EDUCATION COUNCIL
NEW ZEALAND | Matatū Aotearoa

Complaints Assessment Committee (CAC) v Blumenthal:

New Zealand Disciplinary Decision 2017-38

Sally Blumenthal was an early childhood teacher who received five convictions in 2016 for benefit fraud offending, when she did not advise Ministry of Social Development that she was working and earning an income. In breach of s 397 of the Education Act, Ms Blumenthal did not report her convictions.

The Council was advised of these convictions in 2017 when a prospective employer became aware of them and informed the Council. Following an investigation, the Education Council's Complaints Assessment Committee (CAC) referred the convictions to the New Zealand Teachers Disciplinary Tribunal (the Tribunal).

Ms Blumenthal did not attend the Tribunal hearing or participate in the proceedings. The Tribunal noted that Ms Blumenthal had a significant history of similar criminal offending which had been covered by the clean slate scheme. The Tribunal referred to its mandate of protecting the public by providing a safe learning environment for students and noted that practitioners have an obligation to both teach and model positive values for their students. The Tribunal stated, "defrauding the State, and thus the community, is the antithesis of the standard of honesty expected of teachers".

The Tribunal made a finding of serious misconduct.

Given Ms Blumenthal's previous convictions, her lack of engagement, and her failure to report, the Tribunal said, "we simply cannot be assured that the respondent is a fit and proper person to be entrusted with educational responsibility towards children."

Accordingly, the Tribunal censured Ms Blumenthal, cancelled her registration, and annotated the register.

NZTDT 2017/38

BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

UNDER	the Education Act 1989
IN THE MATTER	of a referral of conviction by the Complaints Assessment Committee to the New Zealand Teachers Disciplinary Tribunal
BETWEEN	**THE COMPLAINTS ASSESSMENT COMMITTEE** Referrer
AND	**SALLY JACK BLUMENTHAL** Respondent

DECISION OF TRIBUNAL

Tribunal:	Nicholas Chisnall (Deputy Chair), Susan Ngarimu and Tangi Utikere
Hearing:	On the papers
Decision:	27 April 2018
Counsel:	A Lewis for the referrer No appearance for the respondent

Introduction

[1] The respondent, Sally Blumenthal, was an early childhood teacher. On 2 May 2016, Ms Blumenthal was convicted in the Rotorua District Court on two charges of wilful omission in contravention of section 127 of the Social Securities Act 1964 and three against the same section of making a false statement. Each of the five charges carries a maximum penalty of 12 months' imprisonment and/or a fine not exceeding $5,000. The respondent was sentenced to five months' community detention and 80 hours' community work and the Judge issued her with a warning that imprisonment is a likely consequence should she reoffend.[1]

[2] The respondent failed to meet her obligation under s 397 of the Education Act 1989 (the Education Act) to self-report her convictions. Instead, the convictions were brought to the Education Council's attention in May 2017 by a prospective employer of the respondent. The Complaints Assessment Committee (the CAC) resolved to refer the convictions to the Tribunal under s 401 of 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 enabling us to exercise our disciplinary powers under s 404 of the Education Act.

The evidence produced before the Tribunal

[3] The respondent did not participate in this proceeding, which obliged the CAC to proceed by way of formal proof.

How the respondent's 2016 convictions were made known to the Education Council

[4] We were provided with the affidavit of Alan Dodd, who is a senior investigator at the Education Council. He explained that on 2 May 2017 the manager of an early childhood centre telephoned the Council to advise that Ms Blumenthal had applied for a teaching position. A police vet had disclosed the 2016 convictions.

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[1] *Ministry of Social Development v Blumenthal* [2017] NZDC 26979, Judge Roberts.

[5] The Council contacted the Rotorua District Court the same day. The Ministry of Justice subsequently provided the Council with a certified copy of Ms Blumenthal's 2016 convictions. The record discloses that:

a) The respondent, between 3 July 2014 and 28 December 2014, wilfully omitted to tell the Ministry of Social Development that she received income from Best Educare Limited (Educare);

b) Between 12 January 2015 and 28 June 2015, the respondent wilfully omitted to tell the Ministry that she received income from Educare;

c) On 13 October 2014, the respondent made a false statement on a temporary additional support reapplication form that she had not received income from any source;

d) On 30 June 2015, the respondent made a statement on a reapplication form that she had not received income during the previous 52 weeks; and

e) On 12 January 2015, the respondent made a statement on a temporary additional support reapplication form that she had not received income from any other source.

