

BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

NZTDT 2019/4

IN THE MATTER of the Education Act 1989

AND

IN THE MATTER of a charge referred by the Complaints Assessment
Committee to the New Zealand Teachers
Disciplinary Tribunal

BETWEEN **COMPLAINTS ASSESSMENT COMMITTEE**

AND **VIRGINIA JANE EMMA PACE**
Respondent

DECISION OF THE TRIBUNAL

2 December 2019

HEARING: Held on 7 May 2019 (on the papers)

TRIBUNAL: Rachel Mullins (Deputy Chair)
Kiri Turketo and Stuart King (members)

REPRESENTATION: Meredith Connell for the Complaints Assessment Committee (E Mok)
Ms Pace in person

Hei timatanga kōrero – Introduction

1. The Complaints Assessment Committee ("CAC") has referred to the Tribunal the Respondent's conviction on two representative charges of aiding and abetting two companies to apply amounts of tax for purposes other than in payment to the Commissioner of Inland Revenue ("the Commissioner").
2. These charges are offences under sections 143A(1)(d) and 148 Tax Administration Act 1994 and carry a maximum penalty of five years' imprisonment and/or a fine not exceeding \$50,000.
3. On 9 April 2018 the Respondent was sentenced in the Hamilton District Court to six months' home detention with six months' post detention conditions.
4. The matter was heard on the papers.

Ko te hātepe ture o tono nei – Procedural History

5. We received submissions from the CAC and an Agreed Summary of Facts ("ASoF"). The Respondent provided letters setting out reasons why she felt she should maintain her teacher's registration. Accompanying the teacher's letter were a letter of support from the Director of Learning Links Child Care Limited, Hamilton¹, as well as a letter from the social worker from Child, Youth and Family (as it then was) dated 31 October 2016 regarding the Respondent being an approved caregiver of children in state care. This letter also confirmed the Respondent and her partner's custody and guardianship of a young child.
6. A Pre-Hearing Conference ("PHC") was held on 26 March 2019 where timetabling directions were made. The CAC filed submissions on 9 April 2019 including a signed ASoF and a copy of the Amended Crown Summary of Facts ("ACSoF") that was before the District Court. The CAC also filed a copy of Judge K B F Saunders Notes on Sentencing ("sentencing decision") dated 9 April 2018.² The Respondent filed her letters on 21 April 2019.

¹ This is dated 16 April 2019. However, there is a note that states it has been "redated with Jo's permission". It is not known when this letter was first written. It makes no reference to the respondent's offending, so the Tribunal is not aware whether the writer is aware of the respondent's conviction and/or the disciplinary process.

² *R v Virginia Jane Emma Pace* [2018] NZDC 6704 [9 April 2018]

Kōrero Taunaki - Evidence

Agreed Summary of Facts

7. As noted above, the evidence submitted by the CAC was the ASoF which included the ACSoF and the sentencing decision.
8. The ASoF is set out in full below.
 1. *At all material times Virginia Jane Emma Pace (**Respondent**) was a registered teacher. On 31 August 2017, the Respondent was convicted in the Hamilton District Court after pleading guilty to two representative charges of aiding and abetting two companies to apply amounts of tax for purposes other than in payment to the Commissioner of Inland Revenue. These charges are offences under sections 134A, 1D and 148 of the Tax Administration Act 1994, and carry a maximum penalty of five years' imprisonment and/or a fine not exceeding \$50,000.*
 2. *The offending related to the Respondent's conduct in relation to two companies, Action Woman Limited and Home Based Kids Limited, of which she was a Director and shareholder. As recorded in the Amended Crown Summary of Facts, the offending spanned a total period of 30 months and involved liability to the Commissioner of Inland Revenue of over \$250,000. On 9 April 2018, the Respondent was sentenced by Judge Saunders in the Hamilton District Court to six months' home detention, and six months' post detention conditions. The Judge had regard to the fact that the offending had involved personal benefit to the Respondent, and that the Respondent had been "in frequent contact with the Inland Revenue Department about non-compliance" during the period of the offending. The Judge also took into account that the Respondent had no previous convictions and had pleaded guilty to the offending. The Judge ordered that the Respondent pay reparation of \$154,459.54 to the Commissioner of Inland Revenue.*
 5. *A copy of the Amended Crown Summary of Facts before the Court is attached at **Tab 1**. A copy of the Judge's sentencing notes are attached at **Tab 2**.*

