**IN THE HIGH COURT OF NEW ZEALAND**
**WELLINGTON REGISTRY**

**I TE KŌTI MATUA O AOTEAROA**
**TE WHANGANUI-A-TARA ROHE**

**CIV-2020-485-641**
**[2021] NZHC 1581**

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| BETWEEN | EVAN MORGAN JONES<br>First Applicant | |
| | NZ POST PRIMARY TEACHERS' ASSOCIATION \| TE WEHENGARUA<br>Second Applicant | |
| AND | TEACHING COUNCIL OF AOTEAROA NEW ZEALAND \| MATATŪ AOTEAROA<br>Respondent | |

Hearing: 24-25 May 2021

Counsel: J D Every-Palmer QC, M R G van Alphen Fyfe and T W R Lynskey for Applicants
M Chen and L M Donnelly for Respondent

Judgment: 30 June 2021

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**JUDGMENT OF CHURCHMAN J**

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**PART III**



**PART I**

**Introduction**

[1] The first applicant (a teacher) and the second applicant (a union of post-primary teachers and principals representing approximately 85 per cent of post-primary teachers in New Zealand) seek judicial review of decisions made by the respondent (an independent statutory body established by the Education Amendment Act 2015 to act as the professional and regulatory body for the New Zealand teaching profession) which, at the material time, was governed by the Education Act 1989 (the Act).[1]

[2] On 14 May 2020, the respondent announced decisions it had reached that:

(a) practising certificates for teachers would be valid for one year rather than three years (Annual Certification Decision);[2] and

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1 It is now governed by the Education and Training Act 2020 but this does not materially affect the Council's purposes, powers and functions.

2 The Annual Certification Decision was published in the *New Zealand Gazette* on 6 November 2020.

(b) certification for all teachers trained in New Zealand would incur an annual fee of $157 with various categories, including overseas-trained applicants, provisionally certified applicants, and applicants lodging renewal applications after the expiry of their current practising certificate, incurring higher or additional fees (Fees Decision).[3]

[3] On or about 6 March 2020, the respondent decided to accept a proposal to establish a professional development initiative known as the Leadership Centre (Leadership Centre Decision). The applicants assert that as this time, the respondent had not secured additional funding for the establishment and running of the Leadership Centre and had not undertaken any consultation with the teaching profession in respect of that decision.

[4] It is these three decisions that are challenged by the applicants. The May 2020 decisions are challenged on six separate grounds. The six grounds can be summarised as being:

(a) Ground One: The respondent's failure to consult before imposing annual certification;

(b) Ground Two: Failure to properly consider the merits of annual certification;

(c) Grounds Three and Four: Misconstruction and misapplication of key elements of the statutory regime relating to payment by instalment and the default three-year certification period;

(d) Ground Five: Setting a fee for issuing a practising certificate said to amount to an unlawful tax; and

(e) Ground Six: Failure to provide adequate information and options when consulting in relation to the practising certificate fee.

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3 The Fee decision was published in the *New Zealand Gazette* on 22 May 2020.

*The respondent's position*

[5] The respondent denies each of the grounds for judicial review. It also says that the respondent made nine decisions on 30 April 2020 and claims that the applicants were only challenging five of them.

[6] The respondent's primary position is that it did not have to consult on the decision to move from triennial certification to annual certification because that decision did not fundamentally alter the rights, benefits or status of individual teachers. The argument was expressed as being that, if there is no detriment to those affected by a decision, then an obligation to consult which might otherwise exist, was negated.

[7] In the context of assessing whether there was any detriment in relation to the move from triennial certification to annual certification, it was submitted that the Court should give deference to the subject matter expertise of the majority of the members of the respondent.

[8] The respondent also denied that a misunderstanding of the law as to the legal ability of the respondent to charge the fee for a practising certificate on annual basis where certification was for a three-year period, influenced its decision to adopt a process of annual certification.

[9] The respondent says that it was not obliged to consult in respect of the Leadership Centre Decision because there was no intention for the cost of operating the Centre to be borne by the respondent. It describes the $47,000 of its funds that were actually spent in relation to the project as being "de minimis".

*Relief*

[10] The applicants seek a variety of forms of relief. In respect of the annual certification and fee decisions (and the separate decision relating to the Leadership Centre), it seeks:

(a) an order quashing the decisions;

(b) a declaration that the respondent acted unlawfully and in breach of natural justice in failing to consult on the Annual Certification Decision;

(c) a declaration that the respondent erred in law by failing to consider relevant considerations in respect of the Annual Certification Decision;

(d) a declaration that the respondent erred in law by determining that the Act does not permit teachers to pay for practising certificates in instalments;

(e) a declaration that the respondent erred in law by determining it could limit the period for all practising certificates to one year;

(f) a declaration that the Teaching Council acted *ultra vires* in fixing fees for registration and certification that included a tax for other purposes; and

(g) a declaration that the respondent acted unlawfully and in breach of natural justice in failing to consult on the Leadership Centre Decision.

[11] The respondent denied that the applicants were entitled to any relief. In relation to the exercise of the Court's discretion to grant relief, it asserted that the relief sought had no "practical value". It also submitted that the interests of third parties were relevant to the Court's discretion as to whether or not to grant relief. In this regard, it was submitted that:

> Court intervention to vitiate the gazette notice for a new annual certification fee, for any breach of the grounds of review, would result in [the respondent] becoming insolvent.
>
> …
>
> Insolvency would have a catastrophic impact on all of [the respondent's] functions including those most important to the safety of children and young people in classrooms to ensure teacher applicants for certification were fit to teach and have been properly vetted and that they are competent and have no conduct issues.

[12] Emphasis was also placed on the fact that the annual certification fee had been in place for some four months and that, in addition to having spent transitional Government funding, the respondent had also spent reserves of $5 million in deferring the fee increase from 1 July 2020 to 1 February 2021.

## PART II

### Legislative background

[13] Before analysing the competing arguments, it is helpful to set out the legislative background.

[14] The relevant legislation in force at the time of the impugned decisions was the Education Act 1989. The Act required that teachers employed in New Zealand needed to be both registered and the holders of a current practising certificate.[4]

[15] There are some 140,000 registered teachers and some 105,000 holders of practising certificates. The difference between the two numbers reflects the fact that registration is effectively for a lifetime but not all registered teachers are currently actively teaching and therefore do not need to hold a practising certificate.

[16] There have been several changes to the name of the body now known as the Teaching Council and also to the fee setting powers of this body. As the consequences of these changes are in issue in these proceedings, it is necessary to set them out.

[17] Between 1 October 1989 and 31 January 2002, the Teacher Registration Board was a statutory body responsible for teacher registration and the issue of practising certificates. Its statutory fee setting powers reflected its limited functions.

[18] Section 136 of the 1989 Act provided:

> **The Registration Board may charge fees and impose costs**
>
> (1) the Registration Board may from time to time by notice in the *Gazette*, with the written approval of the Minister, fix fees for registration as a teacher or for the issue of practising certificates; and different fees may be fixed–
>
> (a) in respect of registration effected in different circumstances; and
>
> (b) for practising certificates of different kinds.

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[4] Education Act 1989, s 349(2) (the equivalent provision in the Education and Training Act 2020 is s 92(2)).

[19] On 1 February 2002, the Teacher Registration Board was replaced by the Teachers Council which was a Crown entity. The Teachers Council functions were much more broadly defined than those of the Teacher Registration Board, with s 139AE of the 1989 Act specifying some 13 different functions. However, the scope of the fee setting powers was not similarly broadened. Section 130H, under the heading "Fees and costs" provided:

> (1) the Teachers Council may from time to time by notice in the *Gazette* with the written approval of the Minister, fix fees for the granting of a limited authority to teach;
>
> …
>
> (3) where the Teachers Council cancels a limited authority to teach, it may, by written notice to the person concerned, require the person to pay the Teachers Council any reasonable costs specified in the notice that were incurred by the Teachers Council in dealing with the proposal to cancel the authority or with the cancellation itself;
>
> (4) the Teachers Council may recover from any person as a debt due to it costs required by subsection (3) of this section to be paid to the Teachers Council by that person,

[20] Section 136, under the heading "Teachers Council may charge fees and impose costs", provided:

> (1) the Teachers Council may from time to time by notice in the *Gazette* with the written approval of the Minister, fix fees for registration as a teacher or for the issue of practising certificates; and different fees may be fixed –
>
> (a) in respect of registration effected in different circumstances; and
>
> (b) for practising certificates of different kinds;
>
> …
>
> (3) where the Teachers Council cancels a teacher's registration it may, by written notice to the teacher require the teacher to pay the Teachers Council any reasonable costs specified in the notice that were incurred by the Teachers Council in dealing with the proposal to cancel the registration or with the cancellation itself;
>
> (4) the Teachers Council may recover from the teacher as a debt due to it costs required under subsection (3) of this section to be paid to the Teachers Council by the teacher.

[21] Section 139AF, under the heading "Powers of Teachers Council, relevantly provided:

> (3) the Teachers Council may provide goods and services that are consistent with its functions and may, with the approval of the Minister, charge a commercial rate for any goods and services provided;
>
> (4) the Teachers Council may, by notice in the *Gazette*, fix fees for all or any of the following:
>
> (a) any addition or alteration to a person's registration as a teacher;
>
> (b) any addition or alteration to, or extension of, a person's limited authority to teach;
>
> (c) any addition or alteration to a person's practising certificate;
>
> (d) inspection of the register of registered teachers or any other register or any other documents kept by the Teachers Council that are open to inspection;
>
> (e) the supply of a copy of any entry into a register or other document referred to in paragraph (d);
>
> (f) any other matter for which this Act provides that the Teachers Council may charge fees.

[22] Effective 1 July 2015, the Teachers Council was replaced by the Education Council. This is was a statutory body corporate. Section 382 set out an expanded list of some 16 specified functions. However, the fee setting powers set out in s 383(1) were only extended to include fees for the provision of professional leadership,[5] and costs relating to the performance of disciplinary functions.[6]

[23] Section 383(1) did not include a fee setting power in respect of the following functions listed in s 382:

> (b) to enhance the status of teachers and education leaders;
>
> (c) to identify and disseminate best practice in teaching and leadership and to foster the education profession's continued development in light of research, and evidence of changes in society and technology;
>
> (g) to conduct, in conjunction with quality assurance agencies, approvals of teacher education programmes;

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5 Section 383(1)(f).
6 Section 383(1)(g).