[6] The Council sought a copy of his Honour Judge Roberts' sentencing notes, which were provided to the Tribunal. The notes confirm that the respondent pleaded guilty to the charges. In addition, the Ministry provided the summary of facts upon which the respondent was sentenced and the respondent's complete criminal and traffic conviction history.

The respondent's previous convictions

[7] The respondent has a significant list of previous convictions for dishonesty offending. By the Tribunal's calculation, Ms Blumenthal was convicted of 11 dishonesty offences between 1989 and 1998. By dint of the Criminal Records (Clean Slate) Act 2004, the respondent was not obliged to

bring these convictions to the attention of the Council when she applied for provisional registration in February 2011.[2]

The Council's communications with the respondent

[8] On 24 May 2017, the Council sent an email to Ms Blumenthal advising her of the commencement of an investigation into her 2016 convictions. Ms Blumenthal responded four days later requested a further copy of the explanatory letter that had been attached to the CAC's email. On 8 June 2017, Ms Blumenthal sent an email in which she said:

> Hi what am I to do? These charges I got was from years ago when I was on a benefit and I worked on call but didnt declare it to winz as at that time I thought I could earn a certain amount without declareing it. I am very upset as I feel it has ruined my carear. I didnt realise it was fraud. My ex husband now works for winz and it was him that brought this to winz attention. I have paid the money back and did the community work and home detention so I have been punished for my wrong doings.
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> [The email is set out verbatim]

[9] The Council subsequently requested that the respondent provide a more detailed explanation of the circumstances surrounding her convictions. On 4 and 6 July 2017, Ms Blumenthal was provided with the documents the Council obtained from the Ministry of Justice. Ms Blumenthal was asked to provide a response to the Council on or before 20 July 2017. This deadline expired without a reply being received. The Council made further enquiries of the respondent on 21 and 25 July 2017. On 1 August 2017, Ms Blumenthal replied by email to the Council stating that she had been unwell for many weeks. The Council extended the deadline for a response to 7 August 2017. No explanation was received from Ms Blumenthal.

[10] On 29 September 2017, a senior investigator at the Council wrote to Ms Blumenthal providing her with a further opportunity to explain her position by 9 November 2017. At that point, the CAC panel was scheduled to meet on 16 November 2017. No reply was received. On 7 November, the Council's lead investigator telephoned Ms Blumenthal and left a message for

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[2] At this point, the respondent was deemed to have no criminal record because it had been more than seven years since her last conviction. The respondent was eligible under the Act to say that she had no previous convictions because she was not sentenced to a term of imprisonment for her previous offences and none of her convictions were for a "specified offence".

her reminding her of the 9 November deadline. He called again on 9 November 2017 and sent a follow-up email requesting that the respondent contact him urgently. Ms Blumenthal emailed the Council later that day and requested that the investigator call her. He did so on 14 November and then again on 15 November. Ms Blumenthal neither answered nor returned these calls.

[11] On 8 December 2017, a solicitor at the Council sent an email to Ms Blumenthal putting her on notice that her convictions were to be referred to the Tribunal. The CAC's notice of charge dated 8 December was attached to the email. Ms Blumenthal did not respond.

The Judge's sentencing decision

[12] Judge Roberts stated that the respondent had been granted a domestic purposes benefit that took effect in September 2006. In February 2008, Ms Blumenthal transferred to the invalids' benefit, which she was paid until 28 March 2011. At this point, the respondent commenced work as an early childhood teacher.

[13] We interpolate that Ms Blumenthal graduated with a diploma of teaching in 2010 and obtained provisional registration in February 2011. She worked at an early childhood centre between January 2011 and March 2013. Her registration was renewed on 3 April 2014 and she held a provisional practising certificate from that date until it expired on 21 March 2017. The respondent is not currently employed as a teacher.

[14] In June 2014, the respondent applied for a job seeker benefit, which was granted on 3 July 2014. Ms Blumenthal provided the standard acknowledgement that she would alert the Ministry if there was a change in circumstances that affected her entitlement. Information was received that the respondent had been working and received income she had not declared. The total overpayment was $7,175.43.

[15] The Judge concluded that the respondent's convictions in May 1997 and July 1998 "can clearly be identified as previous instances of benefit fraud", and that Ms Blumenthal has a history of "general dishonesty"; albeit there had not been any convictions for 17 years. His Honour concluded that a sentence "in the realm of 7 to 8 months imprisonment might otherwise be appropriate", but ultimately imposed combined sentences of community

detention and community work. However, Judge Roberts concluded by telling the respondent:

> I am going to issue you with a final warning. The final warning will serve as an indicator to any Judge dealing with you subsequently, particularly in relation to offending of this type, that today I told you that you would go to jail if you are convicted for like-offending in future.