Teacher's Response

6. *The Respondent reported that she was facing criminal charges to the Education Council (as it then was) at an early stage in the criminal proceedings.*
7. *In a letter to the Council dated 25 August 2017, the Respondent stated the following regarding the offending:*

We were an extremely successful early childhood service with very rapid growth...growth worked against us and we were always catching up financially...at the same time, we had an accountant who didn't seem particularly interested in working for us...the accountant was meant to be our tax agent but at no time did he do our monthly returns for PAYE or GST...

The other conviction came about as there was a long period of time where, while I furnished PAYE returns, I didn't have the money to pay them...I made several approaches to the IRD...to make an arrangement to pay the overdue amount but was turned down on every occasion...

I understand that as a Director of my company, I did not meet my tax obligations and I regret not making the necessary follow ups with the accountant. I may be a great teacher with a proven reputation but I am not a business owner – I need to be held accountable...I really just want to be teaching teachers and can't wait to put this behind me...

Ngā Kōrero a te Kōmiti – CAC Submissions

Adverse finding

9. The CAC submits that the Respondent's conduct as outlined in the ASoF amounts to serious misconduct pursuant to section 378 Education Act 1989 ("the Act"). The CAC submits that the Respondent's conduct reflects adversely on the Respondent's fitness to be a teacher and that the Respondent's offending brings the profession into disrepute.
10. The CAC alleges that the Respondent's offending also meets the criteria for reporting serious misconduct under Rule 9 of the Teaching Council Rules 2016 (as drafted prior to the May 2018 amendments) ("the Rules"). In particular the respondent's offending was

an act that could be the subject of a prosecution for an offence punishable by imprisonment for a term of three months or more.³

11. Further the CAC submits that the respondent's conduct was such that it brings or is likely to bring the discredit to the teaching profession.⁴

Penalty

12. As a starting point the CAC submits that the seriousness of the offence justifies a penalty of cancellation of the Respondent's registration. The main aggravating factor being the prolonged nature of the offending over a period of 30 months during which the respondent was often in contact with the Inland Revenue Department ("IRD") about her obligations to pay tax and the consequences of non-compliance. Further, the respondent was aware of her obligations to pay tax during this period yet did not do so. The CAC submits a further aggravating factor was the significant amount of money owed, with the overall liability to the Commissioner of Inland Revenue being over \$250,000.00.
13. In addition, the CAC submits that during the period of offending the respondent used company funds for personal expenditure. The CAC refers to the sentencing decision states that the "*Respondent could have paid the tax owing but chose not to and exhibited all the hallmarks of someone using money for personal advantage*".⁵
14. In terms of mitigating factors, the Committee acknowledges that the respondent pleaded guilty to the criminal charges and expressed remorse for her offending. It is understood by the CAC that the Respondent has taken steps to comply with the reparation order imposed by the Court. Further, the respondent self-reported to the Teaching Council at an early stage that she was facing criminal charges and has fully cooperated during the disciplinary proceedings. It is also accepted by the CAC that the respondent has no prior disciplinary history or any prior convictions.

³ Rule 9(1)(n). An offence under s 143A(1)(d) Tax Administration Act 1994 carries a maximum penalty of five years' imprisonment or a fine not exceeding \$50,000.