(i) to ensure that appraisals made by professional leaders for the issue and renewal of practising certificates achieve a reasonable and consistent standard, by auditing and moderating the appraisals made for at least 10% of the practising certificates issued or renewed in each year;

(j) to establish and maintain the code of conduct for teachers under section 387;

(k) to monitor and enforce the requirements relating to mandatory reporting in this Part and Part 31;

(m) to set criteria for reporting serious misconduct and for reporting on competence issues;

(n) to perform the functions in this Part relating to teacher competence.

[24] Section 383(4) authorised the Education Council to charge a fee for anything that it had fixed a fee for under s 383(1) and, s 383(5) authorised the Education Council to charge for any goods or services it provided in accordance with its functions.

[25] Effective 29 September 2018, the Teaching Council was established as a statutory body corporate. The statutory functions remained the same as those of the Education Council set out in s 382(1) with the addition of the following two functions:

(ea) to review, at any time, the criteria for teacher registration established under paragraph (e) and, after consultation with the Minister–

(i) vary, delete, or replace one or more of the criteria; or

(ii) add one or more criteria; or

(iii) delete all of the criteria and substitute new criteria;

(fa) to review, at any time the standards for qualifications established under paragraph (f) and, after consultation with the Minister–

(i) vary, delete, or replace one or more of the standards; or

(ii) add one or more standards; or

(iii) delete all of the standards and substitute new standards.

[26] No additional fee setting powers were provided.

[27] As at 1 August 2020, the Act was replaced by the Education and Training Act 2020 which had the same statutory functions and fee setting powers as previously except that the auditing function formerly found in s 382(1)(i) was removed.

*Self-funding*

[28] Although not reflected in any amendments to the legislation, it appears that from 2015 onwards, the Government made a policy decision that the Teaching Council should become self-funding. Up until this point, the annual operating deficits incurred by the Council had been funded by the Crown. This had allowed the Council to build up substantial cash reserves. For the 2015/16 financial year, these reserves were said to be $9.539 million.

[29] The respondent has argued that its obligation to become self-funding arises from the wording in cl 7 of Schedule 21 to the Act. That is not correct.

[30] Schedule 21 to the Act was inserted on 1 July 2015 by s 41(3) of the Education Amendment Act 2015 (No. 1). The heading of Schedule 21 is "Governance provisions of Teaching Council". The schedule addresses some general governance related matters and cl 7 is headed "Collective duties". The duties in cl 7 are standard in nature requiring the Council to act in a manner consistent with its functions, duties and powers; that it performs or exercises its functions, duties and powers efficiently and effectively and:

> (3) the Teaching Council must ensure that it operates in a financially responsible manner and, for this purpose, that it prudently manages its assets and liabilities.

[31] A general obligation to prudently manage assets and liabilities is something different to a statutory obligation to be self-funding. However, whether the obligation to become self-funding was statutory in origin or the result of Government policy is not directly relevant to the duties that the respondent owed to teachers to consult over significant changes to the registration process.

*The funding agreements*

[32] On 26 October 2016, the Ministry of Education and the respondent entered into a funding agreement. The background section to this document recorded:

> The Ministry and the Council have agreed that the Ministry will provide funding to the Council to support it in becoming self-sufficient in carrying out its leadership and other statutory functions for the teaching profession and the education system.

[33] The Ministry agreed to provide transitional funding of $21,340,000 plus GST, to achieve this outcome.

[34] The duration of the transitional funding was said to be until 30 June 2019 "when the Council will become self-sufficient".

[35] If the Council was going to become self-funding, its income was realistically going to have come from substantially increased registration and certification fees. The income streams available from other sources were minimal.

[36] Since 2010, the fee for registration and the three-year provisional practising certificate for New Zealand trained graduates had been $220.80. The fee for renewing the three-year practising certificate of any type was the same. For overseas trained teachers, the fee for registration and a three-year provisional practising certificate was $302.57; and for a teacher moving from being provisionally certificated and certificated "subject to confirmation" to a three-year full practising certificate, it was also $302.57.

[37] The Teaching Council calculated that these fees would have to more than double to somewhere between $470 and $500 on a three-year basis in order for it to become financially self-sufficient.

[38] After entering into the 2016 funding agreement, the Council then began a process to review fees for registration and practising certificates. This consultation occurred in 2017 and included consultation on an option of moving from a triennial certification process to an annual certification process. The response from the teachers consulted to the possibility of annual certification was almost unanimously negative.

[39] As a result of the impending general election in 2017, and uncertainty as to the potential consequences of a review of "Tomorrow's Schools" announced by the Ministry of Education in November 2017, no changes were implemented following the 2017 consultation.

[40] In June 2019, immediately before the expiry date of the first transitional funding agreement, the Teaching Council entered into a second transitional funding agreement with the Government. The term of this agreement was specified as being from 1 July 2019 to 30 June 2020. The purpose of the agreement was said to be:

> …to meet the shortfall of approximately $9.6m per annum to enable the Council to remain financially sustainable for the 2019/20 financial year.

[41] The terms of the agreement required the Council to continue to discharge all its statutory functions and to

> …identify additional sources of income to enable the Council to be financially sustainable from 1 July 2020.

[42] Following the execution of the second transitional funding agreement, the Board of the Teaching Council needed to find ways to come up with what they estimated as being an annual operating deficit of between $8.9 million and $9.7 million from 2020/21 onwards.

[43] The Board received a report dated 15 August 2019 from its Chief Financial Officer. That report made a number of observations relevant to these proceedings. Firstly, it acknowledged that the Education (Teaching Council of Aotearoa New Zealand) Amendment Act 2018 made changes to the governance structure of the Council with effect from 1 July 2019, but not to its established statutory role, functions and powers.

[44] The report noted that the financial modelling that had been undertaken showed that, in order to be financially self-supporting, the triennial fee for renewing a practising certificate would need to increase from $220.80 to $510 as well as other increases such as a separate initial registration fee of $85 and significant increases in the fee for overseas teacher applications and applications were changing from provisional registration to full registration ($610 c.f. $302).

[45] The paper also made the observation that consultation with the profession on proposed new fees "must be done by law". It noted that each year there were about 5,500 new teachers joining the profession and a similar number leaving the profession. Significantly, the report did not address the issue of changing the period of triennial certification to something shorter.

[46] The Board of the Council received a further report from the Chief Financial Officer and Acting Deputy Chief Executive dated 25 September 2019. That report identified what was said to be the four levers available to the Board when considering how to achieve financial self-sufficiency: service levels, registration and certification fees, cash reserves and other revenue or service charges.

[47] The report contained the observation:

> Note that increasing Registration and Certification Fees is the *only* lever that can achieve financial sustainability in its own right. The other levers, even when combined and used to their maximum extent, cannot achieve the objective of achieving financial sustainability, but they can be used to dampen the impact of increasing Registration & Certification fees (either in quantum or in timing).

[48] The paper suggested three options ranging from a proposal similar to what had been consulted on in 2017 to one which was materially different to that.

[49] The report expressed the view that:

> Shifting to an annual renewal [of practising certificates] is possible; however, because it would take three years before all members were paying annually, a Council would need some sort of interim measure to maintain sustainability. In 2017, the Council proposed a transitional levy. Annual renewal is not possible until renewals are successfully being processed online.

*The consultation process*

[50] The Board received a further briefing paper on 23 October 2019 from the Chief Financial Officer and the Acting Deputy Chief Executive. That paper noted that, as a result of feedback from the Board on the earlier papers, the authors of the paper had developed a proposal for "a singular fee rather than unbundling into various separate components such as a professional responsibility levy". It also noted the advice given to the Board of the "need to undertake another comprehensive consultation process

before the final decision on fees can be made, given the amount of time that has elapsed since the Teaching Council last consulted on fees."

[51] The paper set out a proposed consultation process and timeline and the commentary on this said:

> In designing the consultation process, we have given due regard to the requirement to ensure teachers have an adequate opportunity to respond to the proposal and the adequate ability to make an informed response on what is proposed.
>
> We have also given due regard to the legal advice we have received in regard to the Teaching Council's statutory obligations to consult and that the Board have adequate time to sufficiently consider the feedback with an open mind before making a final decision.

[52] There was no mention in this document of reducing service costs or departing from the practice of triennial certification.

[53] The Board of the Teaching Council decided to consult on raising registration/certification fees for the purposes of complying with the contractual obligations to become self-funding that they had committed to in the second transitional funding agreement. It set up a pre-consultation meeting with stakeholders including the second applicant, called the Fees Consultation Steering Group on 16 December 2019.

[54] On 24 December 2019, the Acting Deputy Chief Executive sent an email to the invitees who had attended the pre-consultation meeting which provided feedback on issues that had been raised by those who had attended the 16 December 2019 meeting. It related to the proposed increases in Teaching Council's fees from 1 July 2020.

[55] In response to feedback that the Council needed to be clearer around payment options for a teacher, the memorandum said that the Council had "clarified that the ability to pre-pay or post-pay in instalments is not available". This statement is not correct and reflected a significant misunderstanding of the law.

[56] On 15 January 2020, an amended consultation document was provided to the Governing Board. That document essentially set out two options. Firstly, triennial

fees of $470, increased by $100 for overseas trained teachers, provisionally certificated teachers and teachers lodging a renewal application after their current practising certificate expired, and secondly, an alternative option of triennial fees of $500 for renewal of current three-year practising certificate, or $300 for a graduate of an approved New Zealand Initial Teacher Education (ITE) programme, $400 for an overseas trained teacher, $600 for provisionally certificated teachers, and teachers lodging a renewal application after the expiry of their current certificate, $500 for teachers who had not taught in New Zealand over the last five years, and $300 for a graduate from an approved New Zealand ITE programme applying for registration only. The essential difference between the two proposals was whether graduates should have lower registration fees than those renewing their registration.