The relevant law

[16] This case involves the referral to the Tribunal of the fact the respondent has been convicted of criminal offences. The test that therefore applies is whether the circumstances of the behaviour that resulted in the conviction reflects adversely on the fitness of the respondent to practice as a teacher.[3] 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.

[17] 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.[4] 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.

[18] Where a practitioner has been convicted of a criminal offence, it is not the purpose of a professional disciplinary proceeding to punish the teacher a second time for the same offence. Rather, as we emphasised in *CAC v McMillan*,[5] 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.

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

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

[19] We are satisfied that the respondent was provided with ample notice of this disciplinary proceeding and elected not to engage notwithstanding the recurring opportunities provided by the Council to do so. Further, we are satisfied, based on the information contained in Mr Dodd's affidavit, that Ms Blumenthal:

a) Was convicted on 2 May 2016 for five offences against the Social Security Act and sentenced to five months' community detention and 80 hours of community work;

b) Failed to report her convictions in accordance with the obligation contained in s 397 of the Education Act; and

c) Has previous convictions for dishonesty offending.

[20] The burden rests on the CAC to prove, on the balance of probabilities, that an adverse finding is required. We must keep in mind the consequences for the respondent that will result from an adverse conclusion regarding her fitness to teach.

[21] As we have said, we are not required to make a finding that the respondent's 2016 offences constitute serious misconduct before we can make an adverse finding. However, using the applicable limbs of the definition of serious misconduct in the Education Act as a reference point, we accept that the respondent's conduct adversely reflects on her fitness to teach. Practitioners have an obligation to both teach and model positive values for their students.[6] Defrauding the State, and thus the community, is the antithesis of the standard of honesty expected of teachers. Also, 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.[7]

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[6] At the time the respondent offended, this obligation was contained in clause 3(c) of the Code of Ethics for Registered Teachers.
[7] *Collie v Nursing Council of New Zealand* [2001] NZAR 74, at [28].

[22] We repeat what we said in *CAC v O'Sullivan*:[8]

> 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].

Penalty

[23] 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.[9] 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.[10]

[24] 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, we recently undertook a review of previous decisions of the Tribunal concerning fraud convictions in *CAC v Lyndon*.[11] We have considered our earlier decisions but acknowledge the inevitable factual distinctions between those cases and the present.

[25] What the past cases tend to show is that whether we must cancel a teacher's registration to discharge our disciplinary obligations turns on the practitioner's rehabilitative prospects and the degree of insight into the causes of the offending he or she exhibits. Further, the genesis of the fraud is often relevant, as it will demonstrate what motivated the offending, and what degree of risk of repetition there is.[12] Unfortunately, we have no way to gauge these factors given the respondent's decision to absent herself from this disciplinary proceeding. However, we do not accept the respondent's brief explanation provided by email to the Council on 8 June 2017 that she

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[8] *CAC v O'Sullivan* NZTDT 2015/51, at [20].
[9] The primary considerations regarding penalty were discussed in *CAC v McMillan* NZTDT 2016/52.
[10] See *Roberts v Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354, at [51].
[11] *CAC v Lyndon* NZTDT 2016/61, at [26].
[12] See NZTDT 2013/9, at 6.

did not realise that she had committed fraud. This is inconsistent with her guilty pleas to the five charges.

[26] Considered in isolation, the offending underpinning the respondent's 2016 convictions is not necessarily a clear-cut example of the worst kind of misconduct for which the maximum penalty of cancellation is reserved.[13] However, while we accept that the respondent's fraud netted a relatively modest amount, what concerns us, as it did the District Court Judge, are Ms Blumenthal's previous convictions for similar acts of dishonesty. While the respondent's pre-2016 convictions are relatively historic, we are satisfied that she has a propensity to act dishonestly. It is also a significant aggravating feature that the respondent failed to meet her duty of candour owed to the Council by disclosing her convictions.

[27] The CAC submits that nothing short of cancellation of the respondent's registration will meet the obligations owed to the public and the profession. We agree. Clearly, the respondent's previous convictions did not deter her. In conclusion, we are satisfied that cancellation of Ms Blumenthal's registration to teach is the least restrictive outcome that can reasonably be imposed in the circumstances. We simply cannot be assured that the respondent is a fit and proper person to be entrusted with educational responsibility towards children.

Costs

[28] Section 404(2) of the Education Act provides that a cost order cannot be made where, as here, the hearing arises out of a referral of conviction under s 401.

Orders

[29] 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); and

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[13] 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].

c) The register is annotated under 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).