PERMANENT NON-PUBLICATION ORDERS

BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

NZTDT 2022-19

RARO TE MANA O TE UNDER THE	the Education and Training Act 2020 (**the Act**)
MŌ TE TAKE IN THE MATTER OF	of a charge referred to the Tribunal
I WAENGA I A BETWEEN	**COMPLAINTS ASSESSMENT COMMITTEE (CAC)** Kaiwhiu | Prosecutor
ME AND	**Pauline Violet MURPHY** Kaiurupare | Respondent

Nohoanga | Hearing Hei Māngai | Appearance	19 December 2023, AVL (Teams) On the papers
Tribunal	Catherine Garvey (Deputy Chair), Nikki Parsons, Simon Williams

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DECISION-PENALTY AND COSTS

5 February 2024

INTRODUCTION

[1] The substantive hearing of the charge against Pauline Murphy was held in person between 8 and 11 May 2023. The Tribunal issued a written decision on liability dated 2 October 2023.[1] Between the issue of the liability decision and the filing of evidence and submissions as to penalty orders, the Chair who presided over the hearing, Rachael Schmidt-McCLeave, was appointed a Coroner. Accordingly, the matters of penalty, costs and permanent non-publication orders were considered by the original panel members of the Tribunal and a second Deputy Chair.

[2] The reconstituted Tribunal reconvened by AVL on 19 December 2023. The Tribunal sought further information from the Complaints Assessment Committee (CAC) by Minute on 20 December 2023 as to the costs incurred and quantum of the contribution claimed from the respondent. Counsel for the CAC responded by memorandum and accompanying evidence on 25 January 2024.

[3] The hearing considered a fourth amended notice of charge involving conduct occurring between 2010 and April 2021 over which time Ms Murphy owned and managed an Early Childhood Education centre in Palmerston North. Ms Murphy defended the charge, which contained multiple particulars, and the Tribunal found all but two of these established.[2] Ms Murphy was found guilty of serious misconduct in respect of each of the three limbs of s 10(1)(a) of the Education and Training Act 2020 (the Act)[3] and rules 9(1)(a), (b), (c), (j) and (k) of the Teaching Council Rules 2016.[4] The Tribunal also found Ms Murphy's conduct in breach of clauses 1.3 and 2.1 of the Code of Professional Responsibility.

[4] This decision does not repeat the factual matters set out in the Tribunal's decision on liability. Suffice it to say, Ms Murphy's misconduct occurred across a range of areas of her professional practice including unprofessional and threatening behaviour towards employees, breaches of Ministry of Education regulations for health and safety; ill-treatment of children including taking food from mouths, and the use of seclusion as a

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[1] *Complaints Assessment Committee v Pauline Murphy* NZTDT 2022/19.
[2] The Tribunal found established particulars 1(a)(i),(iii),(iv),(v) and their sub-particulars, 1(b)(i),(ii), (iii) and (iv), 1(d), 1(e)(i),(ii),(iii) (sub particulars 1 and 2),(iv),(vi) and 1(f) (all particulars) established. The Tribunal found particulars 1(a)(ii) and 1(c) not established.
[3] The relevant provisions of the Education Act 1989 are identical (s 378).
[4] The charge also includes reference to the New Zealand Teaching Council (Making Reports and Complaints) Rules 2004 and the Education Council Rules 2016.

punitive measure. [5]

PENALTY

[5] Counsel for the CAC provided thorough written submissions, seeking censure and cancellation of the respondent's registration and an order reflecting a contribution of 50% of the CAC's costs.

[6] Counsel for the CAC referred to the primary purposes of penalty as being the maintenance of professional standards including through the provision of specific and general deterrence, and the maintenance of public confidence in the profession.

[7] Section 500 of the Act describes a range of penalties and actions available to the Tribunal. It is well-established that any penalty imposed should be reasonable in the circumstances (the least restrictive that is appropriate) and proportionate to the penalties imposed in similar cases. Cancellation is the most serious penalty available. In *Complaints Assessment Committee v Fuli-Makaua*[6] the Tribunal said that cancellation will be imposed where:

> (a) the offending is sufficiently serious such that no other available penalty sufficiently reflects the adverse effect of the teacher's conduct on their fitness to practise and lowering of the reputation of the profession; and
>
> (b) the teacher has not taken adequate rehabilitative steps to address the causes of the conduct and has shown insufficient insight, such that the teacher poses an ongoing risk.