[57] However, in respect of both options and for all certificate types, the three-year period between certifications was to be maintained. This document also contained a statement that:

> The Teaching Council has no facility for teachers to pay fees by instalments in arrears as it is a legal requirement that all applicable fees are paid in full prior to a Practising Certificate being issued. Neither does the Teaching Council have the facility to support the pre-payment of fees by instalment in advance.

[58] The consultation material distributed by the Council referred specifically to the consultation obligation that the Council believed that it was under. The comments included:

> The Teaching Council is now consulting with the teaching profession and other affected parties on two options proposing new fees from July 2020, consistent with its obligation to act in accordance with the rules of natural justice.

[59] The obligation to act in accordance with natural justice is found in s 382(3) of the Act which provides:

> When performing its functions and exercising its powers, the Teaching Council must act in accordance with the rules of natural justice.

[60] The document also said:

> No final decision on an increase will be made until after those affected have been consulted, and their views considered with an open mind, consistent with our statutory obligations.
>
> The Teaching Council has issued this consultation paper to give parties affected by the proposed fee changes relevant information regarding the proposal, and a reasonable opportunity to make an informed response.
>
> …
>
> The Teaching Council is seeking your feedback before making any decision on whether or not to implement the proposed fee changes in Option 1 or Option 2. Your feedback on the consultation options is important.

[61] The consultation document had a section on the legal authority of the Council to set the fees. After referring to ss 364, 372 and 383 of the Education Act, the following statement was made:

> The Teaching Council's fee-setting powers are broadly stated, and do not prescribe the criteria limiting when the Teaching Council may fix a fee, or the level of such a fee. Nor does the Teaching Council as an independent statutory body, require ministerial approval in order to prescribe fees.

[62] What the statement does not address is the question of whether the Education Act confers a power on the Council to charge fees for matters not specifically authorised by the Act, or whether it can charge a "bundled" fee incorporating its costs in relation to those matters where it has a specific authorisation to charge fees and other matters where there is no such authorisation. That question has become an issue in these proceedings.

[63] Unlike the 2017 consultation, this consultation document did not contain a proposal to alter the period of certification from three years to some other period.

[64] Other than in relation to Limited Authorities to Teach, the sums payable under both Option 1 and Option 2 were specified as being for three years rather than being described as an annual fee.

*Post-consultation developments*

[65] From late February 2020, the respondent and second applicant (and other representative groups) approached the Minister with options to mitigate the proposed fee increase.

[66] On 10 March 2020, the Ministry made a request to the Minister of Finance seeking a late spending initiative for inclusion in the Budget, namely $16.5 million for the purposes of "Supporting the Teaching Council to Transition to an annual practising certificate fee". There was no reference in the document to any proposal to transition from three yearly to annual certification and the only explanation for the late spending initiative was the financial consequences of fees being payable annually rather than every three years.

[67] On 2 April 2020, the Chief Executive of the Teaching Council sent a briefing paper to the Minister noting that in terms of becoming independently financially sustainable:

> Income from the current 3-yearly registration/certification fee of $220.80 equates to only around 40 per cent of the expenditure required for the Teaching Council to carry out its statutory functions.

[68] It referred to the consultation process and noted that the Council had not yet made any final decision on any fee increase. It sought further funding. This document also did not refer to any proposal to alter certification from a three yearly to an annual process.

[69] By letter of 24 April 2020, the Minister acknowledged the representations that he had received from the respondent and others around the proposed increase in fees. The letter said:

> I am pleased to let you know that I have secured funding, through Budget 2020, to cover the income gap a Council faces in transiting to an annual fee. The Budget will provide $11M in financial year 2020/21, followed by $5.5M in 2021/22, to enable the Council to transition to an annual fee. This funding has been approved on the condition that the Council takes steps to make itself financially sustainable and self-sufficient.
>
> Please let me know whether the Council will take up this funding to transition to an annual practising certificate fee.

[70] The Chief Financial Officer provided a briefing paper to the Board of the Teaching Council dated 27 April 2020. The subject was described as "Cost of Transitioning to Annual Fees". It noted that the funding that the Government had agreed to provide "…can be used to help fund the fiscal gap created by shifting from triennial to annual fees."

[71] The report also noted that the additional funding made viable a number of fees options not previously considered to be financially viable and noted that if these fees options were now to be considered, it would require a new consultation process. The briefing paper did not raise the issue of any change from triennial certification.

[72] The Acting Deputy Chief Executive and Chief Financial Officer provided a briefing paper to Council on 29 April 2020 addressing the impact of the funding offer. The subject matter of the briefing paper was described as "Government funding support for transitioning to annualised fees". The conclusion in the report was:

> The modelling and analysis undertaken indicates that $16.5 million in additional Government funding together with a portion of the Teaching Council's forecast cash reserves is materially sufficient to support a transition to annualised fees from 1 February 2021.

[73] A second briefing paper from the Acting Deputy Chief Executive, also dated 29 April 2020 referred to the financial modelling that had been done and asked the Board of the Council to:

> **Note** that the further extensive financial modelling and analysis had been undertaken to determine the viability of transitioning from a triennial fee to an annual fee with the transitional Government funding and the Teaching Council's forecast cash reserves.

[74] A third briefing paper from the Acting Deputy Chief Executive to the members of the Council dated 29 April 2020 invited the Council to either accept or decline:

> …the $16.5 million in Government funding for the specific purpose of transitioning to annualised fees, subject to negotiation of an appropriate funding agreement on terms and conditions acceptable to Council (and consistent with the Education Act) and the Ministry of Education and fix registration/certification and other fees as per **table 1** below by way of a Gazette notice in the week of 18 May 2020.

[75] The Council met by video conference on 30 April 2020 and agreed to accept the $16.5 million "for the specific purpose of transitioning to annualised fees". The Council moved and seconded separate motions in respect of nine separate certificates which provided a base fee of $157 annually, plus an extra fee of $100 for applicants who were overseas trained teachers, applicants who were provisionally certified, or whose certificate had expired before their application for renewal. An annual fee of $157 was also approved for applications for limited authority to teach, for applicants

who had not completed any teaching in New Zealand in the last five years, and applicants who applied for teacher registration only.

[76] On 14 May 2020, the respondent issued a press release which was headed "Teaching profession to move to annual certification from February 2021".

[77] The press release contained a statement which said:

> While fees will increase we believe delaying the increase until February 2021 and moving to an annual process for certification best addresses teachers' key concerns and also allows the Council to get on a secure financial footing and be the true independent body teachers deserve.

[78] To the extent that this statement implies that teachers had expressed a concern which could be met by moving to an annual process for certification, it is untrue. The Council had not sought any feedback on a change to an annual certification process. The consultation document had only sought teachers' views on fee increases and teachers were asked to indicate their preference for either Option 1 which was described as being "Beginning teachers and experienced teachers should pay the same amount", or Option 2 "Beginning teachers should pay a lower amount to support their entry into the teaching profession". There was also a box to tick if the teacher had no preference for either option.

[79] In a separate document, also issued in May 2020, entitled "Your fees at work", the respondent issued a breakdown of what the new annual fee of $157 was for:

(a) $84.82 was said to represent the cost of registration and certification; setting and maintaining the Code of Professional Responsibility and Standards for the Teaching Profession; investigating complaints about teacher misconduct or incompetence; setting the requirements for becoming a teacher; and approving and monitoring higher education programmes;

(b) $16.43 was said to be the cost of professional services including setting expectations for appraisal against the Standards for the Teaching Profession, ensuring the voice of the profession is heard, growing

leadership capability; and providing independent policy advice to Government and other agencies;

(c) $35.28 was for support services such as HR, finance, admin, IT systems, data and security; and

(d) $20.47 was for GST.

[80] At some undisclosed time prior to 18 May 2020, the Minister appears to have communicated with the Teaching Council raising a query about the change from three yearly certification to annual certification.

[81] On 18 May 2020, the Chief Executive of the Teaching Council responded to that query by sending a briefing note to the Minister. That briefing note began:

> **Purpose**
>
> You have asked the Teaching Council for information on the decision to shift from certification for three years to certification for one year and how this will affect teacher interaction with the Council.

[82] The note went on to say:

> The Teaching Council Board decided that moving to an annual process for certification best addressed the profession's key concern in the consultation feedback – that $470 was too much at once, especially those in the ECE sector, beginning teachers, part-time and relief teachers.

[83] This comment accurately reflects the near unanimous consultation feedback as to concern at the quantum of the proposed fees increase but, in implying that the consultation feedback supported a move to annual certification, it is incorrect.

[84] The briefing note went on to say:

> The Council is mindful of the impact on teachers and professional leaders that annual certification could have. The details of how an annualised certification will work have not been fully established but we have a project team and workstreams underway that are actively considering how it will be operationalised before February 2021.

[85] This statement confirms that the respondent had only just begun to think about how annual certification might actually work notwithstanding the fact it had already announced a decision to implement it.

[86] This briefing note also gives some indication of why the Teaching Council chose not to consult about any change proposal in relation to certification. It contains the following assertions:

> In terms of part-payment of fees, or any other staggered payment arrangement, the law provides that teachers must pay all applicable fees before they can renew or be issued with a practising certificate for a period of three years or lesser a period of time determined by the Teaching Council.
>
> Section 364(4) of the Education Act provides that "Despite anything in this Act, the Teaching Council may refuse to register a person as a teacher or issue a practising certificate until the appropriate fee has been paid".
>
> The summary of which is that teachers need to pay **all** of the applicable fee at the time of application in order to be issued with registration or a practising certificate (if eligible), as part-payment of fees (in arrears) is not authorised by our legislation.

[87] These statements of the legal position are wrong. Section 364(4) merely gives the respondent a discretion not to register a person or issue a practising certificate until a fee has been paid. It does not in any way prohibit the respondent from accepting part-payment.

[88] As at the date of the hearing, the respondent accepted that the claims as to its legal inability to accept payment by instalment as set out in this briefing paper to the Minister, the 24 December 2019 paper to stakeholders and the consultation document sent to all of the teachers, were incorrect.

## PART III

### Grounds One and Two – Analysis

[89] The first two grounds for review, being the failure to consult before imposing annual certification, and the failure to properly consider the merits of annual certification, are related so I will address them together.

