DECISION	RSW1/D1/SWDT/2017
IN THE MATTER	of a charge laid under the Social Workers Registration Act 2003
AND	
IN THE MATTER	of disciplinary proceedings against **UILA ESERA** of Auckland, registered social worker

BEFORE THE SOCIAL WORKERS COMPLAINTS AND DISCIPLINARY TRIBUNAL

HEARING	in Auckland on 9 and 10 April 2018
PRESENT:	Ms J C Hughson, Chairperson
	Ms T Hocquard, Ms K Fry, Mr P Comber, Mr B Marra (Members)
	Ms G Fraser (Hearing Officer)
	Ms A Garrick, for the Complaints Assessment Committee
	Practitioner not present at hearing
	Mr S Nicholson granted leave to withdraw as Counsel at commencement of hearing on 9 April 2018

Introduction

1. Mr Uila Esera ('Mr Esera") is a registered social worker. At the time of the relevant events Mr Esera was employed by the Ministry of Social Development as a Residential Social Worker at the Child, Youth and Family (CYF) Whakatakapokai Care and Protection Residence in Manurewa, Auckland.
2. A Complaints Assessment Committee (CAC) laid a professional misconduct charge against Mr Esera alleging that he breached the Code of Conduct (issued by the Social Workers Registration Board under s. 105 of the Social Workers Registration Act 2003 (the SWR Act)). The charge was laid in the alternative; that the conduct alleged was unbecoming of a social worker and reflects adversely on the practitioner's fitness to practise as a social worker.
3. The charge was as follows:

Pursuant to section 72(3) of the Act the Complaints Assessment Committee charges that:

1. On 25 November 2013, Uila Esera acted aggressively towards a young person, LME, who was a resident of the Child, Youth and Family Whakatakapokai Care and Protection Residence in Manurewa.

2. Mr Esera then used inappropriate physical force on the young person.

3. On 2 May 2014, Mr Esera assaulted Grant Bennett, the General Manager of the Child, Youth and Family Residential and High Needs Service, by punching him in the head and face.

4. After a Judge-alone trial on 12 June 2015, Mr Esera was found guilty of a criminal charge of common assault under s 196 of the Crimes Act 1961, punishable by one year imprisonment.

5. Mr Esera's conduct on both occasions was in breach of the Code of Conduct issued by the Social Workers Registration Board pursuant to s 105 of the Act, which provides that to uphold high standards of personal conduct and act with integrity a social worker is expected to refrain from any professional or personal behaviour that puts at risk the individual's and/or the profession's reputation and compromises the social worker's ability to work with the client in a fully professional and caring manner.

The conduct alleged above, considered individually and/or cumulatively, constitutes:

(a) professional misconduct pursuant to section 82(1)(a) of the Act; or in the alternative

(b) conduct that is unbecoming of a social worker and reflects adversely on his fitness to practise as a social worker pursuant to section 82(1)(b) of the Act.

Legal Principles

4. The burden of proof was on the CAC as the prosecuting body.

5. As to standard of proof, the appropriate standard is the civil standard; that is proof to the satisfaction of the Tribunal on the balance of probabilities, rather than the criminal standard. The degree of satisfaction called for will vary according to the gravity of the allegations. The greater the gravity of the allegations the higher the standard of proof[1].

6. The Tribunal is required to consider each particular individually and each proven particular cumulatively in the context of the overall charge.[2]

7. Section 82 of the Social Workers Registration Act 2003 (the SWRA Act) defines the grounds on which a registered social worker may be disciplined. Section 82(1) provides:

> *(1) The Tribunal may make an order under section 83 in respect of a registered social worker if, after conducting a hearing on a charge laid against the social worker, it is satisfied that the social worker—*
>
> *(a) has been guilty of professional misconduct; or*
>
> *(b) has been guilty of conduct that—*
>
> *(i) is unbecoming of a social worker; and*
> *(ii) reflects adversely on the social worker's fitness to practise as a social worker; or*
>
> *…*

8. Section 82(2)(a) provides that a social worker is guilty of professional misconduct if he or she breached the Code of Conduct.

