

BEFORE THE NEW ZEALAND TEACHERS' DISCIPLINARY TRIBUNAL

UNDER the Education Act 1989

IN THE MATTER of Part 10(A) of the said Act

PRACTICE NOTE : COSTS
17 JUNE 2010

In a number of recent cases the basis upon which the Tribunal deals with costs has become an issue. In many of those cases, the Tribunal has had the benefit of counsel experienced in appearing for both the New Zealand Teachers Council's Complaints Assessment Committees and respondents, who have made detailed submissions on the subject.

This Tribunal was established by legislation amending the Education Act 1989 on 1 February 2001. It heard its first case on 19 October 2005. The Tribunal's decision, published as 2005/1, was issued on 4 November 2005.

The first case in which the Tribunal canvassed in any detail the way it would address costs was 2006/1. There, the Tribunal commented on the relatively broad scope of its jurisdiction in respect of costs (see s139AW(h) and (i)). We touched on the general principles which apply to any decision-making body in relation to costs, articulated in *Kaye v Auckland District Law Society* [1998] 1 NZLR 151. We then turned to the general approach which the Tribunal proposed to take on costs. As to that, we said that the Tribunal wished to adopt an "...objective and predictable approach." In order to do that, we signalled that in the majority of cases at least our starting point

would be to consider awarding costs in favour of the successful party in accordance with the current scale of costs applying in the District Court.

Inherent in that approach was a focus on the costs incurred by the parties in relation to hearings.

In fact, there are three broad categories of costs associated with disciplinary proceedings:

- (a) The costs associated with the investigation of a complaint. These are primarily incurred by the relevant New Zealand Teachers' Council Complaints Assessment Committee, though a respondent who participates in the investigative process – as many do – may also incur costs;
- (b) The costs associated with the hearing. These too are costs which may be incurred by both parties; and
- (c) The Tribunal's own costs, that is to say the administrative costs and the costs of bringing five members of the Tribunal together to deal with the matter. These costs are incurred by the New Zealand Teachers' Council.

It is fair to say that in its early decisions the Tribunal focussed almost exclusively on the costs of the hearing, largely ignoring the first and last categories. So, for much of the Tribunal's early years, awards of costs tended to reflect some proportion of the hearing costs.

Incidentally, to date the Tribunal has not made an award against a complainant. All awards have been made against respondents. That simply reflects the fact that in all cases in which costs have been in issue the complainant has made out a case of misconduct. In a number of cases, the Tribunal has observed that the issue of costs is not a one way street and that if a charge of misconduct is brought by a Complaints Assessment Committee against a respondent which is not made out, the Tribunal will entertain an application for costs against the Complaints Assessment Committee, just as it does in the reverse situation.

In 2008/15 the Tribunal signalled – at a very general level – that it may in the future consider increasing costs awards, but did not go on to articulate the basis upon which it might consider costs applications in the future.

Recently, because of the way in which the issue of costs has arisen in certain cases, the Tribunal has had cause to reconsider its approach. We have made a point of commenting on this issue in recent cases, but in each of those cases we considered that it would be unfair, without first signalling our intention to do so, to alter the basis upon which we deal with costs.

The purpose of this Minute is to make it clear that from this point on we intend to deal with costs differently.

There can be no serious doubt that s139AW(h) and (i) give the Tribunal jurisdiction to make costs awards reflecting all three categories identified above.

Research suggests that equivalent disciplinary bodies in both the legal and medical professions make costs awards which cover all three categories.

It is probably correct to say that, by and large, the earning capacities of members of the occupational groups dealt with by those disciplinary bodies are higher than the earning capacities of teachers. But that argument cuts both ways. It means that individual teachers are less able to bear large costs awards. But, by the same token, it means that teachers as a whole – who fund the New Zealand Teachers' Council and its disciplinary processes – ought to be protected as much as possible against costs incurred as a result of the misconduct of individual teachers. And the Tribunal's perception is that the profession has a legitimate expectation that the greater proportion of their practising certificate fee will be used to defray registration costs and those of professional leadership rather than disciplinary processes.

The basic policy issues can be stated shortly. It is the hallmark of professional groups that they take collective responsibility for ensuring that their members adhere to certain standards of behaviour. Inevitably, this comes at a collective

cost because the members are obliged to fund professional bodies and disciplinary processes to enforce adherence to those standards. There is thus a cost of membership of the professional group, but membership also confers benefits. The question is, at the level of the individual case, who should bear the cost of disciplinary proceedings.

It would be hard to make a case that the profession should bear 100% of these costs (or, in other words, that, where a professional disciplinary proceeding results in a finding of misconduct, there should be no award of costs). Equally, it would be hard to contend that the profession should bear none of the costs (that costs awards should reflect 100% of the actual costs). So the question comes down to striking an appropriate balance between those two extreme positions. The Tribunal is not satisfied that it has necessarily struck an appropriate balance to date. We have a sense that the profession (teachers, collectively) are being expected to shoulder too high a proportion of the costs. And, we think there is a strong argument for approaching the matter in the same way as 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.

That is the approach which the Tribunal considers appropriate to adopt in the future.

It goes without saying that costs – like every aspect of the decision making process – must be considered on a case-by-case basis, and the Tribunal will approach the issue of costs afresh in each case, having regard to the background to and facts of each case, so as to put itself into a position where it can arrive at a fair result.

That said, the purpose of this Practice Note is to signal –so that it does not come as a surprise to anyone – that, in the future, the Tribunal's starting point will be to consider in each case whether it is fair and appropriate, having regard to the circumstances, that it make an award in favour of the successful party reflecting 50% of all three categories of costs.

I should record that this Practice Note follows extensive consultation and debate involving all current members of the Tribunal.

A handwritten signature in black ink, appearing to read "Kenneth Johnston".

Kenneth Johnston
Chairman