[90] The key issue is whether or not the decision to move from a triennial to an annual certification process after the consultation had concluded, amounted to a substantial change requiring re-consultation. The author of *Judicial Review: A New Zealand Perspective* has described the obligation this way:[7]

> A shift of focus after consultation requires that consultation be reopened if the shift is substantial, as does significant new information or a change in the proposal but not if the change is only a reorganisation of previous proposals, or a change of personnel.

[91] The Supreme Court in *New Zealand Pork Industry Board v Director-General of the Ministry for Primary Industries* indicated that ultimately, whether the obligation to consult again is triggered will depend on the nature, extent and impact of the further work, with the focus being on whether that work led to a substantial change.[8]

[92] A similar approach was usefully articulated by Collins J in *Hawke's Bay and Eastern Fish and Game Councils v Hawke's Bay Regional Council*:[9]

> Fairness is at the heart of the issue. Those who have a right to be consulted must be given an adequate opportunity to express their views and to influence the decision-maker. An assessment of whether or not a decision-maker has acted fairly is a quintessential judicial task that is highly influenced by context.
>
> There have been various formulations of the duty to re-consult when circumstances have changed between the initial consultation and the basis upon which a decision is based. In *Smith, R (on the application of) v East Kent Hospital NHS Trust* the Court suggested that the need for re-consultation occurred "if there was a fundamental difference" between a proposal consulted upon and the basis upon which the decision-maker made his or her decision.

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7 Graham Taylor *Judicial Review: A New Zealand Perspective* (4th ed, LexisNexis, Wellington, 2018) at 13.83 (footnotes omitted).

8 *New Zealand Pork Industry Board v Director-General of the Ministry for Primary Industries* [2013] NZSC 154; [2014] 1 NZLR 477 at [173].

9 *Hawke's Bay and Eastern Fish and Game Councils v Hawke's Bay Regional Council* [2014] NZHC 3191 at [118]-[120] (footnotes omitted).

> In some New Zealand decisions the scope of a decision-maker's duty to re-consult echoes the United Kingdom position to some extent. There can be no doubt a decision-maker must re-consult if the final decision differs in a fundamental way from the decision which was indicated at the time of consultation. However some New Zealand decisions suggest the duty is engaged at a lower threshold. For example, in *Air New Zealand Ltd v Nelson Airport Ltd*, Miller J found that further consultation might have been required if advice contained in a report already in the decision-maker's possession differed in a "material[ly] adverse way".

[93] The respondent relies on a number of different grounds to justify its failure to consult on its decision to amend certification from a triennial to an annual process.

[94] Counsel sought to distinguish the obligation arising from the common law or a statutory duty to act in accordance with natural justice on the one hand, and a specific statutory obligation to consult on the other hand.

[95] Ms Chen submitted:

> The Governing Board is required "to act in accordance with the rules of natural justice" in making decisions about fee increases and the period before practising certificates expire, as distinct from other provisions in the Education Act where Parliament has expressly required consultation with affected parties. Thus the Governing Board did not have to consult on the Annual Certification Decision if fairness did not require it.

She submitted that fairness did not require re-consultation here. It is therefore necessary to see how the concept of fairness has been interpreted by the New Zealand Courts.

[96] In the case of *Contact Energy Limited v Electricity Commission*, MacKenzie J said:[10]

> The extent of the change is the major factor in determining whether further consultation will be required. Here, the change was a fundamental one.

[97] In *Wanaka Stakeholders Group Incorporated v Queenstown Lakes District Council*, van Bohemen J found that the decision challenged, "…went considerably beyond the scope of the Statement of Proposal".[11]

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[10] *Contact Energy Limited v Electricity Commission* HC Wellington CIV-2005-485-624, 29 August 2005 at [31].

[11] *Wanaka Stakeholders Group Incorporated v Queenstown Lakes District Council* [2021] NZHC 852 at [220].

[98] If an amendment is significant or goes significantly beyond the scope of a proposal then fairness requires consultation.

[99] Where the rules of natural justice require consultation, or where a legitimate expectation of consultation arises, the manner of consultation will be the same as if the obligation was expressly imposed by statute. In the case of *R (Moseley) v London Borough of Haringey,* which is regularly applied by the New Zealand Courts, the UK Supreme Court said:[12]

> A public authority's duty to consult those interested before taking a decision can arise in a variety of ways. Most commonly, as here, the duty is generated by statute. Not infrequently, however, it is generated by the duty cast by the common law upon a public authority to act fairly. The search for the demands of fairness in this context is often illumined by the doctrine of legitimate expectation; such was the source, for example, of its duty to consult the residents of a care home for the elderly before deciding whether to close it in *R v Devon County Council ex parte Baker* [1995] 1 All ER 73. But irrespective of how the duty to consult has been generated, that same common law duty of procedural fairness will inform the manner in which the consultation should be conducted.

[100] In determining the scope of fairness in the present case, Ms Chen placed significant emphasis on the fact that the majority of the members on the Council were elected by, and represented, seven sectors of the teaching profession and that a majority of members were teachers, principals and professional leaders appointed for their relevant expertise. Eleven of the 13 members of the Governing Board were said to be registered teachers.

[101] It was argued that given the professional expertise of the members of the respondent, the Court should defer to their judgment on professional matters. This argument was advanced particularly in the context of whether or not it could be said that the move from triennial to annual certification produced any detriment to teachers. It was not accepted that having to go through the process of certification annually rather than once every three years, was a detriment.

[102] Two reasons were advanced for this. The principal one was the development and implementation of Hapori Matatū. This was a digital services platform which the

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12 *R (Moseley) v London Borough of Haringey* [2014] UKSC 56 at [23].

respondent had been developing. It facilitated online application for practising certificates in replacement for what was said to be a cumbersome paper-based exercise. Reference was also made to the fact that even with triennial certification, some work previously had to be done on an annual basis. The implication was that the move to annual certification really did not produce any detriment to teachers.

[103] The applicants' response to these arguments was essentially two-fold. Firstly, it was submitted that the development of the Hapori Matatū platform was a separate initiative unconnected with the fees increase and that, but for the move to annual certification, significant time and effort savings in processing applications for certification would have been realised. It was submitted that the benefit that would otherwise have flowed from the implementation of Hapori Matatū was significantly dissipated with the move to annual certification.

[104] A reference was also made to the fact that not all teachers had the same time-saving experience as a result of the implementation of Hapori Matatū and a system called Professional Growth Cycle (PGC).

[105] The PGC process was described as one of "high trust". It was also a process which left significant discretion to Principals as to the way in which it would be implemented.

[106] Susan Haugh, for the applicants, deposed that the approach to this process by schools could be split into three different types. Approximately one-third of the schools not requiring any evidence of meeting the standards and fulfilling PGC targets for certification purposes. One-third retained large parts (if not all) of the old appraisal approach to use as its PGC approach, and requiring documented inquiry projects, evidence of professional conversations and the like. The final third adopted a kind of a half-way point between the full PGC approach and appraisals and required some additional evidence of meeting the standards and fulfilling PGC targets such as documenting PGC achievements and having pre-applications meeting with endorsers.

[107] This description of what was actually happening in practice was not challenged by the respondent. Instead it was submitted that the extra work identified in two of

the three categories was not required by the Teaching Council for certification purposes but was "extra work voluntarily adopted by the schools concerned over and above the requirements of the PGC process".

[108] This submission misses the point that it is not the teachers who choose how to implement the PGC processes, it is the schools. The net result is that for a large number of teachers, it is seriously arguable that the move to annual certification, even with the ability to use Hapori Matatū and PGC, the work involved is greater than the work involved with triennial certification.

[109] There was no cross-examination on the affidavit evidence. It is therefore not possible to come to a definitive view on exactly how much extra work by teachers and heads of department is caused or the precise value of that work in dollar terms. However, the proposition put forward by the respondent that there is no detriment is highly contestable.

[110] This is not a situation where members of the respondent Board have the monopoly on knowledge in relation to these sorts of matters. The teachers have equally as extensive knowledge as to the actual as opposed to theoretical effect on them, of the move to annual certification.

[111] The issue of whether or not a consultation has been carried out in accordance with the rules of natural justice is not a question where the Court is obliged to defer to the expertise of members of the Council. It is a legal question and it is resolved by the applications of settled principles of law, not the opinions of individual members of the Council.

[112] Counsel for the respondent submitted this case was analogous to *Lab Tests Auckland Limited v Auckland District Health Board*[13] and quoted a passage from that judgment where the Court of Appeal said:[14]

> In this context, the obligation to consult must depend on whether a DHB is proposing significant changes to a service, viewed objectively, rather than the

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13 *Lab Tests Auckland Limited v Auckland District Health Board* [2009] 1 NZLR 776; [2008] NZCA 385.

14 At [327]-[328].

> fears of a particular group or groups within the DHB's resident population that a service reduction may result.

[113] In this case, the fears expressed by the teachers were not subjective ones about something that might potentially happen in the future, they were based on the actual experience of teachers under the new system.

[114] Ms Chen claimed that the Teaching Council "…had already been "influenced" by the feedback from the 2017 Consultation about excess workload driving a 80 per cent response in favour of triennial fees …"

[115] The 2017 proposal was different to the current proposal. Some 11,000 of the teachers affected by the 2019 proposal would not have been teachers in 2017 and would therefore not have been consulted. They were entitled to be consulted.

[116] There is no evidence that the variation of the 2019 proposal to include a change to triennial certification had any connection at all with any feedback received either in 2017 or 2020. It appears to have arisen from the mistaken view that the Council was unable to charge fees on an instalment basis and if fees were to be charged annually then certification also needed to occur annually.

[117] The teachers consulted on the 2019 proposal had no opportunity to influence the Council's decision to abandon triennial certification in favour of annual certification.

[118] In terms of the language used by the Supreme Court in *New Zealand Pork Industry Board v Director-General of the Ministry for Primary Industries*,[15] the Board's decision to move to annual certification involved a "substantially different approach" to that which had been set out in the consultation proposal.

