 24/06/19	08:30 am	10:30 am	2.00		Contact
		10:30 am	11:00 am		0.50	Lunch
		11:00 am	03:30 pm	4.50		Contact
Week Total						
[Redacted]	Tue 25/06/19	08:30 am	11:30 am	3.00		Contact
		11:30 am	12:00 pm		0.50	Lunch
		12:00 pm	03:30 pm	3.50		Contact
Week Total						
[Redacted]	Wed 26/06/19	08:30 am	12:30 pm	4.00		Contact
		12:30 pm	01:00 pm		0.50	Lunch
		01:00 pm	03:30 pm	2.50		Contact
Week Total						
[Redacted]	Thu 27/06/19	08:30 am	12:30 pm	4.00		Contact
		12:30 pm	01:00 pm		0.50	Lunch
		01:00 pm	03:30 pm	2.50		Contact
Week Total						
[Redacted]	Fri 28/06/19	08:30 am	12:30 pm	4.00		Contact
		12:30 pm	01:00 pm		0.50	Lunch
		01:00 pm	03:30 pm	2.50		Contact
Week Total				32.50		
Sign [Redacted]				69.75		

*Signing off incorrect information in timesheets*

10. Over the period from April to August 2019, [Redacted] signed off time sheets for herself which contained incorrect information.
11. [Redacted] did not review the timesheets correctly before signing them off:
  - a. **11 April 2019:** signed the timesheet as starting work at 7.30am, but arrived at the Centre at 10.00am;
  - b. **18 June 2019:** signed the timesheet as ending work at

- 3.30pm, but left the Centre for the day at 1.00pm;
- c. **21 June 2019:** signed the timesheet as ending work at 3.30pm, but left the Centre for the day at 11.00am;
  - d. **27 June 2019:** signed the timesheet as ending work at 3.30pm, but left the Centre for the day at 11.00am;
  - e. **1 July 2019:** signed the timesheet as working from 8.30am to 3.30pm, but was absent from the Centre from 10.00am until 12.45pm;
  - f. **9 July 2019:** signed the timesheet as ending work at 3.30pm, but left the Centre for the day at 12.30pm;
  - g. **17 July 2019:** signed the timesheet as working from 8.30am to 3.00pm, but left the Centre for an hour during the day;
  - h. **23 July 2019:** signed the timesheet as working from 8.30am to 3.30pm, but left the Centre at 9.00am and returned to the Centre at an unspecified later time;
  - i. **31 July 2019:** signed the timesheet as ending work at 3.30pm, but left the Centre for the day at 2.00pm;
  - j. **2 August 2019:** signed the timesheet as ending work at 4.00pm, but left the Centre for the day at 2.45pm;
  - k. **19 August 2019:** signed the timesheet as working from 8.30am to 3.30pm, but left the Centre for an appointment at 10.30pm and then left for the day at 2.40pm; and
  - l. **20 August 2019:** signed the timesheet as ending work at 3.30pm, but left the Centre for the day at 2.30pm.

### **Use of Unprofessional Language in Text Communication**

12. ██████████ used unprofessional language in text communication in a work context.
13. On 23 August 2019 ██████████ messaged another staff member, ██████████, about ensuring enough teachers were at the Centre that day. ██████████ was unable to attend the Centre because her daughter was ill. The relevant parts of their exchange are:

██████████: ██████████ [my daughter] is still sick. I'm going to have to stay home again...

██████████: OK, what's happening with staff today, I only have me mel stevie

██████████: Can you ask cherie?

██████████: Shiree cant work today

██████████: Crap

Okay I've messaged Ana lura and asked if she can cover lunches Fuck

How many children do you think you will get today?

Can you ask Trisha to message Renee and see if she can come into work today

██████████: Trishee asked renee, she cant. Is karina in today

██████████: What about Helen?

██████████: Helen cant she has appointments

██████████: This is what

pisses me off about

fridays No one works

Well. I literally cant come in

Crap what are we going to do?

