

BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

UNDER the Education Act 1989

IN THE MATTER of disciplinary proceedings pursuant to
Part 10A of the said Act

BETWEEN **THE COMPLAINTS ASSESSMENT
COMMITTEE**

Referrer

AND **NATASHA JOY ASHTON** of Manukau,
Teacher, Registration No. 319636

Respondent

DECISION ON COSTS
27 June 2018

Tribunal: Maria Johnson and David Spraggs
John Hannan (Deputy Chair)

Decision: 27 June 2018

Counsel: Rebecca Scott for CAC
T Oldfield for Respondent

- [1] The Tribunal issued its substantive decision in this matter on 18 May 2017. It found serious misconduct established with regard to the majority of the particulars of charge alleged against the respondent, although not with regard to what could fairly be regarded as the most serious particular of charge.
- [2] The respondent has submitted that the schedules of costs submitted by the CAC and the Tribunal are not "actual and reasonable".
- [3] In its decision 18 May 2017 the Tribunal ordered that the respondent pay 50% of the CAC's actual and reasonable costs and 50% of the Tribunal's actual and reasonable costs. The CAC and Tribunal were to provide a schedule of costs. If the respondent wished to dispute that these are not actual or reasonable she was to make submissions on these points by memorandum. The decision on any submissions in relation to actual and reasonable costs was delegated to the Deputy Chair.
- [4] Schedules have been provided. The CAC's costs totalled \$45,552.35. Some specific items within that schedule are disputed by the respondent as explained below, as well as the general principles upon which costs are being computed.
- [5] Two schedules were produced for the Tribunal, totalling \$30,270. The schedules included sitting fees for the Chair, Tribunal members, registrar's fees, costs of venue, catering, the stenographer, travel and accommodation costs.
- [6] The respondent's counsel submitted that these were very substantial costs and would involve one of the larger costs awards sought by the CAC and that a careful approach was therefore required. Counsel for the respondent also noted that with regard to the CAC's costs there is no indication of how much

time was spent on each attendance nor an indication of counsel's hourly rate.

- [7] Counsel for the respondent submitted that the costs should be no greater than those which would be deemed reasonable in the District Court, on the basis that appeals from the Tribunal are to the District Court and the District Court is higher in the hierarchy of courts. Counsel submitted the proceeding should be categorised as the equivalent to 2B in the District Court costs schedules. It was said that the proceedings had a good deal of factual dispute but that the CAC investigation laid the factual foundation for the Disciplinary Tribunal proceedings. It was said the appropriate daily recovery rate for a proceeding in this category would be \$1550 per day. Counsel produced a table allocating appropriate times for preparation and appearances and submitted that a reasonable amount of costs would be \$21,855 on a 2B basis.
- [8] Counsel noted that the CAC did not establish a number of particulars as set out in the notice of charge, 3.1.4, 3.2.9, 3.5.1, 3.5.7, 3.5.11, 3.5.12, 3.5.13, 3.5.16, 3.5.22, 3.5.23. He submitted this should have some bearing on costs.
- [9] Counsel also submitted that no disbursements should be awarded, citing first, public policy reasons for ensuring that unnecessary or excessive costs and disbursements are not incurred as this creates an extra burden on the profession. Counsel also submitted that this was not a situation where it was appropriate to instruct out of town counsel with the associated travel and accommodation costs. He submitted that courts of ordinary jurisdiction almost never award the travel disbursements of out of town counsel.
- [10] He also pointed to a particular item in the schedule disbursements for the CAC "Ranstad staff recruiters for locum cover of witnesses", an amount of \$628.78. He said this appeared to have been incurred by the respondent's former employer.

- [11] As to the Tribunal's costs, counsel noted that these are shown as "estimated" and suggested they should be sufficiently particularised to allow the respondent to determine whether they were actually and reasonably incurred. This was particularly so in relation to the estimated fees relating to the chair. It was also submitted that the disbursements for the Tribunal were inappropriate and that the respondent should not be required to pay for travel and accommodation and associated costs of the Tribunal. Also, it was submitted that it was not appropriate that Tribunal members from out of Auckland should have been assembled.
- [12] The respondent therefore submitted that she should pay half of the CAC's investigation costs, \$809.47, half of the CAC's reasonably incurred costs, \$10,927.10, and half of the Tribunal's actual and reasonable costs excluding the chair's costs, flights, taxis meals and accommodation, \$7288.50.
- [13] Counsel for the CAC submitted that the costs provided by the CAC do contain sufficient detail, consistent with the level of detail typically provided, and accepted, in other cases before the Tribunal and other professional disciplinary jurisdictions. Counsel for the CAC referred to NZTDT 2016/13 C in which CAC costs of \$10,892 were awarded for a one-day hearing. She submitted that the costs put forward were appropriate having regard to the number of witnesses and the preparation required for the proceedings given the significant number of particulars (47 separate particulars in total). She noted that the respondent had been unwilling to admit to any aspect of the charge or the facts other than one particular matter.
- [14] Counsel for the CAC submitted that reference to costs awards in the District Court was irrelevant given the Tribunal's Practice Note on Costs 10 June 2010, which sets out the Tribunal's approach from that date as being "consistent with the way the legal and medical professions do, that is to say, from the starting point that awards of costs should reflect 50% of the successful party's

actual and reasonable costs associated with the investigative process and any hearing, and the Tribunal's costs...".