9. The Tribunal has considered professional misconduct arising out of a breach of the Code of Conduct in *Complaints Assessment Committee v Curson* [3] and in subsequent cases including *Complaints Assessment Committee v RSW X*[4] and *Complaints Assessment Committee v Austin*[5]. In those cases the Tribunal adopted a two-step approach to assess what constitutes professional misconduct in cases of this kind:

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[1] *Z v Complaints Assessment Committee* [2009] 1 NZLR 1 (SC)
[2] *Duncan v Medical Practitioners Disciplinary Committee* [1986] 1 NZLR 513 *and Chan v Medical Practitioners Disciplinary Committee* CA 70/96, 7 August 1996
[3] 01/08/SWDT, 30 July 2008
[4] RSW5/D2/SWDT/2016, 11 October 2016 at [44]
[5] RSW2/D2/SWDT/2016, 9 September 2016 at [53]

a. The first step involves an objective analysis of whether or not the registered social worker's acts or omissions can reasonably be regarded by the Tribunal as constituting a breach of the Code of Conduct.

b. The second step (threshold) requires the Tribunal to be satisfied that the registered social worker's acts or omissions require a disciplinary sanction for the purposes of protecting the safety of the public and/or enhancing the professionalism of social workers (by maintaining professional standards).

10. These steps reflect an adoption by this Tribunal of the well-established approach taken in respect of charges of professional misconduct laid against registered health practitioners under the Health Practitioners Competence Assurance Act 2003. Guidance for the application of the two-step test can be found in *F v Medical Practitioners Disciplinary Tribunal*[6].

11. The correct approach to threshold is that described in *F v MPDT* (above) which endorsed the earlier statement of Elias J in *B v Medical Council*[7]. Elias J made the important point that the threshold is "inevitably one of degree". The Court of Appeal expressed the issue in this way:

> *"In cases of both professional misconduct and conduct unbecoming it will be necessary to decide if there has been a departure from accepted standards and then whether the departure is significant enough to warrant sanction."*

12. In determining whether the departure is significant enough there must be positive reasons to justify such a conclusion.

13. Counsel for the CAC submitted that the threshold step should not be overstated in the context of a charge laid under s. 82 of the SWR Act. It was submitted that was because the Act appears to provide that any breach of the Code of Conduct constitutes professional misconduct (s. 82(2)(a)) - which is a difference between the Health Practitioners Competence Assurance Act 2003 and the SWR Act). For the reasons which will be apparent from the analysis below, in this case the Tribunal has not had to grapple with the issue of whether every breach of the Code of Conduct will amount to professional misconduct which warrants disciplinary sanction. However the Tribunal envisages that there may be situations where a social worker

[6] [2005] 3 NZLR 774 (CA)
[7] noted at [2005] 3 NZLR 810

breaches the Code of Conduct but the breach is not sufficiently significant to warrant the imposition of sanctions.

14. In *Martin v Director of Proceedings*[8] and *C v Professional Conduct Committee of the Nursing Council*[9] the High Court has confirmed that the two step test for professional misconduct under the Health Practitioners Competence Assurance Act 2003 is an objective test and does not allow the Tribunal to consider matters personal to the practitioner in any significant way. Personal factors are given full consideration at the penalty stage if the Tribunal finds the charge established.

15. The Tribunal accepts the above principles for the purposes of the professional misconduct charge.

16. As above, the charge was laid in the alternative (under s. 82(1)(b)). In terms of the test of conduct unbecoming of a social worker and which reflects adversely on a practitioner's fitness to practise as a social worker, there are a number of decisions of this Tribunal where the Tribunal adopted the approach of the Medical Practitioners Disciplinary Tribunal and the higher courts on appeal, in cases of charges alleging conduct unbecoming which reflects adversely on a practitioner's fitness to practice under the (repealed) Medical Practitioners Acts 1995 (see *Complaints Assessment Committee v Hungahunga*[10]). The Tribunal as presently constituted has no reason to depart from that approach.

17. In *B v Medical Council*,[11] Elias J discussed the test as follows:

> *"There is little authority on what comprises "conduct unbecoming." The classification requires assessment of degree. But it needs to be recognised that conduct which attracts professional discipline, even at the lower end of the scale, must be conduct which departs from acceptable professional standards. That departure must be significant enough to attract sanction for the purposes of protecting the public...*
>
> *The structure of the disciplinary processes set up by the Act, which rely in part upon judgment by a practitioner's peers, emphasises that the best guide to what is acceptable professional conduct is the standards applied by competent, ethical and responsible practitioners. But the inclusion of lay representatives in the disciplinary process and the right of appeal to this court indicates that usual professional practice, while significant, may not always be determinative: the standards applied must ultimately be for the court to determine, taking into account all the circumstances including not only usual practice but also patient interests and community expectations, including the expectation that professional standards not be permitted to lag. The disciplinary process in part is one of setting standards*."