█: I dont know.hopefully Karina is in today

### **Teacher's Response**

#### *Signing Off Incorrect Time Sheet Information*

14. During the course of the investigation, █ gave the following responses to the allegations:

- a. She said she had done nothing wrong.
- b. She said she may have missed timesheets and that she may have walked out offsite.
- c. In response to the timesheet allegations, she said that they were completed by another staff member and that she had not done them for a while.
- d. She said that, in general, "I filled some of the time sheets and Karina entered some of them"; that "it was a mix".
- e. She said there were not enough relievers at the Centre and that impacted on her ability to do her role.
- f. She explained that she had been the victim of domestic violence during the period of the allegations and had been sleeping in her vehicle at times. She arranged for the relevant Police summaries to be provided directly to the investigator. She said that she had been trying to do her best for the children at the Centre as well as for her own children.

#### *Use of Unprofessional Language in Text Communication*

15. █ stated that the text messages sent to █ were sent outside of the workplace and work time and therefore were not a work issue. She also said



that [REDACTED] was a friend and that she was just talking to her as a friend.

16. She now accepts that her use of the "f" -word in the text message to [REDACTED] was unprofessional. She says she used the word to vent her frustration at staffing levels and that it was not directed at [REDACTED].

7. We must be satisfied on the balance of probabilities that the CAC has proved the particulars of the charge. In this case, the admissions in the summary of facts provide an adequate basis to establish the particulars of the charge. Accordingly, we find that the particulars are established. That does not, of itself, mean we have found the conduct amounts to misconduct. To decide that question, we need to assess this established conduct against the criteria for misconduct or conduct otherwise entitling the Tribunal to exercise its powers.

### **Misconduct and serious misconduct**

8. In this case, we are asked to consider misconduct rather than serious misconduct. Unlike serious misconduct, misconduct is not defined by statute. However, we are guided by earlier decisions of the Tribunal which have concluded that to find misconduct we should consider whether the criteria in s 378(1)(a) but not the criteria in s 378(1)(b) are established, or in other words the statutory criteria for misconduct are made out but none of the reporting requirements are established.<sup>2</sup> We have adopted that test for misconduct.
9. It goes without saying that the criteria for serious misconduct are relevant because they inform our decision about whether this meets the criteria in s 378(1)(a). Section 378 of the Act provides:

***serious misconduct means conduct by a teacher—***

***(a) that—***

***(i) adversely affects, or is likely to adversely affect, the well-being or learning of 1 or more students; or***

***(ii) reflects adversely on the teacher's fitness to be a teacher; or***

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<sup>2</sup> See *Evans v NZTDT* (2020) NZDC 20062 at (40) and *Teacher Y v Education Council of Aotearoa New Zealand* (2018) NZDC 3141 at (64)

- (iii) may bring the teaching profession into disrepute; and
- (b) that is of a character or severity that meets the Education Council's criteria for reporting serious misconduct.

10. So, against that background, we turn to consider the submissions of the parties in this case.

*CAC submissions*

11. The CAC submitted that this was misconduct rather than serious misconduct. The CAC conceded that this was not deliberately dishonesty, and rather was done negligently at a time when [REDACTED] had significant personal difficulties. The CAC submitted that the time sheet mistakes both reflected adversely on [REDACTED] fitness to be a teacher and was likely to bring the teaching profession into disrepute.
12. The CAC argued that the behaviour failed to meet the high standards of the Code of Conduct for Teachers and noted that the Centre operated in a high trust model, and it was therefore the responsibility of [REDACTED] to show the appropriate professionalism, care and integrity when confirming her hours of work. They also noted that the conduct had potential consequences for teacher/student ratios which could have impacted on the Centre's compliance with its legal obligations. They noted that [REDACTED] should have had a good knowledge of the staff handbook and demonstrated better professional conduct.
13. With regard to bringing the teaching profession into disrepute, the CAC reminded us of the test in *Collie v The Nursing Council of New Zealand* and submitted that members of the public would consider that the reputation of the teaching profession had been lowered by [REDACTED] failure to ensure her timesheets were correct and that the use of the unprofessional language also lowered the profession in the eyes of the public.
14. Turning to the second particular, the CAC submitted that it was important for teachers to maintain professional standards and the use of the unprofessional language with a colleague adversely reflected on her fitness to be a teacher. The CAC submitted that teachers are expected to treat colleagues with respect in their professional relationships including communications such as this.
15. The CAC also argued that the reputation of the teaching profession had been lowered by [REDACTED] use of the unprofessional language.

