

PRACTICE NOTE OF TEACHERS DISCIPLINARY TRIBUNAL

PRACTICE NOTE 1: COSTS

DATE: 1 April 2022

This practice note replaces the practice note on costs dated 10 June 2005.

1. The purpose of this practice note is to provide some guidance to parties of the procedures the Tribunal intends to continue to follow under section 500(1)(h) and (i) of the Education and Training Act 2020 (**the Act**)¹ which gives the Tribunal the power to order a contribution to costs after hearing a matter.

2. Section 500 of the Act provides:

500 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:*

...

(h) *require any party to the hearing to pay costs to any other party:*

(i) *require any party to pay a sum to the Teaching Council in respect of the costs of conducting the hearing:*

...

Costs against a teacher

3. The costs that may be incurred in bringing a matter to the Tribunal may include:

- a. The cost of the investigation;
- b. The CAC's legal costs to prepare and prosecute the matter before the Tribunal;
- c. The Tribunal's costs in conducting the hearing.

4. Where the Complaints Assessment Committee (**CAC**) is successful against a teacher, the Tribunal has adopted the approach used in health disciplinary cases, starting with *Cooray v Preliminary Proceedings Committee*.² In that case Doogue J held that the starting point for a reasonable order of costs is 50 per cent of reasonable costs, and that in some circumstances downwards or upwards adjustment will be appropriate.

¹ The Education and Training Act 2020 applies to all matters initiated on or after 1 August 2020 and all references in this Practice Note to section 500 of the Education and Training Act 2020 also apply to section 401 of the Education Act 1989 which contains identical provisions.

² *Cooray v Preliminary Proceedings Committee* (Unreported, High Court Wellington Registry, AP 23/94)

5. In assessing the reasonableness of costs incurred, the Tribunal may compare the amounts claimed with other cases to ensure consistency across cases.
6. The general legal principles which apply to costs against professional people facing disciplinary charges include:
 - a. The fact that professional groups ought not to be expected to fund all the costs of the disciplinary regime; and members of the profession who come before disciplinary bodies must be expected to make a proper contribution towards the costs of the inquiry and hearing;³
 - b. Costs are not in the nature of a penalty or to punish;⁴
 - c. The practitioner's means should be taken into account;⁵
 - d. A practitioner has a right to defend himself or herself;⁶ and
 - e. The level of costs should not deter other practitioners from defending a charge.
7. The 50% starting point may be increased or decreased taking into account various factors, including:
 - a. the way in which the parties have conducted themselves, including whether any party unnecessarily prolonged the proceedings (including the hearing time) with meritless arguments or irrelevant evidence;
 - b. whether there were any novel points that merited further argument and determination, even if eventually unsuccessful;
 - c. the financial situation of the teacher.
8. Without limiting the Tribunal's discretionary decision-making, in most cases where a teacher has admitted a charge and fully co-operated in bringing the matter to an end in an expedient way, the costs contribution has usually been in the region of 40%.
9. The Tribunal will direct that the Complaints Assessment Committee and the Tribunal Secretary file schedules of costs so that the respondent teacher may question and/or make comment on the amount being asked for before a final decision is made on costs.

³ *G v New Zealand Psychologists Board* HC Wellington, CIV-2003-485-2175, 5 April 2004, Gendall J; *Vasan v Medical Council of New Zealand* AP 43/91, 18 December 1991

⁴ *Gurusinghe v Medical Council of New Zealand* [1989] 1 NZLR 139 at 195

⁵ *Kaye v Auckland District Law Society* [1988] 1 NZLR 151

⁶ *Vasan v Medical Council of New Zealand* AP 43/91, 18 December 1991

Costs against the Complaints Assessment Committee

10. Where a teacher has successfully defended a charge, the Tribunal will consider any application for costs against the CAC in light of the following principles:⁷
- a. A costs order should only be made against a regulator if there is good reason for doing so. “Good reasons” include that the prosecution was misconceived, without foundation, or borne of malice or some other improper motive.
 - b. Success by the practitioner in defending a matter is not, on its own, a good reason for ordering costs against a regulator.
 - c. A regulator should not be unduly exposed to the risk of financial prejudice if unsuccessful, when exercising its public function.
 - d. The Tribunal is still required to exercise its evaluative, discretionary jurisdiction.⁸

The effect of a legal aid grant

11. Where a teacher has been granted legal aid under the Legal Services Act 2011, section 45 of that statute says that no costs can be made unless the Tribunal is satisfied that there are exceptional circumstances, which may include:
- a. any conduct that causes the CAC to incur unnecessary cost:
 - b. any failure by the teacher to comply with the procedural rules and orders of the court
 - c. any misleading or deceitful conduct:
 - d. any unreasonable pursuit of 1 or more issues on which the teacher fails:
 - e. any unreasonable refusal to negotiate a settlement or participate in alternative dispute resolution:
 - f. any other conduct that abuses the processes of the Tribunal.



Theo Baker

Chair 1 April 2022

⁷ *Baxendale-Walker v Law Society* [2007] EWCA Civ 233; adopted in *Canterbury-Westland District Standards Committee v Simes* [2012] NZLCDT 28

⁸ *Lagolago v Wellington Standards Committee 2* [2017] NZHC 3038, 8 December 2017