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[8] [2010] NZAR 333

[9] [2017] NZHC 1178, at [126]-[130]

[10] RSW6/D1/SWDT/2016

[11] Above fn.7

18. Importantly in *F v Medical Practitioners Disciplinary Tribunal* the Court of Appeal at paragraph [80] held that in charges of 'conduct unbecoming', in order to determine that the conduct is significant enough to warrant disciplinary sanction the Tribunal must satisfy itself that the conduct reflects adversely on the practitioner's fitness to practise.

19. In relation to the "reflects adversely on fitness to practise" rider, the Tribunal in *Complaints Assessment Committee v Going*[12] adopted the approach of the Medical Practitioners Disciplinary Tribunal in *Zauka* [13]where the Tribunal held:

> *"It is not necessary that the proven conduct should conclusively demonstrate that the practitioner is unfit to practise. The conduct will need to be of a kind that is inconsistent with what might be expected from a practitioner who acts in compliance with the standards normally observed by those who are fit to practise medicine. Not every divergence from recognised standards will reflect adversely on a practitioner's fitness to practise. It is a matter of degree."*

20. The Tribunal accepts the above principles for the purposes of the alternative charge of 'conduct unbecoming of a social worker'.

The evidence in support of the charge:

Agreed facts

21. An Agreed Statement of Facts was as follows:

Background

1. *Uila Esera became registered as a social worker on 25 August 2011.*

2. *In November 2013, he was employed by the Ministry of Social Development (the **Ministry**) as a Residential Social Worker at the Child Youth and Family (**CYF**) Whakatakapokai Care and Protection Residence in Manurewa, Auckland.*

3. *Mr Esera had been employed by the Ministry since 10 April 1995. He had been in the Residential Social Worker role since at least 3 October 2011, and had been Acting Team Leader for two short periods.*

4. *Whakatakapokai provides safe and secure care for up to 20 young people, whose length of stay varies from a few weeks up to a year. The young people in the residence are aged from 11 years old, with the average age being 13 to 14 years old. Most are severely at risk, with varied and complex needs.*

[12] RSW8/D1/SWDT/2016, 20 December 2016 (at [31]))

[13] MPDT 245/03/106C, 22 August 2003(in the context of a referral of convictions charge where the same rider applied)

Non-violent crisis intervention

5. *During the course of his employment, Mr Esera received training in Non-Violent Crisis Intervention (**NVCI**).*

6. *Since the early to mid 1990s, all CYF staff working in Care and Protection residences were required to be trained in NVCI, including a full training course and then refreshers annually. NVCI training was given by certified NVCI trainers.*

7. *Mr Esera's NVCI training included a two-day training in July 2012.*

Incident on 25 November 2013

8. *On 25 November 2013, an incident occurred at Whakatakapokai involving Mr Esera and a resident, LME. This incident was recorded on CCTV footage which will be played to the Tribunal and is admitted into evidence by consent.*

9. *At the time, LME was 16 years old. Her birthday is 1 March 1997.*

Employment investigation

10. *As a result of that incident, an employment investigation was commenced by the Ministry. During that investigation, Mr Esera was represented by Steve Nicholson.*

11. *Two copies of the investigation report were prepared by the Ministry. They are attached and labelled **A** and **B**. The second, later and updated, copy, included notes of meetings with witnesses, which are appended to the report.*

12. *On 2 May 2014, on behalf of Mr Esera, Mr Nicholson attended a meeting at Whakatakapokai where he was advised that the decision had been made to dismiss Mr Esera from his employment with the Ministry.*

13. *The others present at the meeting were Grant Bennett, the General Manager of the Child, Youth and Family Residential and High Needs Service, Clive Kilgour, Senior Human Resources Consultant for MSD, and Raewyn Holland, the Residence Manager.*

14. *Mr Esera did not attend the meeting. He waited outside in the car in the car park.*

Assault on 2 May 2014

15. *After the meeting, Mr Nicholson went out to the car and told Mr Esera the outcome of the meeting. Mr Esera got out of the car and entered the Whakatakapokai building. He was distressed. Mr Nicholson followed him.*

16. *Mr Esera approached Mr Kilgour, who was standing in the hallway, stopping about one metre away from him, face to face ("facing off" with him).*

17. *When Mr Nicholson arrived, he intervened, putting his arm between the two men, and told Mr Esera that they should leave.*

18. *Mr Esera initially walked towards the door but then turned and walked back further into the building. He was angry.*