*Respondent submissions.*

16. In response, the respondent invited the Tribunal to conclude that it might not be misconduct and, if it was misconduct, it was only by the barest of margins. This was despite having conceded that the behaviour was misconduct before the hearing.
17. With regard to the first particular, the respondent reminded us of [REDACTED] difficult personal circumstances at the time of the timesheets being entered incorrectly and invited us to conclude that the conduct was not misconduct.
18. The respondent argued the behaviour was consistent with what might be expected from a teacher who acts in compliance with the standards by those who are fit to teach and that not every divergence from the recognised standards with adversely reflect on the teacher's fitness.
19. With regard to the allegation, she brought the teaching profession into disrepute, the respondent reminded us of the high standard to be met in order for that to be established.
20. The respondent noted that the respondent's workload had been significantly increased by the resignation of the Centre Administrator in 2017. The respondent submitted that her conduct was not likely to bring the teaching profession into disrepute. The respondent characterised the conduct in this case as isolated mistakes which were out of character from the teacher who had been for 20 years in the profession.
21. In relation to the second particular, the respondent notes that her choice of words was a lack of judgement but that that occurred under increasingly difficult circumstances when she was frustrated and did not amount to misconduct.
22. The respondent pointed to the CAC's awareness of the family violence, but still decided to refer the matter to the Tribunal. The respondent was critical of the CAC in doing that.

### **Analysis**

23. Our decision about whether this amounts to misconduct is guided by the criteria in s 378(1)(a). We note from the outset that we do not consider that the text message exchange, while something that should not have occurred, amounted to misconduct. Not all mistakes amount to misconduct and in this case, and we considered it was significant that the use of the swear words were not directed at the recipient and there was nothing aggressive or intimidatory about the words. They were simply expressions of frustration which should not have occurred but did not reach the standard to amount to misconduct. Her text message did not adversely reflect on [REDACTED] fitness to be a teacher

and did not bring the teaching profession into disrepute.

24. Turning to the erroneous timesheets, we do not consider that those engage the disrepute criteria because they, as the CAC accept, were not done dishonestly and were simple, if moderately serious, errors of judgement by a teacher with an otherwise unblemished record.
25. The test for deciding whether a teacher's actions are likely to bring the teaching profession into disrepute is set out by the Court in *Collie v Nursing Council of New Zealand*.<sup>3</sup> It is an objective test and requires consideration of whether reasonable members of the public informed of the facts and circumstances, could reasonably conclude that the reputation and good standing of the profession is lowered by the respondent's actions.
26. Members of the public properly appraised of the circumstances of this conduct would not consider that the profession as a whole had been diminished.
27. So, turning to the effect of the incorrect timesheets on the respondent's fitness to be a teacher, we conclude that this criterion was made out. We note that the timesheets were significantly at odds with the respondent's actual work hours over an extended period of time.
28. While we consider that the misconduct was not at the highest end of seriousness, we do note the effect on the Centre could have been significant because the respondent's absence from the Centre for extended periods of time could have had implications on the staff to child ratio, and therefore had implications for the Centre's operating licence.
29. While we accept the CAC's justified concession that the behaviour was not done dishonestly, the degree of carelessness involved in not checking her timesheets over that period of time is moderately high.
30. We are cognisant of the reasons why this occurred and the respondent's very difficult personal circumstances at the time, but nonetheless we considered her actions reflected adversely on her fitness to be a teacher.

### **Penalty**

31. Following a finding of misconduct, we need to consider the appropriate penalty. The purpose of imposing penalties in the professional disciplinary context has considered by

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<sup>3</sup> *Collie v Nursing Council of New Zealand* [2001] NZAR 74.

the Tribunal previously. In *CAC v McMillan*,<sup>4</sup> we summarised the role of disciplinary proceedings against teachers as:

*... 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.*

32. Our powers on a finding of serious misconduct (or an adverse finding) are contained in section 404 of the Act which provides:

#### **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:*
  - (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*

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<sup>4</sup> *CAC v McMillan* NZTDT 2016/52, 23 January 2017, paragraph 23.