[119] The respondent submitted that the real reason that the Council did not consult on the prospect of triennial certification but annual instalments was "…because they did not have the administrative capability to provide instalments and due to the risks

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15 *New Zealand Pork Industry Board v Director-General of the Ministry for Primary Industries*, above n 8.

with issuing a PC in advance of full payment". These are exactly the sorts of issues that may well be resolved with consultation. In any event, this submission is inconsistent with the emphasis in the consultation and other documents already referred to, on the claimed legal inability of the respondent to accept payment by instalment.

[120] The respondent also argues that it did not have to consult on the change to the term of certification because it had no option but to accept the proposal from the Minister for further funding of $16.5 million. Reliance is laid on the fact that, in the estimates for Vote Education for the 2020/21 financial year, the nature of the policy initiative for which the additional funding was authorised was described as being "Supporting the Teaching Council to Transition to an Annual Practising Certificate Fee".

[121] There is a difference between annual certification and an annual fee for certification. There is no evidence that would indicate that the Minister had any preference one way or the other for triennial certification or annual certification. It is also clear that the Minister was misled by the Council in the briefing paper of 18 May 2020 which responded to his query by saying that it was unlawful for the Teaching Council to pay for triennial certification by annual instalments.

[122] The Minister's principal concern has clearly been to alleviate the financial hardship on teachers from such a large increase in their registration fees. It is unrealistic for the respondent to suggest that the funding provided by the Minister was somehow dependent on the change to annual certification.

[123] For the reasons set out above, I have reached the conclusion that the change to the period of certification was a significant one that produced detriment for a large number of teachers. The teachers had no opportunity for meaningful or indeed any input into the decision. There is also no indication that the funding provided by the Minister would have been any different had the proposal put to him been for retention of three-yearly certification with payment by annual instalment. Fairness required that the respondent consult on this decision.

[124] In relation to the second ground of judicial review, the failure to consider the merits and disadvantages of annual certification, it is clear that the Council did not do this. This appears to have been because they formed the view that this was not an option because they could not lawfully accept payment by instalments.

[125] In coming to this conclusion, I have not overlooked the evidence of Ms Hoskin and Ms Ngarewa. Although there is no documentary record of the Board having considered the merits of annual certification, Ms Hoskin and Ms Ngarewa both deposed to there having been discussions on this point. Ms Hoskin also deposes that the Council considered whether to consult on the move to annual certification before "deciding whether or not to accept the Minister's offer" and was advised that "natural justice did not require a re-consultation" because there would be "no detriment" to teachers from a move to annual certification.

[126] None of these comments are recorded in any Board papers or meeting minutes.

[127] Judicial review proceedings differ from other High Court proceedings. Generally, they proceed on the basis of affidavits filed without cross-examination. They are also determined on the basis of the material before the decision-maker at the time of the decision. As Randerson J said for the Court of Appeal in *Taylor v Chief Executive of Department of Corrections*:[16]

> A decision-maker may file affidavits explaining relevant facts and circumstances at the time the decision was made. But where, as here, the record reveals an adequate record of the decision and the facts before the decision-maker, the scope for additional explanatory evidence will be limited. … The decision-maker must refrain from descending into ex post facto justification in an attempt to improve on the original decision. The Court will give little weight to such explanations in the absence of compelling reasons.

[128] In the present instance, not only does the written record not support a conclusion that the Board discussed the merits of a move to annual certification, it also shows that the overwhelming pre-occupation of the Council was the cashflow consequences of the move from triennial payment of the fee to annual payment.

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16 *Taylor v Chief Executive of Department of Corrections* [2015] NZCA 477 at [33] (footnotes omitted).

[129] The briefing note from the Chief Executive to the Minister of 18 May 2020 referred to at [84] above is also inconsistent with the proposition that the Council had given any real consideration to the consequences of a move to annual certification.

**Ground Three – Error of law in respect of paying by instalments**

[130] The Board of the Teaching Council claims that it did not misunderstand the legal position in relation to its legal ability to have triennial certification but annual payments and refers again to the contents of the affidavit of the Chair, Ms Ngarewa. Also referred to is the claim that some of the earlier documents submitted to the Board in relation to the consultation did not contain the incorrect statement about the lawfulness of payment by instalments. There are two difficulties with this argument.

[131] Firstly, the Council unequivocally represented to those who had attended the December stakeholders' meeting, in its 24 December 2019 document, and in the consultation document sent to all teachers, that it was unable to lawfully consider payment of fees by annual instalments.

[132] By making that incorrect representation, the Council denied itself the opportunity of receiving feedback on the option of continuing with triennial certification but paying fees on an annual instalment basis.

[133] Secondly, if, as deposed by Ms Ngarewa, the members of the Council correctly understood their legal situation, it is astonishing that not one of the Council members (all of whom, Ms Ngarewa deposes, are said to have been aware of the correct legal position) took no steps to point out the errors in the 2020 Fees Consultation Information Pack for Council Members that they were provided with, or the error in the consultation document itself.

[134] The respondent appears to blame the second applicant for not identifying the error in the respondent's understanding of the legal position. It was submitted:

> No responses were received to the 24 December 2019 email, including any response from the PPTA.

[135] Given the fact that this document was sent out on Christmas Eve, it is hardly surprising that neither teachers nor the PPTA had obtained legal advice on it prior to 15 January 2020 when the consultation document was provided to the Board members.

[136] The claim that all of the Board members were aware of the correct legal position is also inconsistent with the Chief Executive's briefing note to the Minister as late as 18 May 2020.

[137] Again, this is a situation where the Court prefers the evidence set out in the documentary record and not subsequent conflicting affidavit evidence.

[138] If the consultation document had not misstated the legal position, and if the advice given to both the Board and Minister on payment by instalments had been correct, then it cannot be asserted with confidence that the outcome of the consultation process would have been the same. This ground of review is also made out.

**Ground Four – Error in respect of ability to set period of validity for practising certificates**

[139] The applicants argue that the Council's power to set expiry dates for practising certificates differs as between teachers who already hold a current practising certificate and graduate teachers who do not already hold a practising certificate. It is argued that the term of a certificate issued to a graduate cannot simply be determined by the Council and notified in the *Gazette* but must be decided in accordance with the standards and criteria maintained under s 382(1)(h) of the Act.

[140] It is submitted that departures from the default three-year period for new teachers can only be made on a teacher by teacher basis, and that in setting an expiry period of one year for all practising certificates, the Council did not consider the "standards and criteria" maintained under s 382(1)(h).

[141] The applicants acknowledge that in respect of the renewal of existing certificates, s 361(4)(a)(ii) authorises the Teaching Council to specify, by notice in the *Gazette*, a time earlier than the third anniversary of the day on which the certificate

already held expires. It is submitted that this is in distinction to the provisions of s 361(4)(b) which say:

> a practising certificate issued to a teacher who does not already hold a current practising certificate expires–
>
> (i) on the third anniversary of the day it is issued;
>
> (ii) at any earlier time that the Teaching Council decides in accordance with the standards and criteria maintained under s 382(1)(h).

[142] The significant distinctions in the sections are said to be that s 361(4)(b)(ii) uses the word "decide" rather than "specify"; that there is no obligation to publish an earlier expiry in the *Gazette*; that the Council is not provided with the power to determine an earlier expiry period for any and all kinds of certificate; and that it must set any period of expiry earlier than three years in accordance with the standards and criteria. It is noted that the relevant standards are set out in the Code of Professional Responsibility and Standards for the Teaching Profession. It is said that a teacher by teacher approach is required to assess whether compliance with the six standards have been met.

[143] The applicants say that the teacher by teacher focus is supported by the standards themselves. They submit that first time teachers are in a different position to those who have already been certified and that they have yet to establish their teaching practice through which they can demonstrate that they meet the standards.

[144] It is submitted that they require a default period of time over which to develop that practice and that, where Parliament has set that default period at three years, to require annual certification for all new teachers, without reference to the Standards or the different position new teachers are in, is to set the bar too high.

[145] The respondent asserts that the applicants failed to correctly identify the different kinds of practising certificates that s 361(4)(b) may apply to, in particular the fact that the category of teachers applying for a practising certificate who do not currently hold a practising certificate is not limited to new teachers but may include teachers who have taken a break from teaching and overseas teachers. It is alleged that the applicants have placed an unwarranted gloss on the requirement to specify an

earlier expiry period by *Gazette* notice for renewals of current practising certificates as opposed to the issue of practising certificates to teachers who do not already hold a current practising certificate. It is submitted that there is nothing in s 361(4)(b)(ii) that prevents the Teaching Council from deciding to set an expiry time earlier than the three-year default so that the expiry time equally applies to all applicants who do not already hold a current practising certificate.

[146] The respondent says that the only mandatory requirement in s 361(4)(b)(ii) is that any earlier time set by the Teaching Council must be decided "in accordance with the standards and criteria maintained under s 382(1)(h)".

[147] It is submitted that when teachers apply for a practising certificate, the mandatory requirements it must be satisfied of before one of the different types of practising certificate are issued, are generic. It is submitted that the criteria established and maintained by the Teaching Council, as published in April 2020, and updated in February 2021, apply to all teachers who apply for that particular kind of certificate, and that the criteria are not variable on a case by case basis, depending on the circumstances of individual applicants.

[148] The starting point to resolve these contentions is to identify what the "standards for ongoing practice" and "criteria for the issue of practising certificates of different kinds" referred to in s 382(1)(h) actually refer to. The standards for ongoing practice would appear to be contained in the document "Our Code, Our Standards"|Ngā tikanga matatika ngā paerewa (Ngā Paerewa).

[149] Separately, the "criteria for the issue of practising certificates of different kinds" are found in the document "Requirements for Teacher Registration, Practising Certificates and Limited Authority to Teach" published in April 2020.

[150] The criteria apply to all applicants. Although an applicant will apply individually, all applicants must meet the same criteria.

[151] The April 2020 document Requirements for Teacher Registration, Practising Certificates and Limited Authority to Teach does not appear to contain anything that

supports a one-year teaching certification process. Under the heading "Overview" it stipulates:

> If you want to be employed as a teacher, you also need to apply for and be granted a practising certificate which is renewed every three years, if you want to continue to practice.