[8] Counsel for the CAC referred us to several cases in the ECE setting involving somewhat similar facts leading to cancellation of registration and we have considered each of these. Of particular relevance are *CAC v Sonya Costello*[7] and *CAC v Grace Trow*[8] both of which involved persistent poor conduct including rough handling of young children, inappropriate communication with staff, and a lack of insight meaning that rehabilitation was not seen as a realistic prospect. Counsel submitted that further aggravating features in the present case are:

> (a) that the offending did not involve a single isolated incident but rather ongoing ill-treatment, with the use of the closed sleep room used for punishment being of particular concern.

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[5] Education (Early Childhood Services) Regulations 2008.
[6] NZTDT 2017/40 at [51]
[7] NZTDT 2021/39, 5 August 2022
[8] NZTDT 2019/82, 28 July 2020. Counsel also referred us to the following cases which we considered: *CAC v Julia Costello* NZTDT 2020/29, 14 December 2021; *CAC v Jamasbnejad*; *CAC v Kelsie Trow* NZTDT 2019/95, 28 July 2020 and *CAC v Ashton* NZTDT 2015/39, 28 May 2017.

(b) the number of children affected and the negative impact of the respondent's behaviour on parents and staff.
(c) the vulnerability of the children given their young age, and associated risk of harm to their physical, psychological and emotional wellbeing.
(d) the respondent's (adverse) contribution to staff culture, creating an environment in which the centre's employees felt unable to challenge poor practice.
(e) breaches of legal requirements including in relation to keeping incident reports, food storage, preparation and handling.

[9] Counsel submitted that the only potentially mitigating factors apparent for Ms Murphy are the absence of a previous disciplinary history and the voluntary undertaking not to teach that has remained in place now for over three years.

[10] Written submissions on behalf of the respondent were also received, accepting that both cancellation and censure are appropriate. The key area of disagreement raised by Mr Drummond is as to the appropriate level of costs to be imposed, which we discuss below.

[11] We agree that in light of the Tribunal's findings on liability including adverse credibility findings against the respondent, the varied and prolonged nature of the respondent's misconduct and the absence of any rehabilitative steps or insight shown, cancellation and censure are appropriate. A lesser penalty would not adequately protect the public or support the maintenance of professional standards.

COSTS

[12] Unlike the courts, there is no guidance for the Tribunal in terms of daily rates and the like to define what is reasonable in terms of costs. The public function of disciplinary proceedings and the absence of a clear rule that costs follow the event contribute to the discretionary nature of an order. The timeframe over which disciplinary matters sometimes extend, as in this case, no doubt contributes to costs, potentially requiring a need to refresh relevant matters and re-brief witnesses. The Tribunal's Practice Note on costs dated 1 April 2022 is intended to give guidance to parties about the level of contribution towards costs that may be ordered under s 500(1)(h) and (i) of the Act. These provisions allow costs to be ordered against a party, and also in favour of Teaching Council. The Practice Note includes the following:

> 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*[9]. In that case Doogue J held that the starting point for a

[9] Unreported, High Court Wellington Registry, AP 23/94.

reasonable order of costs is 50 per cent of reasonable costs, and that in some circumstances downwards or upwards adjustment will be appropriate.

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 the hearing;[10]

b. Costs are not in the nature of a penalty or to punish;[11]

c. The practitioner's means should be taken into account;[12]

d. A practitioner has a right to defend himself or herself;[13]

e. The level of costs should not deter other practitioners from defending a charge.

[13] The hearing occurred over four days, and the attendance of the CAC's eleven witnesses was required given the respondent's defence of the charge and the absence of an agreed statement of facts. The members who sat at the liability hearing considered that the evidence of each of the CAC witnesses was discrete and relevant.

[14] The CAC seeks a 50% contribution towards a total amount of costs of $74,480 (excluding GST), being $37,240.00. The initial submissions for the CAC as to costs indicated that this figure was comprised as follows: $41,876.00 for attendances up and until the hearing which commenced on 8 May 2023, $21,230.00 for sole (senior) counsel for the hearing itself and attendances outside of sitting hours where the hearing was held over 8-11 May 2023; and post-hearing attendances totalling $8,697.00 plus $2676.50 for "work in progress". The costs of the CAC's investigation were not claimed.