⁴ Rule 9(1)(o)

⁵ Above n 2 at [7]

Ngā kōrero a te Kaiurupare – Respondent's submissions

15. In response, the Respondent refers to an otherwise unblemished teaching record. She completed her teacher training in 1987 and apart from three short breaks during which time she had her children, she has taught consistently in that time.
16. She refers to her commitment to continually upskill herself and as recently as 2018 completed her Adult Tertiary Teaching Certificate and is currently working towards a Certificate in Adult Literacy and Numeracy. The respondent is also studying at Te Wananga o Aotearoa in the He Papa Tikanga programme.
17. The respondent acknowledges that her offending was inexcusable but said that she did not have adequate systems in place (including alleged negligent professional advice) to ensure that tax was paid as it should be. She submits that she has suffered tremendously as a result of what has happened but accepts responsibility for the offending.
18. The respondent notes that while running a business was not something she did well, she believes that she is an excellent teacher and is committed to the teaching profession.
19. In support, the respondent provides a redated letter from Joanna Purdy, Director at Learning Links Child Care Limited in Hamilton which talks of the respondent's good character and work ethic.⁶ There is a further letter from a social worker from Child, Youth and Family (as it then was) dated 31 October 2016 referring to the respondent's role as a respite and transitional carer for children in State care. She has also been granted custody and guardianship of a young child.

Te Ture - The Law

20. In cases of referral of convictions, the Tribunal needs to reach an adverse finding before it can exercise any of the powers available to it under section 404 of the Act.⁷ The test that applies is whether the circumstances of the behaviour that resulted in the conviction reflect adversely on the fitness of the respondent to practice as a teacher.

⁶ Refer n 1

⁷ *CAC v Teacher* NZDT 2005/1, 4 November 2005.

21. The Tribunal does not appear to have previously dealt with a case of offending with a similar factual basis to the present case. The CAC has referred the Tribunal to cases involving benefit fraud offending submitting that analogies can be drawn from these cases.
22. In the case of *CAC v Perez*⁸ the Tribunal identified the key themes that have emerged from benefit fraud cases:

The Tribunal treats benefit fraud as a form of dishonesty. The label benefit fraud does not make such fraud any more or any less serious than other categories of fraud. The seriousness of the teacher's offending relates to the particular circumstances of the fraud, rather than any such categorisation;

Any teacher convicted of fraud stands the risk of losing his or her registration. Serious dishonesty on a teacher's part by definition raises an issue about a teacher's fitness to teach. In every case involving convictions for benefit fraud, or any other serious fraud, therefore, the question inevitability arises as to whether the Tribunal can discharge its responsibilities by making an order which does not involve cancellation of the teacher's registration;

In many cases, the Tribunal has felt able to impose a lesser sanction;

The cases suggest that when a teacher takes an active role in the proceeding, is prepared to acknowledge their wrong-doing and provides some credible explanation, that teacher is in a stronger position that he or she should retain registration;

However, much depends on the seriousness of the offending and there are some cases in which the offending is simply too serious for the matter to be dealt with in any other way.

23. The *CAC v Perez*⁹ case involved a teacher who was a solo parent studying towards her teaching degree and receiving the assistance from Work and Income New Zealand ("WINZ"). At times when the WINZ income was insufficient, the teacher received financial support from her father which she considered was a gift and did not declare it. The teacher began a fixed term full time teaching position at the beginning of 2013 but continued to

⁸ *CAC v Perez* NZTDT 2015/48 9 May 2016 at [20]

⁹ Above n 8

receive WINZ income until the middle of the year due to her unstable financial position. The offending took place between 2010 – 2013 and reparation sought was for \$35,483.83.

24. The Tribunal fell short of ordering cancellation in that case and provided detailed reasoning for that decision:¹⁰

[28] The Tribunal's responsibilities in considering the appropriate penalty in any case are primarily concerned with the protection of the public and the maintenance of professional standards. Other considerations often play a part. However, in this case, those appear to us to be the principal matters which need to be considered.

[29] The Tribunal's obligation in this as in every case is to consider all available options and to identify the least punitive outcome (professional disciplinary proceedings not primarily being concerned with punishment, especially in a case such as this where they have been preceded by criminal proceedings) which will enable it to discharge its responsibilities to the public and the profession as summarised above.

[30] In this case the Respondent has been convicted of serious offences, and we have been obliged to consider whether we can discharge our responsibilities by making an order which does not involve the cancellation of her registration or the suspension of her practising certificate. In the end, we reached the view that we can.