[152] On page 9, there is the statement "Practising certificates are issued for three years", and on page 10, the paragraph dealing with Tiwhikete Whaakoranga Tōmua|Provisional Practising Certificates says:

> Most new teachers will be required to complete a compulsory two-year programme of induction and mentoring provided by their employer and supervised by a mentor who is fully certificated (tūturu) your tōmua gives you three years to do this.

[153] What s 361(4)(b)(ii) requires is that, in respect of the types of application that it relates to, if a practising certificate is to be less than the default period of three years set out in s 361(4)(b)(i), the departure has to be decided in accordance with the standards and criteria maintained under s 382(1)(h).

[154] In determining that the period of certification for all applicants would be one year, the Council does not appear to have analysed what standards for ongoing practice or criteria for the issue of practising certificates necessitate that. The sole consideration appears to have been the need to ameliorate the burden of the substantial fees increase by spreading payment over three years.

[155] The respondent submitted that the default expiry period of three years in s 361(4)(b) was an interim measure while the Education Council completed a full policy review that would be the platform for establishing new standards and criteria for teaching practice and the issuing of practising certificates of different kinds. This submission is not supported by an analysis of the Regulatory Impact Statement that preceded the amendments brought in by the Education Amendment Act 2015. This document discussed the various options available in relation to the regulation of teachers and its overall conclusion was:

> Accordingly, Option 3; Lifetime registration and three-yearly practising certificates, is assessed to best meet the specified objectives and address the identified policy problem.

[156] The Act, in s 361(4)(b), has specified different criteria for the Teaching Council to depart from the default three-year period of certification. In relation to the renewal of practising certificates for teachers who currently hold them, the procedure set out in s 361(4)(a)(ii) is straightforward. All that is required is a notice in the *Gazette*. However, the practice in relation to departing from the default three-year period for those other types of practising certificates governed by s 361(4)(b) is different. It does not simply require a notice in the *Gazette* but needs to be decided "in accordance with the standards and criteria maintained under s 382(1)(h)". This provision has not been complied with in this case, as there is no connection between departure from the default three-year period and anything to do with standards and criteria. The decision is therefore unlawful.

**Ground Five – *Ultra vires* in setting omnibus fee to cover other expenses**

[157] The issue here is whether or not the Act authorises the Teaching Council to set fees only for the specific matters authorised by the Act or whether it is permitted to set an omnibus fee to cover all its operating expenses.

[158] The applicants submit that setting an omnibus fee is inconsistent with the empowering legislation and also with the language commonly used by Parliament when it intends to authorise the use of an omnibus fee of the type involved here.

[159] As noted above in [14]-[27], the Act has evolved significantly since it was first enacted in 1989. The applicants point to the fact that although the functions and powers of the Council were successively expanded, there was a disconnect between the expansion of the fee setting powers and the allocation of new functions.

[160] Mr Every-Palmer drew attention to the fact that the 2015 amendments, which foreshadowed a move away from Crown Entity status and a corresponding reduced reliance on Government funding, only amended the Council's fee setting powers to include "the provision of professional leadership" and "costs relating to the performance of disciplinary functions".[17]

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[17] Education Amendment Act 2015, s 40.

[161] Counsel noted that the first funding agreement dated 26 October 2016 also required fees to be set by reference to tasks.[18]

[162] The applicants compared and contrasted the language used in the legislation relating to other professions where it was intended that omnibus registration fees could be set. Section 40(2)(h) of the Chartered Professional Engineers of New Zealand Act 2002, s 76 of the Registered Architects Act 2005, and s 73(3) of the Lawyers and Conveyancers Act 2006 were referred to as examples.

[163] Counsel also submitted that when Parliament had intended to impose a statutory mandate for a professional body to be financially self-sufficient it had used specific language, and noted, by way of example, that cl 11(d) of the Schedule to the Registered Architects Act 2005 provided specifically that the Board was required to operate in a financially responsible manner and for that purpose to ensure that it:

(i) maintains its long-term financial viabilities; and

(ii) covers all of its annual costs from its net annual income; and

(iii) acts as a successful going concern; and

(iv) prudently manages its assets and liabilities.

[164] This wording was distinguished from the more limited wording in Schedule 21 of the Act to operate in a financially responsible manner and for that purpose prudently manage its assets and liabilities.

[165] The applicants referred to the long-established proposition that a charge for a service which exceeds its reasonable cost can be regarded as an unlawful tax. Counsel referred to the dictum of Lord Justice Atkin in *Attorney General v Wilts United Dairies Ltd*:[19]

> There is … no suggestion that the charge made in this case is part of a price payable by the defendants for milk bought by them … In these circumstances, if an officer of the executive seeks to justify a charge upon the subject made for the use of the Crown (which includes all the purposes of the public revenue), he must show, in clear terms, that Parliament has authorised the particular charge. The intention of the legislature is to be inferred from the

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18 See Measure G in Schedule 2 (p9) of the second funding agreement.

19 *Attorney General v Wilts United Dairies Ltd* (1921) 37 TLR 884 at 886.

> language used, and the grant of powers may, though not expressed, have to be implied as necessarily arising from the words of a statute …

[166] Counsel noted that the current Treasury Guidelines for Setting Charges in the Public Sector also reiterated this principle saying:[20]

> **Important note:** Charges that are in excess of the costs of providing the service could be interpreted as a tax, in which case such charges must be authorised by or under an Act of Parliament as required by section 22(a) of the Constitution Act 1986. Taxes are outside of the scope of this guidance.

[167] The respondent asserts that it is entitled to fix a "bundled" fee which covers all of its operational costs. Counsel relies on s 383(1)(h) of the Act. The structure of s 383 is that it starts by saying that "the Teaching Council may, by notice in the *Gazette*, fix fees for all or any of the following". Thereafter, seven specific functions are listed starting with "any addition or alteration to a person's registration as a teacher" and including matters such as "the provision of professional leadership" and "costs relating to the performance of disciplinary functions". To this list of seven specified functions, s 383(1)(h) adds:

> any other matter for which this Act provides that the Teaching Council may charge fees.

[168] It is submitted that s 383(4) which says:

> The Teaching Council may charge a fee for anything that it has fixed a fee for under subsection (1).

[169] And s 383(7) which says:

> The Teaching Council has all other powers conferred by this Act or reasonably necessary to enable it to perform its functions.

are also relevant.

[170] Section 383 clearly proceeds on the basis that the Teaching Council is authorised to fix fees for "all or any" of the matters set out in s 383(1)(a)-(h). The corollary of that is that it cannot levy fees for functions that are not covered by s 383(1)(a)-(h).

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[20] Treasury *Guidelines for Setting Charges in the Public Sector* (April 2017) at [1.1].

[171] The use of the words "all or any" at the start of s 383(1) indicate that, in respect of those functions identified in s 383(1)(a)-(h), there can be a combined fee covering one or more of those matters. However, what it does not authorise is a combined or bundled fee that includes a fee for matters which are not listed in s 383(1).

[172] Section 383(1)(h) is not a catch-all provision which authorises the setting of fees to cover the costs of every function that the respondent carries out. In order to be authorised by s 383(1)(h), a function must relate to a "…matter for which this Act provides that the Teaching Council may charge fees".

[173] As already discussed, there is a gap between the functions that have been progressively added to the Teaching Council and its predecessors and the specific statutory authorisation to charge fees for those functions. For example, the document titled "Your fees at work" produced by the Teaching Council in May 2020 provided a breakdown of what was described as "the new annual fee of $157". It identified $16.43 of the fee being for "professional services" and included within this designation are the functions of "Ensuring the voice of the profession is heard" and "providing independent policy advice to Government and other agencies".

[174] Neither of these matters fall within the ambit of s 383(1)(h) as matters which the Act specifically authorises the Teaching Council to charge fees for. The consequence of this is that the Teaching Council is not authorised to charge a bundled fee which covers these matters.

[175] Section 383(4) is of no assistance to the respondent because it has not fixed a fee for these matters under subs (1), and neither does s 383(7) help because, when the structure of s 383 is so clearly based on authorising fees for identified functions, it cannot be said that the authorising of fees for functions that the statute does not expressly entitle the levying of a fee, could be said to be something "reasonably necessary to enable it to perform its functions".

[176] As a separate issue relating to the applicants' challenge in Ground Five, the respondent claimed that the applicants had only sought judicial review of two matters

being the decision to reduce the period of certification for teachers from three years to one, and the decision to increase the fee of the issuing of a practising certificate.

[177] It was submitted that the Council had made nine discrete decisions in relation to eight different fee categories with a separate decision being made relating to the discontinuance of transitional rebates for teachers moving from provisional to full practising certificate within the certification cycle.

[178] While the respondent chose to pass separate motions in relation to the fees for each different category of certificate, the basic decision was to move from a fee of $220.80 paid every three years to a new annual fee of $157 to which, for certain categories of registration, surcharges were added. Indeed, the "Your fees at work" document distributed by the respondent to teachers in May 2020 explaining its decision in relation to fees, did not refer to eight separate fees but only one. It said:

> The new annual fee of $157 (or $3 per week) replaces a previous fee of $220.80 paid every three years ($1.40 per week). The increase will take effect February 2021.

[179] The applicants have clearly challenged the fixing of the base annual fee at $157. That base fee is a component of the various categories for registration as a teacher. If it is invalid, then it invalidates each fee decision of which it was a component. This ground for judicial review is made out.

**Ground Six – Failure to provide sufficient information and options on level of expenditure/services rendered**

[180] The applicants claimed that the respondent did not make available, during the consultation process, sufficient information for teachers to assess the reasonableness of its projected annual expenditure. They submit that in order to be able to make informed and useful responses, they ought to have been provided with:

(a) a detailed explanation of the basis for the costs incurred; and

(b) options for the delivery of services and the costs that each would incur.

[181] They complain that the figure of $18.3 million for operating costs set out in the consultation document has an estimate of operating costs for the Teaching Council for the 2020/21 financial year that was based on an assumption representing the outcome of various decisions as to what the Council was going to do. The applicants complain that the consultation treated the quantum of the projected operating costs as being outside the scope of consultation.

[182] The applicants refer to the view of their financial analyst, Mr Cox, who stated, "the financial material does not provide a sufficient basis for assessing the Teaching Council's efficiency or value for money".