19. *Mr Bennett and Ms Holland were in a meeting room and had been discussing other general matters.*

20. *Mr Esera entered the room and assaulted Mr Bennett.*

21. *Mr Esera punched Mr Bennett in the head and face at least three times while they were in the room. He also punched his back/torso.*

22. *Ms Holland called over the Whakatakapokai radio system for assistance.*

23. *Mr Nicholson sought to intervene by grabbing Mr Esera to separate him from Mr Bennett, pulling him into the hallway. While Mr Nicholson had hold of Mr Esera, Mr Esera continued to lunge at Mr Bennett but those punches did not connect.*

24. *Mr Esera was telling Mr Nicholson to let him go, and shaking himself to try to release Mr Nicholson's hold. Mr Nicholson suffered a swollen finger as a result.*

25. *Mr Esera stepped towards Mr Bennett again. Mr Bennett crouched down or bent forward, and Mr Esera punched him a few more times in the back.*

26. *At no point did Mr Bennett punch or strike Mr Esera.*

27. *While this was happening, another staff member from Whakatakapokai arrived, saw Mr Esera hitting Mr Bennett in the hallway, and yelled out to Mr Esera to stop.*

28. *Mr Nicholson grabbed Mr Esera again and Mr Bennett went up the hallway into a different room. Mr Esera walked after him but Mr Nicholson followed him and ushered him out of the building.*

29. *As they went to leave, Mr Esera and Mr Nicholson drove past the entrance to Whakatakapokai in the car and Mr Esera yelled out the window "I'll be back". He was still angry.*

30. *Photographs of Mr Bennett's injuries are attached and labelled **C**. The photographs show six points of injury: two on Mr Bennett's neck, his chin, his nose, his forehead and his cheek. After the photographs were taken, Mr Bennett developed a black eye.*

31. *A criminal charge was laid. Mr Esera was charged with assault with intent to injure, under s 193 of the Crimes Act 1961, which has a maximum penalty of three years imprisonment.*

32. *After a judge-alone trial in the Manukau District Court on 12 June 2015, Mr Esera was found guilty by Judge Recordon of an amended charge of common assault, under s 196 of the Crimes Act 1961, which has a maximum penalty of one year imprisonment.*

33. *A copy of the Judge's reasons for his finding of guilt are attached and labelled **D**.*

34. *Mr Esera applied for and was granted a discharge without conviction under s 106 of the Sentencing Act 2002. A copy of the Judge's sentencing notes is attached and labelled **E**.*

Personal grievance

35. On 28 July 2014, Mr Esera filed a personal grievance in respect of unjustified dismissal by the Ministry.

36. This expired on 29 July 2017, because there had been no action taken for more than three years.

Interview with the Complaints Assessment Committee

37. On 19 June 2017, Mr Esera attended a meeting with the Complaints Assessment Committee. He was supported by his lawyer, Mr Nicholson, and Hurimoana Dennis, as support person.

*38. An accurate transcript of that interview is attached and labelled **F**.*

Admission

*39. I, **Uila Esera** of Auckland:*

(a) confirm and admit the agreed statement of facts;

(b) consent to the admission of the CCTV footage and the attached documents;

(c) admit particulars 3 and 4 of the disciplinary charge against me;

(d) admit that assaulting Grant Bennett breached the Social Workers Registration Board Code of Conduct, including because it was conduct that put at risk my individual reputation and has brought or was likely to bring discredit to the reputation of the social work profession; and

(e) therefore the assault constituted professional misconduct; but

(f) reserve my position in relation to particulars 1 and 2 of the charge.

CAC Witnesses

22. In respect of the first incident on November 2013 at Whakatakapokai, the CAC called additional evidence as follows:

23. **Ms Keren Williams**[14]: Ms Williams is a Residential Youth Worker at Whakatakapokai and has worked there since May 2010. She is not a registered social worker but has trained as a social worker. Ms Williams explained the role of a Residential Youth Worker in providing care and protection for young persons who require it while they are in transit through Whakatakapokai until they are placed in the community. She

[14] Witness Summons dated 21 March 2018

explained that the young persons who reside there are often at risk, and in need of care and protection, often with drug and alcohol issues, anger and violence issues, mental health issues, and with little family support. At the time of the incident on 25 November Ms Williams' recollection was that there were three staff working on the floor in the unit and "about 7 or 8 kids"[15]. Ms Williams stated that Mr Esera's role was similar to hers although he was more senior than her and he was also a shift leader in charge of staffing, juggling the security and safety of everyone on the shift, as well as working on the floor in the unit.