[15] Mr Drummond submitted that a reduced contribution of 35-40% is appropriate, given the respondent's claim of having limited financial means, and the level of costs incurred by the CAC. Mr Drummond pointed to the absence of a breakdown of said

[10] *G v New Zealand Psychologists Board* HC Wellington, CIV-2003-485-2175, 5 April 2004, Gendall J.
[11] *Gurusinghe v Medical Council of New Zealand* [1989] 1 NZLR 139 at 195.
[12] *Kaye v Auckland District Law Society* [1988] 1 NZLR 151.
[13] *Vasan v Medical Council of New Zealand* AP 43/91, 18 December 1991.

costs, and questioned what looked to counsel (on the face of it) to be an hourly rate for the hearing in excess of $750. Mr Drummond also challenged whether it was reasonable for Ms Murphy to bear costs in relation to the several amendments to the charge.

[16] As noted in our introduction, the Tribunal sought clarification from the CAC regarding some aspects of the costs claimed. The memorandum and supporting documents filed by the CAC provide further detail regarding the time spent in preparation of evidence and preparation for the hearing, and the involvement of three solicitors at different levels of experience and their hourly rates claimed.

[17] The memorandum of counsel provides the following clarifications:

(a) The fees totalling $41,876 initially said to be up to the hearing in fact includes costs from the issue of the charge in June 2022 until 1 May 2023.

(b) The hearing-related costs totalling $21,230 include costs from 1 May 2023 being the week before the hearing through to and including 11 May 2023.[14] This includes preparatory work, preparation of a witness summons, attendance at a PHC and attendance at the hearing and related attendances on hearing days by senior counsel at an hourly rate of $390.

(c) The only disbursement included relates to the preparation and service of a witness summons, in the sum of $1500.

[18] In this jurisdiction a percentage contribution of costs is often specified following guidance from the Practice Note and with discretion for adjustment following the provision of a costs schedule by the party seeking costs. Hearings on the papers where neither of the parties are represented (having provided all information in writing ahead of the hearing) or by attendance via audio visual link are not uncommon, meaning the quantum of costs is minimised relative to an in-person hearing. However, it remains important that teachers who face a disciplinary charge consider their opportunity to defend the charge or to otherwise be heard in person and do so without the risk of a substantial costs order against them acting as a deterrent or indeed an absolute barrier.

[19] Ms Murphy has not shied away from an order for costs, albeit she seeks to reduce the amount of her contribution that is claimed by the CAC. Limited detail has been provided as to Ms Murphy's means, but it is not a stretch to believe that an order of over $37,000 will be punitive for most people. We are told that the respondent is receiving superannuation having retired from the teaching profession, a retirement that was likely premature due to the disciplinary proceedings. We also note that two of the sub-

[14] The invoices themselves did not make the revised explanation of what amounts covered what timeframe as clear as the memorandum suggests.

particulars were not proved. In the ordinary course, some minor reduction would be appropriate to reflect this.

[20] Neither party referred us to any authorities where the quantum of costs has been challenged. In *Complaints Assessment Committee v E* [2018] NZTDT 950 the then-Chair of the Tribunal was required to consider an objection to the costs sought and carried out a detailed analysis of the costs incurred by the CAC, ultimately making reductions to determine a "reasonable" quantum of costs. That case is not on all fours, and costs will inevitably be dependent on the circumstances of the case, but it does confirm that in appropriate cases an analysis of costs may be undertaken and a revised 'starting point' for contribution imposed.

[21] We find that the costs sought, while incurred by counsel experienced in this jurisdiction and without making criticism of the prosecution of the charge, are high. Even a reduced contribution is likely to act as a deterrent to others who may wish to defend a disciplinary charge, especially in person. For the purposes of determining a reasonable contribution by the respondent, we consider it is appropriate to modify the amount claimed for the hearing itself and the amount claimed for preparatory work to recognise the several amendments made to the charge. We reduce the claim for the hearing and related attendances to $15,600 which still reflects a 10-hour day per hearing day at senior counsel's hourly rate. We reduce the claim for preparation by $3,500 to as best we are able reflect a portion of the time spent on amendments to the charge, in reliance on the invoices furnished by the CAC. We do not otherwise adjust the claim for time spent in preparatory work, or following the hearing. This means we calculate the contribution to be paid by Ms Murphy based on a lesser total of $65,350.

[22] In the absence of significant mitigating factors or detailed financial information, and reflecting that Ms Murphy's conduct has ultimately led to the multi-day hearing and adverse finding, a contribution of 40% will be imposed.

[23] There is also the matter of the Tribunal's costs, which total $33,234.17. this reflects costs incurred for travel, accommodation, venue and catering and sitting fees as well as the costs of the Disciplinary Tribunal Co-ordinator. The respondent will be required to make a 40% contribution towards these costs.