[183] The applicants say that the Council ought to have consulted on alternative options for the delivery of the Council's statutory functions and rely on observations of the UK Supreme Court in *R (Moseley) v Haringey London Borough Council*.[21] The applicants submit that there "must have been" alternative options available for delivery of the services that the Council was obliged to provide.

[184] The respondent refers to the fact that it received lots of feedback from the consultation process including 29 pages of written feedback from the PPTA and 13 of its branches. It noted that there were no requests by any party consulted for further information. Counsel relied on the decision in *Wellington International Airport Ltd v Air New Zealand* as authority for the proposition that what was obliged to be provided to consultees was "relevant information and with such further information as they request".[22] The reference was made to the various cases which make a point that consultation is not litigation nor is it a process akin to that of discovery.

[185] As all counsel accepted, the content of the obligation of fairness in relation to the statutory power of decision is very much context specific. In some cases, a great deal of information will need to be provided before it can be said that those consulted are fully informed and able to make intelligent responses and in other cases much less will be required.

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21 Above n 12.

22 *Wellington International Airport Ltd v Air New Zealand* [1993] 1 NZLR 671 at 676.

[186] The relevant background or contextual matters here are that it was common knowledge that, since the establishment of the Teaching Council in 2015, only about 40 per cent of its overall operating costs had been met by the registration and certification fees charged. Apart from some minor income from services provided, the balance of the operating costs had come from advances from the Government. It was equally clear that the Government had decided that the Teaching Council, going forward, would have to meet its own costs.

[187] The consultation document issued by the respondent referred to previous financial analysis undertaken by Deloitte and reviewed by the Ministry of Education and PricewaterhouseCoopers as to the ongoing income needs of the Council.

[188] The information provided in the consultation document broke down into three categories what the components of the estimated $18.3 million operating costs were. Appendix 3 to the consultation document provided a further breakdown.

[189] The consultation document also included comparative data on the registration fees for other professional organisations. That data showed that the existing fees were below (in some cases very significantly below) corresponding registration/ certification fees for other bodies.

[190] It is significant that no request was made by any of those consulted for access to the financial modelling which the consultation document identified as having been completed by Deloitte and reviewed by PricewaterhouseCoopers and the Ministry of Education.

[191] The facts in this case can be distinguished from those in *Haringey*. The PPTA is a well-informed, well-resourced and effective representative. If it had concerns about the reliability of the forecast Budget, it could have asked for the financial modelling data but did not do so.

[192] While it is possible that a reduction of services might have produced some savings, the reality was that the Act was prescriptive in relation to the functions the Council was required to deliver. The other reality was that, even if services could be

reduced, cost savings would be minimal. It is also not possible to seriously dispute the proposition that, the only source of income that was going to permit the Council to meet its estimated operating costs was a substantial fee increase.

[193] While the estimated operating costs of $18.3 million were an assumption and the consultation document did not identify alternatives to a fee increase, in the absence of any request for further information or assertion of inadequacies in the information provided, it cannot be said that fairness required more of the Council. This ground of review is accordingly not made out.

**Leadership Centre Decision**

[194] The applicants contend that on or around 6 March 2020 the Teaching Council decided to accept a proposal to establish a professional development initiative known as the Leadership Centre. The purpose of this centre is to provide teachers with the opportunity to develop leadership capabilities. The applicants assert that the Teaching Council has not secured any additional funding for the establishment and running of the Centre and that no consultation was undertaken with the teaching profession in respect of the decision to establish the Centre.

[195] The respondent admits that it decided to accept the invitation to establish the Leadership Centre but otherwise denies the applicants' claims.

[196] The respondent accepts that it did not consult with the teaching profession but says that it was justified in not doing that "…because there was no intention for the cost of operating the Leadership Centre to be borne by the Teaching Council, and therefore teachers, through fees".

[197] The respondent does not assert that any agreement exists between it and the Government in relation to the funding of the Leadership Centre. In her affidavit, Ms Barnes admits that for the financial year ended 31 March 2021, the Teaching Council had spent some $47,000 on matters to do with the Leadership Centre. She says these funds came from its general projects budget.

[198] Costs were also incurred in the 2019/20 financial year but Ms Barnes deposes that they were all related to the Stewardship Group which was funded under a contract with the Ministry of Education.

[199] The respondent acknowledges that the funds allocated for the Leadership Centre were not included within the category of "Professional Leadership and Teacher Capability" functions for which the forecast operating costs of $5 million per annum for the 2020/21 financial year were published in the "Consultation on Proposed Changes to Teaching Council of Aotearoa New Zealand Fees" consultation document. It says that they were not included under this heading because the Leadership Centre was "seen as a separate project with separate funding arrangements".

[200] The respondent further says that it did not identify the extent to which costs associated with the establishment and running of the Leadership Centre should be included in the Budget to be recovered through teachers' fees "because there was no intent to cover the costs of operating the Leadership Centre through teachers' fees".

[201] Beyond the statement that the Teaching Council did not "intend" to fund the Leadership Centre, there is no evidence of any contractual arrangement entered into with the Government to reimburse it for the funds already allocated or spent. The respondent dismisses the $47,000 taken from its general projects budget to fund this initiative as being "de minimis".

[202] The establishment and operation of a Leadership Centre is not something that the Act authorises the respondent to charge a fee for.

[203] From the limited evidence available, it appears that the respondent has not yet been reimbursed in respect to the $47,000 spent in the 2020/21 financial year for the Leadership Centre. It is not clear whether those funds will be reimbursed. It is also not clear why a contract was not entered into if there had indeed been a commitment by the Government to meet all of the costs of the establishment and operation of the Leadership Centre.

[204] By way of contrast, the two provisional funding agreements entered into before the Government provided the funding subsidies, were very specific about what the money was for, even down to specifying milestones for payment.

[205] It appears that the invitation to the Teaching Council to establish a Leadership Centre did not come out of the blue. As long ago as March 2018, the then Education Council made submissions to the Government on a Draft Leadership Strategy. It also seems that the PPTA was consulted and, in her affidavit, Ms Barnes deposes the PPTA position as being:

> If the Leadership Centre or any other functions are added to the work of the Teaching Council it is essential that the full funding for this is provided directly by Government. If Government believes that these roles are of value and worth creating, then they should stump up the resources.

[206] It also appears that the Government wants the Teaching Council to be involved in this initiative and has entered into a number of funding agreements to facilitate the Teaching Council's activities. These include a funding agreement dated 19 April 2018 between the then Education Council and the Ministry for the Leadership Capabilities Project totalling $87,687.50 including GST; a funding agreement between the Ministry of Education and Teaching Council dated 3 October 2018 in the sum of $34,500, plus GST for distributing material relating to Leadership Capabilities; and a further similar agreement signed on 13 June 2019 for sums totalling $300,235, including GST.

[207] Therefore, in spite of the apparent absence of any contractual agreement to reimburse the Teaching Council for the $47,000 spent in the 2020/21 financial year, there appears to be a basis for an assumption that those funds might be reimbursed.

[208] Ms Barnes further deposed:

> The discussions are proceeding on the basis that the Government will provide the funding, as it does now, and teachers will not have to pay for it. Once we have options for a proposed operating model, we will consult with the profession before making any final decision.

[209] Given the fact that there has been some consultation generally on issues relating to the Leadership Strategy and the undertaking by Ms Barnes for further consultation once the proposed operating model is finalised, it is premature to suggest

that there has been a breach of the obligation to consult simply because the Teaching Council has agreed in principle to establish the Leadership Centre and has spent some $47,000 of its general funds for which it has not yet been reimbursed.

[210] This ground of judicial review is therefore not made out. To the extent matters relating to the Leadership Centre have any relevance to these proceedings, it would seem, at best, that they are an example where the Government appears to be prepared to separately fund a function that it wishes the Teaching Council to undertake as an exception to its policy that the Teaching Council should be financially self-sufficient.

**Relief**

[211] Both parties acknowledged that, in judicial review proceedings, the Court has a discretion as to whether to grant relief although, where grounds of review are established, "strong reasons" are required to decline to grant relief.

[212] Here the respondent says that it will suffer "substantial prejudice" and that this is a sufficient reason to decline relief.

[213] The applicants acknowledge that the granting of relief sought would cause considerable disruption to the process of issuing practising certificates. Their solution to this is for the Court to quash the annual certification and fee decisions with effect six months from the date of the judgment. They submit that this would allow for consultation to occur and new decisions to be made.

[214] However, as the applicants acknowledge, if the Court upholds the fifth ground of review (as it has), the bundled levy would amount to an unlawful tax which would be void *ab initio*. It says that the consequence of this is that the previous triennial fee of $220.70 would apply to teachers who have been certified from 1 February 2021.

[215] The respondent points to the fact that it has spent not only the transitional funding provided by the Government but also a substantial amount of its cash reserves and that it cannot recover this money.

[216] It also submits that it would be required to repay the $11 million in Government funding appropriated to support it in transitioning to annual fees and would become insolvent as a result.

[217] The respondent also says that the relief sought would be of no practical value to the applicants and it would adversely affect the interests of third parties. It was submitted that the granting of the relief sought would undermine the performance by the Teaching Council of:

> Functions including those most important to the safety of children and young people in classrooms to ensure teacher applicants for certification were fit to teach and have been properly vetted and that they are competent and have no conduct issues.

[218] In a memorandum dated 26 May 2021 filed pursuant to leave, Ms Chen claimed that delay was a relevant factor for the Court to consider in relation to relief, claiming that these proceedings were filed almost six months after the annual certification fee was gazetted on 22 May 2020. This submission is not entirely correct although the Fees Decision was published in the New Zealand Gazette on 22 May 2020, the Annual Certification Decision was not published in the New Zealand Gazette until 6 November 2020.