24. Ms Williams outlined the training she had received in Non-Violent Crisis Intervention (NVCI/CPI) including prior to starting work at Whakatakapokai and subsequent six-monthly two-day refresher/renewing courses. She stated that all staff received this training from an external provider and refresher training internally, and that she had attended at least one or two refresher courses with Mr Esera between May 2011 and the incident in November 2013. Ms Williams referred to the NVCI training booklet which she stated all staff used at the time of the incident in November 2013. She stated that there is a handbook of policies relating to restraint and the relevant guidelines were "pinned up in the hubs in the units and in the staffroom" on site, for staff.[16] Ms Williams stated that the focus of NVCI is on early intervention and that physical intervention and restraint should only be used as a last resort, if the young person is completely out of control, a risk to themselves or others and where there is no other option to control the young person. She stated that if physical intervention is required then a staff member should never do this on his or her own.

25. Ms Williams outlined the relevant risks associated with physical intervention including people getting hurt, triggering young persons who have traumatic backgrounds including physical and sexual assault, and contributing to a negative relationship between the young person and the staff member afterwards. She outlined the alternatives to restraint which she stated she was taught at training including methods to calm down the young person by talking them down, offering that the young person goes to their bedroom or another location, calling another staff member to assist using the radio transmitter all staff always have on them when

[15] Transcript, page 39, L16-18
[16] Transcript, page 59, L28-34

on duty, and replacing the staff member who has been engaging with the young person and replacing them with another staff member who has better rapport with the young person.

26. Ms Williams stated that at the time of the incident in question, physical restraint took place more commonly compared to the present day. She stated that at the time, incident reports were being completed every couple of days.

27. Ms Williams described Mr Esera as "trigger happy" with a black and white approach; her evidence was that he would give a directive, if it was not followed by the young person then there would be "a consequence"[17]; "nine times out of ten they would be put in 'time-out'[18]; if that was refused then he would intervene physically (by restraining them).

28. Ms Williams then gave evidence about the incident on 25 November 2013 between Mr Esera and the young person LME. She stated that she was present when the incident occurred and that Mr Esera and another staff member, Paremata Willis (a senior Residential Youth Worker) were also working with her. Ms Williams explained that at afternoon tea time LME had refused afternoon tea initially (she had been offered a muesli bar) but then saw that other young persons were having an icecream. Her evidence was that when LME said "hey I want icecream too" and was "aggressively yelling abuse" at Mr Esera this triggered him and LME was directed to time-out. However when LME refused, Mr Esera initiated physical contact with LME by going straight in and grabbing her rather than taking any steps to de-escalate the situation. Ms Williams' evidence was that Mr Esera's voice was at a heightened volume, angry in tone and he "went in for a one man restraint", without radioing for any support, and without warning. She described how it looked like Mr Esera "was picking [LME] up and dumping her on the ground or against the wall" as LME was "lashing out physically".

29. Ms Williams then described the aftermath of the incident when she stated she comforted LME, LME was taken to the secure unit (a lock down facility) to calm down, and her completion of an incident form (and later a statement about the incident when she was interviewed by HR in March 2014) as well as her discussion with her

[17] Transcript, page 40, L22
[18] Transcript, page 40, L23

manager, Raewyn Holland. Ms Williams stated that staff did not debrief after the incident and as far as she knew, Mr Esera took his glasses (which had broken during the incident) and left the unit[19].

30. Ms Williams told the Tribunal that in her 8 years of working at Whakatakapokai she would class the interaction between Mr Esera and LME on that occasion as "the most violent that I've witnessed."[20]

31. Ms Williams stated she had not seen the CCTV footage of the incident.

32. **Mr Phillip Johnson[21]:** at the time of the incident in Whakatakapokai, Mr Johnson was a teacher aide for the Creative Learning Scheme which was the alternative education provider at Whakatakapokai. Mr Johnson outlined how he worked with Mr Esera two or three days every three weeks when Mr Esera was rostered on to assist at the school near the unit (primarily, he stated, to calm down young persons who got heated at each other or the teachers during school time). He explained that during breaks, including afternoon tea breaks, staff would take the children back to the unit and that he (Mr Johnson) would every so often pop over to see if the children were ready to go back to school and on those occasions he would sometimes see Mr Esera. Mr Johnson also gave evidence about the NVCI training and how it was "hammered into us that physical interaction was a very last resort…"