[31] There are some key features of this case which have enabled us to do so:

- *First, the Respondent has taken a full part in this professional disciplinary process from the start. She reported her own offending. She cooperated with the Complainant. She attended the hearing and gave evidence herself. She brought further evidence. She provided the tribunal with the necessary information to consider the case in detail and reach an appropriate conclusion;*

¹⁰ Above n 8 at [28] – [31]

- *Second, the Respondent has acted honourably, honestly and openly throughout; with the authorities; with the school; with the Council; with the Complainant; and with the Tribunal. It is difficult to imagine a teacher more cooperative in such a situation;*
- *Third, as the District Court Judge acknowledged in sentencing the Respondent, in part at least, it is possible to understand how the Respondent did not believe that she was obliged to declare the receipt of gifts from her father. For other purposes (most obviously tax), gifts are treated as being in a particular box and do not have to be accounted for. That of course is no answer to the component of the charge which focussed on the Respondent failing to declare that she was working;*
- *Fourth, by all accounts the Respondent is a talented teacher, and is very strongly supported by her employer;*
- *Fifth, the Respondent is a single mother raising a young child;*
- *Finally, aside from the protection of the public and the maintenance of professional standards, rehabilitation is another matter which is often taken into account in professional disciplinary proceedings, when considering penalty. The Respondent's rehabilitation will be assisted by her ability to go on teaching.*

25. The Tribunal found that it could discharge its responsibilities to the public and the profession by making an order which enables the Respondent to continue teaching.
26. The CAC has also referred the Tribunal to the case of *CAC v Muir*¹¹ where a teacher claimed the Domestic Purposes Benefit while living with a partner, and on four separate occasions made false declarations regarding her entitlement to receive that benefit. The offending was over a period of three years and involved a sum of \$44,823.95.

¹¹ *CAC v Muir* NZTDT 2015/47, 23 December 2015

27. The Tribunal considered the various mitigating factors (which included self-reporting the convictions, cooperating with the disciplinary process, and losing her employment as a result of the offending) and in that case ordered censure and annotation of the Register with conditions imposed on her practising certificate.
28. In *CAC v Teacher*¹², the teacher in that case pleaded guilty to four charges of using a document with intent to obtain pecuniary advantage, and one charge of obtaining by deception. The case involved the teacher receiving the Unemployment Benefit (and related grants/allowances) whilst working and the offending occurred over a period of approximately two and a half years. The teacher received an overpayment of \$36,953.47.
29. By way of mitigation the teacher disclosed that she was suffering financial hardship at the time of the offending due to an abusive and alcoholic husband, and she was focused on doing what she felt she needed to do to protect and provide for her whānau.
30. The Tribunal censured the teacher and ordered annotation of the Register and imposed conditions of the teacher's practising certificate.

Kōrerorero – Discussion

31. In the present case the Respondent's offending spanned a period of approximately 30 months and totalled an overall liability to the Commissioner of \$251,678.25 (including penalties and interest). The total core debt is \$154,459.54. This is a significant amount of money, far in excess of the sums involved in the other cases referred to us by the CAC.
32. During the period of offending the Respondent was in frequent contact with IRD about non-compliance and so was fully aware of her obligations to pay. Further the Respondent chose to use money that was available to pay the taxes owing, for her own personal benefit. She went on overseas trips and purchased a half share in a property. The Crown Summary of Facts records that identified funds applied to personal expenditure from one of the Respondent's companies totalled \$222,328.40 which includes a withdrawal of \$147,000.00
33. In a letter from the Respondent dated 25 August 2017, she takes no responsibility for her actions. She states that the Ministry of Education funding model "worked against" her

¹² *CAC v Teacher* NZTDT 2015/27 2 May 2016

business, her accountant was incompetent, the IRD “drew out” accusations against her and she was in abusive relationship. Of note for the Tribunal was that the respondent does not exhibit any consideration for the staff, children and families that were affected by her offending.

34. In a further letter from the respondent dated 21 April 2019 she appears to be more reflective and takes responsibility for her actions. Whether that is as a result of these disciplinary proceedings or not is unclear.
35. The Tribunal is satisfied that an adverse finding in this case is justified.