- [15] She noted that overwhelmingly the majority of the particulars were proved and observed that particular 3.5.13 – failing to model and encourage professional behaviour to staff – was proved.
- [16] She submitted that the CAC should be free to instruct any counsel with the necessary expertise to provide required representation and that it has regularly been accepted by the Tribunal that counsel may need to travel throughout New Zealand to attend hearings. In relation to the Ranstad invoice for witness locum cover she noted that this was invoiced to the centre but forwarded and paid directly by the Education Council on behalf of the CAC. She said that the Ranstad invoice had been raised with counsel for the respondent and that she had been advised that the costs would be included in the costs recovery exercise.
- [17] This is indeed one of the larger costs awards sought in this Tribunal. The Tribunal has already determined that the respondent should pay 50% of "actual and reasonable costs". The factors which can incline the Tribunal to reduce the percentage of costs awarded – for example early cooperation with the CAC and admission of charges, with the avoidance of a need for a hearing by an agreed statement of facts – did not apply in this case, and there was insufficient evidence advanced of inability to pay to result in an adjustment on that basis.
- [18] Counsel for the CAC is correct in noting that earlier references in Tribunal decisions to equivalence or commensurability with District Court costs have been superseded by the Practice Note to which she refers. The usual principle in this Tribunal is that as a professional disciplinary body where the costs of the disciplinary process will fall on the profession, a practitioner whose conduct has fallen short of required standards and who is found to have engaged in serious misconduct can expect to pay a substantial

contribution, normally 50%, towards the actual and reasonable costs of the disciplinary process.

- [19] That said, I am concerned that the extremely lengthy particulars in this case added somewhat to the costs and complexity of the hearing, by causing both the CAC and the respondent to concentrate on proving or challenging each and every particular. It is difficult to assess the precise extent to which that has added to costs, but it is a factor to be taken into consideration.
- [20] Comparison with District Court costs is not, generally, appropriate following the Practice Note. Apart from anything else, the policy which at least partly underlies the costs schedules in the ordinary courts is that parties are to be encouraged to compromise their claims and not to proliferate legal costs. It is however a requirement of effective professional discipline systems that allegations of serious misconduct are usually pressed to a definitive conclusion one way or another. This can be done either by a hearing, or by admissions on agreed facts. The costs of this process fall on the profession but must also be borne by practitioners whose misconduct is established.
- [21] Counsel for the CAC is correct that the costs schedule submitted by the CAC is in the form typically provided to the Tribunal. It is not unreasonable for the CAC to engage counsel with appropriate expertise, albeit from out of town, and the accommodation and travel costs are not excessive.
- [22] The Ranstad staff recruiter's cost of \$628.78 is however disallowed. This is not a cost of the CAC. If the CAC has chosen to incur it to encourage the employer of witnesses to release them, that is its choice. It has the option of summoning witnesses. It should not become an ordinary expectation that the employer of witnesses will be provided with assistance of this nature to release them. Deducting \$628.78 from the total CAC costs of \$45,552.35 gives a sub total of \$44,923.57

- [23] Given concerns about the additional complexity of the hearing being caused to some degree by the proliferation of particulars, I reduce the CAC costs on an actual and reasonable basis to \$40,000.
- [24] As to the Tribunal's costs, it is true that the schedules are on the basis of an estimate. However this is the Tribunal's standard practice and the only element of the estimate that I can identify as potentially excessive and thus not actual and reasonable is the chair's sitting fee, "pre-and post", in a total sum of \$10,800. I have consulted my records of time spent on this matter at hearing and "pre and post" and, applying the rate charged to the Tribunal, consider that a chair fee of \$7000 is more accurate. Deducting the difference from the total Tribunal fees cost of \$30,270 gives a remaining sum of \$26,470. Taking into account again the additional complexity of this matter caused by the proliferation of particulars I fix the Tribunal's actual and reasonable costs at \$22,000. This reduction is not due to anything resulting from actions of the Tribunal or its staff, but it is not reasonable that the respondent should bear the Tribunal's costs of the added complexity.
- [25] The respondent is ordered to pay \$20,000 towards the CAC's costs being 50% of the CAC's actual and reasonable costs fixed at \$40,000.
- [26] The respondent is ordered to pay \$11,000 towards the Tribunal's costs being 50% of the Tribunal's actual and reasonable costs fixed at \$22,000.

[27] In total the respondent is ordered to pay \$31,000 as a contribution to the costs of the CAC and Tribunal.

Dated: 27 June 2018



JGH Hannan: 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).