33. The CAC by acknowledging the relatively low-level conduct of the finding of misconduct nonetheless sought censure and a condition to advise employers of the Tribunal's decision. The respondent argued that no penalty was necessary.
34. In determining the appropriate penalty, we obviously considered the fact that we had found misconduct rather than serious misconduct and the CAC's concession that this was not deliberate dishonestly by [REDACTED]
35. In these circumstances, we do not consider that it is appropriate to impose a censure. In our view censure is reserved for more serious conduct which deserves marking out as worthy of the Tribunal's disapproval. Given our findings of the relatively modest seriousness of this misconduct, we do not consider it deserves such disapproval.
36. We carefully considered whether this was behaviour that required notification to future employers so as to ensure that they were fully apprised of [REDACTED] character. Ultimately, we concluded that it was not. Our basis for this was that it was accepted it was not deliberate dishonesty and because of [REDACTED] personal circumstances which are significantly mitigating. In the end, we considered that a finding of misconduct on its own was sufficient to marking of the behaviour and no further penalty was necessary.

### **Costs**

37. That brings us to the issue of costs. Ordinarily where there is a finding of serious misconduct, we would order the payment of costs which would be in the region of 40% of the actual costs. However, in this case, the CAC do not seek costs because ultimately there was a finding of misconduct rather than serious misconduct and if misconduct had been dealt with at the CAC level (as it could have been) then no costs would have been payable. [REDACTED] endorses that approach.
38. We agree that this is an appropriate case to depart from the usual approach to the ordering of costs when some form of adverse finding has been made against the teacher. So, we do not order the payment of a portion of the CAC's costs. We could have still ordered the payment of the Tribunal's own costs, but we will not do so for the same reasons as why we did not order payment of a portion of the CAC's costs. We do not see costs given the misconduct finding and the fact that [REDACTED] is presently not working, would be appropriate or fair.

## **Name suppression**

39. We can deal with name suppression relatively briefly. In this case, [REDACTED] seeks name suppression on the basis of her personal circumstances and in particular the serious domestic violence that she was suffering at the time of the misconduct. The CAC do not oppose name suppression and we agree such a concession is a responsible one.
40. In this case, we do note the presumption of transparency and open justice applying to Tribunal decisions in the same way as decisions of the Courts and to other Tribunals. However, we ultimately concluded that name suppression was appropriate and proper in this case, for essentially two reasons:
- (a) First, [REDACTED] personal circumstances and the serious domestic violence that she was subjected to at the time of the misconduct. That seriously mitigates her behaviour and also justifies her not having her name published, given those circumstances.
  - (b) Second, that if the case had remained in the CAC process and been dealt with there, then [REDACTED]' name would not have been published.
41. So, for those reasons we order suppression of [REDACTED] name and all of the identifying details under s 405(6) of the Education Act 1989. We also suppress the name of [REDACTED] as publishing her name is also not necessary in the public interest.

## **Some concluding comments**

42. Before we leave this decision, we wish to make a couple of observations: first, this is exactly the type of case which could have been dealt with much more speedily and efficiently if [REDACTED] had properly engaged with the process at an early stage. We acknowledge her difficult personal circumstances, but we do implore teachers to not bury their head in the sand when this type of process begins because inevitably that will delay and disrupt the process, often with negative consequences for that teacher.
43. Secondly, we request that parties focus their energies on the matters that will assist the Tribunal to make the decisions that it is required to make in order to determine the case. Here, there were two sets of submissions and two sets of reply submissions filed by each party. There was a considerable amount of material provided to us that we do not consider assisted us in determining the case. We were not assisted by detailed analysis of what

had or had not gone on in the CAC process and what the CAC knew or did not know at during that investigation. We would have benefited from streamlining of the material provided to us focusing on the key issues and not the focus on what we considered peripheral and unhelpful matters.

A handwritten signature in blue ink, consisting of several loops and a long horizontal stroke at the end.

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Ian Murray  
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).