Kupu Whakatau – Decision

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

404 Powers of Disciplinary Tribunal

(1) *Following a hearing of a charge of serious misconduct, or a hearing into any matter referred to it by the Complaints Assessment Committee, the Disciplinary Tribunal may do 1 or more of the following:*

- (a) *any of the things that the Complaints Assessment Committee could have done under section 401(2):*
- (b) *censure the teacher:*
- (c) *impose conditions on the teacher’s practising certificate or authority for a specified period:*
- (d) *suspend the teacher’s practising certificate or authority for a specified period, or until specified conditions are met:*
- (e) *annotate the register or the list of authorised persons in a specified manner:*
- (f) *impose a fine on the teacher not exceeding \$3,000:*
- (g) *order that the teacher’s registration or authority or practising certificate be cancelled:*
- (h) *require any party to the hearing to pay costs to any other party:*

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

37. In the recent decisions of *CAC v Cook* NZDT 2018/50, and *CAC v Mackay* NZDT 2018/69 31 July 2019 the Tribunal spent some time reviewing the penalty principles set out by His Honour Collins J in *Roberts v Professional Conduct Committee*.¹³ Collins J summarised the matters to be considered by the Health Practitioners Disciplinary Tribunal (“HPDT”) when imposing a penalty under s 101 Health Practitioners Competence Assurance Act 2003 (“HPCA Act”). The Tribunal in *CAC v Cook*¹⁴ and *CAC v Mackay*¹⁵ reviewed the principles that the Tribunal should turn its mind to when considering penalty following a finding entitling it to exercise its powers:

- (a) Protecting the public;
- (b) Setting standards for the profession;
- (c) Punishment;
- (d) Rehabilitation;
- (e) Consistency;
- (f) The range of sentencing options;
- (g) Least restrictive; and

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

¹⁴ *CAC v Cook* NZDT 2018/50

¹⁵ *CAC v Mackay* NZDT 2018/69 31 July 2019

(h) Fair, reasonable and proportionate

38. We adopt those findings in the present case.

Protecting the public

39. In the present case the respondent's conduct has been the subject of criminal proceedings and it can be expected that the protection of the public was considered by the sentencing judge. Judge Saunders in sentencing noted¹⁶:

[7] The purpose of sentencing you is to hold you accountable and it is to deter not only you but to provide general deterrence. Because of the very nature of tax obligations the Commissioner relies on the honesty of tax payers so there is a relationship of trust. This case exhibits all the hallmarks of someone using money for personal advantage.

40. In the disciplinary cases involving health practitioners, it is the protection of the public who might be using the services of the professional that is emphasised. In disciplinary cases involving teachers, as set out in section 377 of the Act "users" of the service provided by teachers are the children and young people in our schools. An important part of the public protection consideration is to deter other teachers from engaging in similar conduct.

Setting standards for the profession

41. Setting standards for the profession is the role of the Teaching Council and the disciplinary bodies. It is not the function of the criminal courts. The respondent's conduct as a private citizen has been determined in the District Court it is for the Tribunal to now review her conduct as a teacher. Any penalty imposed pursuant to s 404 of the Act is done so following consideration of the expectation of the behaviour of teachers as professionals entrusted with the care and nurturing of our tamariki mokopuna.

42. In *CAC v McMillan* NZTDT 2016/52,¹⁷ 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

¹⁶ Above n 2 at [7]

¹⁷ 23 January 2017, at [23].

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.

Punishment

43. The superior courts have emphasised that the purpose of professional disciplinary proceedings for various occupations is not to punish the practitioner for misbehaviour, although it may have that effect.¹⁸ We have said that where a practitioner has been convicted of a criminal offence, it is not the purpose of the Tribunal to punish the teacher a second time for the same offence.¹⁹
44. In *CAC v Cook* the Tribunal looked at the punitive nature of professional disciplinary proceedings and reviewed some contrasting decisions in that regard.²⁰

In the present case, s 404(2) prohibits us from fining the respondent because this matter is a referral of conviction. This recognises that the “index” offence (the offence that has been dealt with in the court system) has already attracted a maximum penalty of at least 3 months’ imprisonment, and that means that a financial penalty was a possible outcome.