[219] The starting point in considering whether the Court should exercise its discretion not to quash an unlawful decision is the proposition that there must be strong reasons not to grant relief and that cases in which relief would be declined were "exceptional".[23] The Court of Appeal in *Air Nelson Limited v Minister of Transport* observed that in considering whether to exercise its discretion not to quash an unlawful decision or grant another remedy, the Court can take into account the needs of good administration, any delay or other disentitling conduct of the claimant, the effect on third parties, the commercial community or industry, and the utility of granting a remedy.[24]

[220] The Supreme Court in *Ririnui v Landcorp Farming Limited* also observed that although relief in judicial review is discretionary, Courts today will generally consider

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23 See *Air Nelson Limited v Minister of Transport* [2008] NZCA 26 at [59] and [60].
24 At [59].

it appropriate to grant some form of relief where they find a reviewable error, and where there has been a fundamental error by a decision-maker concerning an applicant's legal status, for which the decision-maker is responsible, a Court would usually grant relief by ordering the decision-maker to reconsider on the correct basis.[25]

[221] Counsel for the respondent submitted that the requirement for "strong reasons" to decline relief in judicial review proceedings has now been modified so as to apply principally to a case where the claimant has suffered "substantial prejudice" and that in the generality of cases a more nuanced approach is required.[26]

[222] Counsel also referred to the decision of the Court of Appeal in *Department of Internal Affairs v Whitehouse Tavern Trust Board* where the Court of Appeal indicated that relief may be refused where it would be futile, legislation was likely to be changed, or administrative chaos would otherwise result.[27]

[223] The respondent submitted that there was no substantial prejudice to the claimants requiring the Court's intervention and re-consultation.

[224] The respondent also asserted that the fact that the applicants had proposed a prospective invalidation of the decisions not to take place until six-months hence "acknowledges and underscores that there is no serious detriment to teachers that require urgent reversal".

[225] I accept the respondent's submissions that the Court of Appeal has recently championed a more cautious approach, as articulated by Arnold J in *Rees v Firth*[28] and Stevens J in *Tauber v Commissioner of Inland Revenue*.[29] This is consistent with the views expressed by the author of *Judicial Review: A New Zealand Perspective* who usefully articulated the existence of the "substantial prejudice" requirement as follows:[30]

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25 *Ririnui v Landcorp Farming Limited* [2016] NZSC 62 at [112].
26 Relying on *Rees v Firth* [2011] NZCA 668, [2012] 1 NZLR 408; and *Tauber v Commissioner of Inland Revenue* [2012] NZCA 411, [2012] 3 NZLR 549 at [91].
27 *Department of Internal Affairs v Whitehouse Tavern Trust Board* [2015] NZCA 398, [2015] NZAR 1708 at [96].
28 Above n 27.
29 Above n 27.
30 Above n 7, at 5.33.

> …if the plaintiff is not prejudiced by the decision or action, or is only a little prejudiced, then the weight in favour of granting a remedy will in this respect be little and existence of a matter of public interest pointing against a remedy will more easily lead to a refusal of a remedy. The matter can be viewed from the opposite direction. If the effects of a remedy on others are very great, so too must be the prejudice to the plaintiff.

[226] I have rejected the respondent's submission that the applicants suffered no detriment as a result of the failure to consult on the change to annual certification. The nature of the detriment is that teachers applying for certification will have to spend more time and effort undertaking that exercise on annual basis as compared to a triennial basis.

[227] For some teachers, the amount of extra work will be ameliorated, to some extent, by the implementation of Hapori Matatū and PGC. However, because of the variation in approach between schools over which the teachers effected have no control, there are many teachers who will end up having to undertake significantly more work by having to complete the recertification process annually rather than triennially.

[228] As mentioned, it is impossible, in the context of judicial review proceedings, to quantify the time value of this extra work but it seems more appropriately categorised as prejudice rather than substantial prejudice. This means that I have some flexibility in considering the public interest factors that might militate against relief.

[229] The three most relevant public interest factors would seem to be:

(a) effect on third parties;

(b) prejudice to public administration; and

(c) delay.

[230] It is my view that the respondent has exaggerated the effect on third parties of quashing the decisions. As noted in [217] above, the third parties identified by the respondent as potentially being affected were "children and young people in classrooms" whose safety was said to be compromised in relation to "ensuring

applicants for registration and certification were fit to teach and had been properly vetted, and that teacher conduct and competence matters were appropriately dealt with".

[231] This submission is predicated on the proposition that if the Fee Decision and Annual Certification Decision are quashed, the Teaching Council will become insolvent and therefore unable to operate causing chaos.

[232] The idea of insolvency is also predicated on the assumption that the Teaching Council will be required by the Government to repay the funds that it had been advanced. It seems improbable that the Government would act in such a manner. It is far more likely that the Government would continue to support the Teaching Council as it has done since 2015. To the extent that legislative amendments are required, it also seems likely that the Government would attend to them promptly.

[233] The fact that legislative amendment may be required is not a reason for refusing relief. Indeed, in *Mangawhai Ratepayers' and Residents' Association Inc v Kaipara District Council*, the Court of Appeal said, in the context of validating legislation being required in respect of an unlawful rate:[31]

> Validating legislation has frequently been passed where Parliament has formed the judgement that it is necessary in the overall public interest to rectify errors by local authorities. Parliament is the appropriate forum for addressing such issues.

[234] At the hearing, there was some discussion by counsel as to the question of the need for possible reimbursement of registration fees. That is a separate question to whether or not judicial review should be granted. Duffy J was presented with a similar issue in *Mangawhai Ratepayers' and Resents Association Inc v Northland Regional Council* where she said:[32]

> The plaintiffs want an order directing the NRC to return the rates I have found to be unlawful to the respective ratepayers. Such an order goes beyond the bounds of the present proceeding. It is in the nature of restitutionary relief. However, the statement of claim makes no claim for restitution. There are

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[31] *Mangawhai Ratepayers' and Residents' Association Inc v Kaipara District Council* [2015] NZCA 612, [2016] 2 NZLR 437 at [205].

[32] *Mangawhai Ratepayers' and Resents Association Inc v Northland Regional Council* [2017] NZHC 1972 at [7] (footnotes omitted).

> occasions where a decision in judicial review that payments in the nature of government levies or taxes are unlawful has subsequently led to a court ordering return of those payments. However, such orders are inevitably made in subsequent proceedings for restitution. A notable example is *Woolwich Equitable Building Society v Inland Revenue Commissioner.*

[235] These comments are apposite here. It is possible that following re-consultation, the Teaching Council may come to a similar decision in relation to the fee increase required. It is also possible that there may be a legislative response authorising the backdating of that fee increase to 1 February 2021. In any event, a claim for recovery of fees paid is a private law restitutionary claim rather than a public law one.[33] It is not a matter for determination in these proceedings.

[236] In relation to prejudice to public administration, this factor, by itself, normally has little weight.[34] Generally, it would need to be coupled with other factors such as delay[35] or prejudice to third parties to justify withholding a remedy.

[237] In relation to the question of delay, particularly when judicial review proceedings are challenging something such as the imposition of a rate, applicants are expected to act reasonably promptly. What is an unreasonable delay is dependent on the facts.

[238] In *Hauraki Catchment Board v Andrews*,[36] the Court of Appeal held that a delay of approximately two and a half years in bringing judicial review proceedings regarding the fixing of a rate, particularly where the issue intended to be raised was readily discernible from the start was lengthy but, nonetheless, upheld the decision of Wild CJ at first instance that a delay of this length was not fatal.

[239] In *Meridian Energy Co v Wellington City Council*,[37] notwithstanding some delay, Collins J found that because the case involved the lawfulness of a tax, he would not have declined the judicial review application on the grounds of delay "…because

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33 See *Vodafone Ltd v Ofcom* [2020] QB 857 for an example of such a restitutionary claim.
34 See *Judicial Review: A New Zealand Perspective*, above n 7, at 5.40.
35 See *Anderson v Valuer General* [1974] 1 NZLR 603.
36 *Hauraki Catchment Board v Andrews* [1987] 1 NZLR 455 at 448 and 457-458.
37 *Meridian Energy Company v Wellington City Council* [2017] NZHC 48.

money paid to a public authority in the form of an unlawful tax ought to attract a remedy".

[240] I do not find that there has been any particular delay here so as to disentitle the applicants from remedy. The applicants needed to understand the background to the respondent's decision. Ms Haugh deposes that the challenged decision was issued at a time of change to COVID levels, that the second applicant needed to have meetings with members to receive instructions on options and that it also engaged in direct correspondence with both the respondent and the Minister and it was only when these initiatives failed that it commenced these proceedings. The applicants also undertook an information gathering exercise by way of Official Information Act (OIA) request. The respondent says it responded diligently to the OIA request. The applicants have a different view. It is unnecessary for me to ascribe fault. The reality is that the information gathering exercise preparatory to the issue of proceedings took some time.

[241] If the Court was simply dealing with the first three grounds of judicial review, the course proposed by the applicants of the Court making a prospective quashing of the decisions, suspended for six months, would have had some merit.[38] However, the difficulty arises with Grounds Four and Five.

[242] In terms of Ground Four, my finding that the respondent did not have a lawful power to set a blanket one-year expiry period for new graduates, if suspended for six months, would effectively amount to a judicial amendment to the Act. That is not something I can do.

[243] The situation is similar in relation to my finding in respect of Ground Five. If the setting of an omnibus fee is *ultra vires* the respondent's powers, then it effectively amounts to an unlawful tax. That is also something that is void *ab initio*.

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[38] In considering whether the decision should be considered invalid *ab initio*, or whether there is any prospect of applying relief in the form of prospective invalidation, a useful starting point is Fisher J's decision in *Martin v Ryan* [1990] 2 NZLR 209. See also *Spencer v Attorney-General* [2013] NZHC 2580 at [117]; *Murray v Whakatane District Council* [1999] 3 NZLR 276 (HC) 276 at 320; and Philip Joseph *Joseph on Constitutional and Administrative Law* (5th ed, Thomson Reuters, 2021) at 973.

## Outcome

[244] I make a declaration that the Fees Decision and Certification Decision are unlawful and the first five grounds for judicial review are upheld. The sixth ground of judicial review is not upheld.

[245] The Fees Decision and Annual Certification Decision are quashed.

[246] The Leadership Centre Decision is lawful and the application for judicial review in respect of it is dismissed.

## Costs

[247] The parties are encouraged to agree costs but if that is not possible, the applicants are to file and serve a memorandum within 14 days of the date of this decision with the respondent to reply within 14 days of receipt of the applicants' memorandum.

**Churchman J**

Solicitors:
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