Non-Publication

[24] An application for permanent non-publication of the respondent's name and

identifying details has been made. Section 501 of the Act provides that the default position is that hearings are conducted in public, with details of the charge, the evidence and names of witnesses being known unless it is "proper" to suppress these or other details of the proceedings.

[25] To determine whether it is proper to make an order, we are required to balance the public interest in the proceedings against the interests of the person seeking the order (or some other person, if that is relevant). This involves consideration of whether the consequences of publicity that the applicant wishes to avoid are likely to happen. That is, is there a real, appreciable or substantial risk of the perceived harm occurring.[15]

[26] The respondent's application hinges on social media commentary and an incident occurring when the charges were initially made public. The respondent asserts that there is an ongoing risk to her personal safety should further publication of her name be allowed, reigniting the adverse response that she received when details of the charge were reported in the media. It is further submitted by Mr Drummond that there is a limited public interest in the Tribunal's decision on the basis that Ms Murphy is no longer working as an early childhood teacher or manager, and the time elapsed since the events the subject of the charge.

[27] The CAC opposes a permanent order being made, noting that the Centre and the respondent have already been named, with that earlier publicity including photographs. It is submitted that the Tribunal ought to distinguish between "*legitimate threats of harm*" to a teacher and negative social media comments, some of which are now three years old. Counsel submits that it is speculative rather than likely that further publicity relating to this matter will elicit an unpredictable response from members of the public. This in part relies on the lack of evidence of any further adverse fall-out for Ms Murphy following publicity of the hearing itself. Members of the media were present at the hearing, with a report published following the first day. Counsel also notes that there is no evidence that the respondent's personal contact details have been published (with reference to an earlier complaint by Ms Murphy that a rock was thrown into the ECE centre).

[28] The respondent's evidence does not support a current and likely risk of harm from publicity other than what might be considered the ordinary consequences of an adverse disciplinary finding. This is not to disregard or to condone the unpleasant

[15] In reliance on *CAC v Teacher* NZTDT 2016/68, citing *R v W* [1998] 1 NZLR 35 (CA).

commentary that was written on Facebook pages about Ms Murphy. The proliferation of means by which members of the public can receive information and make public comment is not a matter that is in our control, and unless there is good reason – that is, a likely risk of harm – we should not attempt to pre-empt what members of the public may or may not express. There are other appropriate means by which such public comment is regulated.

[29] As Ms Murphy is no longer teaching or involved with an ECE centre, publicity does not risk harm to any institution or current children. There are permanent orders in place to protect the identity of the children who Ms Murphy's conduct relates to and to the witnesses for the CAC.[16] For completeness we record these again here:

> Permanent non-publication of the names and identifying details of the children involved in the various incidents or otherwise referred to in the evidence, and of the CAC's witnesses, is ordered. These are appropriate in respect of the ages and vulnerabilities of the learners and the lack of public interest in knowing the names of the CAC's witnesses, especially given many are the parents of the children involved.

[30] No evidence was provided to indicate that identification of Ms Murphy would cause harm to the CAC's witnesses who were former colleagues or parents of children at the centre.

[31] Accordingly the application for permanent non-publication of Ms Murphy's name is declined.

Orders

[32] We make the following orders:

(a) Ms Murphy is censured, pursuant to s 500(1)(b) of the Act.
(b) Ms Murphy's registration with the Teaching Council is cancelled, pursuant to s 500(1)(g) of the Act.
(c) Ms Murphy is to pay a contribution towards the costs of the Complaints Assessment Committee in the sum of $26,140, pursuant to s 500(1)(h) of the Act.
(d) Ms Murphy is to pay a contribution to the Teaching Council for the costs of the disciplinary proceedings in the sum of $13, 293.68, pursuant to s 500(1)(i) of the Act.
(e) The permanent orders for non-publication made at paragraph 130 of the Tribunal's liability decision dated 1 October 2023 remain in force.

[16] n1, at [130].

C Garvey
Deputy Chair of the New Zealand Teacher's Disciplinary Tribunal

Appeal Notice – Right of Appeal under Section 504 of the Education Act 1989/ Section 504 of the Education and Training Act 2020

1. This decision may be appealed by the 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. Clauses 5(2) to (6) of Schedule 3 applies to every appeal under this section as if it were an appeal under clause 5(1) of Schedule 3.