*In a case that was decided before the Supreme Court’s leading decision of *Z v Complaints Assessment Committee*,²¹ the High Court noted in a case under the Dental Act 1988²² the punitive aspect of disciplinary proceedings under that Act was reflected in the fact that the Dentists Disciplinary Tribunal had the power under to fine and censure. Lang J further noted that “such penalties*

¹⁸ *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [97]; *In re A Medical Practitioner* [1959] NZLR 784 at p 800 (CA).

¹⁹ *CAC v Blumenthal* NZTDT 2017-38, 27 April at [18]

²⁰ *CAC v Cook* NZDT 2018-50, 11 April 2019 at [46] – [48]

²¹ *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [97]; *In re A Medical Practitioner* [1959] NZLR 784 at p 800 (CA) in *CAC v Cook* NZDT 2018-50, 11 April 2019 at [47]

²² *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818; 13 August 2007. This case was decided before the Supreme Court issued *Z v Dental Complaints Assessment Committee* in 2008 but was not referred to in that latter decision. The punitive aspects of the penalty provisions of the HPCA Act was further acknowledged by Collins J in *Roberts v Professional Conduct Committee* (Above n 13)

inevitably involve issues of deterrence. They are designed in part to deter both the offender and others.”²³

In practice, even where the conduct referred to the Tribunal could not be the subject of any type of conviction in the criminal court, it is extremely rare for this Tribunal to impose a fine on a teacher. The censure has been used as a mark of disapproval by the Tribunal, in an effort to reflect the expectations of the public and the profession.

45. Like *Cook*, as this is a case involving the referral of a conviction, it is not open for the Tribunal to fine the respondent. However, in *Mackay* we said that:²⁴

“...as a fine is a penalty available to the Tribunal under s 404 of the Act, as is censure, suspension and cancellation, whilst punishment and deterrence are not the primary focus of professional disciplinary proceedings, it was certainly the intention of the legislature that in the appropriate circumstances, punishment and deterrence could be the desired outcome.”

46. This case involves a serious breach of trust and a significant amount of money. The respondent had money available to her to pay the tax that was owing but instead made a conscious decision to use that money for herself. The public holds teachers to a high standard; honesty and trust are non-negotiable.

Rehabilitation

47. The Tribunal in *Cook* observed that²⁵:

A similar rationale applies to teachers. There is no merit in depleting the profession from experienced teachers where we consider rehabilitation is possible.

²³ Above n 13 at [27]

²⁴ Above n 15 at [49]

²⁵ Above n 12 at [50]

Consistency

48. In considering penalty the Tribunal must do its best to be consistent in its approach and treat similar cases alike. However, each case has a unique set of facts and while there may be similarities, rarely will two cases be the same.
49. In *Patel v The Dentists Disciplinary Tribunal*²⁶ Randerson J expressed the importance of consistency in this way:

As well, while absolute consistency is something of a pipe dream, and cases are necessarily fact dependent, some regard must be had to maintaining reasonable consistency with other cases. That is necessary to maintain the credibility of the Tribunal as well as the confidence of the profession and the public at large.

50. As noted above the CAC has invited the Tribunal to consider cases of benefit fraud as a useful analogy in this case, as “*there does not appear to be any previous Tribunal cases involving offending on all fours with the offending in the present case.*”²⁷ While analogies can be drawn, there are several key aspects to this offending that distinguish it from the benefit fraud cases referred.
51. We note *CAC v Perez*²⁸, *CAC v Muir*²⁹, and *CAC v Teacher*³⁰ which we have reviewed in detail at paragraphs 22-30.

The range of sentencing options

52. The Tribunal must measure the respondent’s behaviour against the range of sentencing options available. Maximum penalties are reserved for those whose conduct warrants a severe consequence.

Least restrictive

53. The notion that the Tribunal should consider the least restrictive penalty is usually discussed in the context of cancellation or suspension. The CAC propose cancellation as

²⁶ *Patel v The Dentists Disciplinary Tribunal* HC AK AP 77/02 8 October 2002.

²⁷ CAC Submission 9 April 2019 at [3.4]

²⁸ Above n 8

²⁹ Above n 11

³⁰ Above n 12

a starting point and therefore the comments in *Patel v Dentists Disciplinary Tribunal*³¹ are relevant:

[30] *The consequences of removal from a professional register are ordinarily severe and the task of the Tribunal is to balance the nature and gravity of the offences and their bearing on the dentist's fitness to practice against the need for removal and its consequences to the individual: Dad v General Dental Council [2002] 1 WLR 1538. As the Privy Council further observed at 1543:*

Such consequences can properly be regarded as inevitable where the nature or gravity of the offence indicates that a dentist is unfit to practise, that rehabilitation is unlikely and that he must be suspended or have his name erased from the register. In cases of that kind greater weight must be given to the public interest and to the need to maintain public confidence in the profession than to the consequences of the imposition of the penalty to the individual.

[31] *I respectfully adopt the observations of the Privy Council and would add that it is incumbent on the Tribunal to consider carefully the alternatives available to it short of removal and to explain why the lesser options have not been adopted in the circumstances of the case.*

54. In *CAC v Fuli-Makaua*,³² the Tribunal said that cancellation is required in two overlapping situations, which are:

- (a) Where the seriousness of the conduct is such that no outcome short of deregistration will sufficiently reflect its adverse effect on the teacher's fitness to teach and/or its tendency to lower the reputation of the profession; and

³¹ Above, note 28

³² *CAC v Fuli-Makaua* NZTDT 2017/40, at [54], citing *CAC v Campbell* NZTDT 2016/35 at [27].

- (b) Where the teacher has insufficient insight into the cause of the behaviour and lacks meaningful rehabilitative prospects. In this scenario, there is an apparent ongoing risk that leaves no alternative to deregistration.³³

55. In this case the respondent's offending involved an overall liability to the Commissioner of \$251,678.25. Identified funds of the respondent's companies applied to personal expenditure was \$222,328.40 – almost the same amount as the liability to the Commissioner.

Fair, reasonable and proportionate

56. The Tribunal must turn its mind to whether to a proposed penalty is fair, reasonable and proportionate in the relevant factual circumstances and as noted above is consistent with similar cases.

Our decision on penalty

57. We note that the respondent has an unblemished record as a teacher having not appeared before the Tribunal previously and appears to have cooperated with the CAC throughout the disciplinary process.

58. However, we note the following aggravating factors:

- (a) The amount of money involved with significant. Far in excess of the benefit fraud cases previously dealt with by the Tribunal;
- (b) The offending took place over a 30-month period during which the respondent was in contact with the IRD and was aware of her obligation to pay tax;
- (c) The respondent benefited directly from the offending; and
- (d) The respondent initially showed a lack of remorse for the offending and blamed others for a situation that was entirely of her own making. This showed a lack of insight and integrity on the part of the respondent.

³³ See *CAC v Teacher* NZTDT2013/46, 19 September 2013 at [36].

59. For those reasons, we are of the view that this is a case that falls within the first category of cases described in *Fuli-Makaua* in that the seriousness of the conduct is such that no outcome short of deregistration would be appropriate. Despite the conduct being in regard to the respondent's roles as a business administrator and not a teacher, the dishonesty, lack of integrity and deliberate disregard for her obligations to pay tax, in the Tribunal's view reflects adversely on the respondent's fitness to be a teacher. Further we are of the view that the reputation of the profession would be lowered if the respondent was to continue to teach.
60. In light of the above, the Tribunal orders as follows:
- (a) Censure under s 404(1)(b) of the Act;
 - (b) Cancellation of the respondent's registration under s 404(1)(g) of the Act.

Utu Whakaea – Costs

61. As this is a referral of a conviction under s 397 of the Act the Tribunal has no jurisdiction to make any award of costs.



Rachel Mullins
Deputy Chair

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

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