33. Mr Johnson then described what he saw and heard of the incident on 25 November 2013 involving Mr Esera and LME. He stated that he heard "yelling" before he opened the door to the unit, that he observed a "heated argument' between LME and Mr Esera near the "hub office" (Patiki); that LME "nutted off" at Mr Esera, that initially Mr Esera was using his hands and arms to try and direct LME; he was getting angry and frustrated and so was she. Mr Johnson described Mr Esera's voice as becoming "more focused and stronger". He said in his evidence "they were getting mad at each other". His evidence was that Mr Esera then started walking towards LME, front on to her, with his hand reaching towards her straight out in front of him; LME took a swing when Mr Esera was three feet away from her, and that Mr Esera then grabbed LME rather than pushing her away or deflecting her. LME fell to the ground and Mr

[19] Transcript, page 49 L29 - page 50, L2
[20] Transcript, page 50, L 15-17
[21] Witness summons dated 21 March 2018

Esera was trying to grab LME's arms, pushing her up against the wall. He described how they then fell to the floor - Mr Esera fell on top of LME for two or three seconds before other staff (which the CCTV footage depicted were present during the incident) came and intervened. Mr Johnson stated he had not seen the CCTV footage of the incident.

34. After hearing from Ms Williams and Mr Johnson, Counsel for the CAC played the **CCTV footage** of the incident at Whakatakapokai on 25 November 2013 to the Tribunal, by consent. The footage did not have audio. The Tribunal watched the footage closely and carefully. The Tribunal's observations of the CCTV footage are outlined below but at this stage it is recorded that the footage enabled the Tribunal to see how the incident unfolded and to assess the appropriateness of Mr Esera's conduct. A booklet of still images from that footage was also provided to the Tribunal.

35. After the CCTV footage had been viewed, the CAC called **Mr Kelly Manning**. Mr Manning was called as an expert. His qualifications included Graduate Diploma in Business Studies (Training and Development) from Massey University, Certificate in Youth Work, and a Certificate in Tikanga Maori. He is also a member of Ara Taiohi – Youth Workers Professional Association and the CPI Instructor Association. He is also a registered Workplace Assessor for the Certificate of Youth Work. Since 1996 Mr Manning has been involved with NVCI training (he stated has delivered over 2000 hours of NVCI training including for CYF/Ministry of Social Development and the Youthlink Family Trust) and from 2000 to 2016 he held a Masters level certification in NVCI. In 2016 he retrained to deliver the current version of NVCI, Management of Actual and Potential Aggression (MAPA). He has an Associate level certification in MAPA and knowledge of the care and protection context through his current role as Chief Operations Officer at Reconnect Family Services.

36. Mr Manning provided an overview of the principles and best practice of NVCI, an explanation of how it applies in the social work context or when working with vulnerable young people and an independent opinion about the incident on 23 November 2013. He explained how the behaviour of adults working in the care and protection context should not re-traumatise the young person.

37. It was Mr Manning's opinion having heard the evidence of the CAC's witnesses and having viewed the CCTV footage (at the time the Tribunal viewed it in the hearing room), that the threshold of "imminent harm" was not met before any attempt at a physical NVCI technique was warranted and that the techniques used by Mr Esera, as observed from the CCTV footage, were not NVCI techniques.

38. **Ms P Huitema:** Ms Huitema was the presiding member of the Complaints Assessment Committee which was established in June 2016 and which laid the charge against Mr Esera. Ms Huitema swore an affidavit, which was admitted by consent, outlining the Committee's investigation process and the information obtained by the CAC in relation to both incidents referred to in the charge.

39. An agreed bundle of documents was admitted by consent. Those documents included the investigation reports and statements taken by CYF from staff and several young people following the incident at Whakatakapokai in November 2013, as well as the NVCI handbook and a copy of the transcript of Mr Esera's interview with the CAC in 2016.

40. Mr Esera was not present at the hearing and did not give evidence on his own behalf for liability purposes. Other than the admissions in the agreed statement of facts, the Tribunal did not have the benefit of any other evidence from Mr Esera and he was not available for cross examination or questioning by members of the Tribunal. That said the Tribunal considered the description Mr Esera had given to the CAC, as recorded in a transcript of his interview with the CAC in 2016[22]. In that interview Mr Esera did not dispute using physical force on LME but his position was that non-physical intervention was insufficient and impossible; that he found himself under attack by LME and that he acted in self—defence. He told the Committee that LME punched him out of nowhere[23].

The Code of Conduct and relevant professional standards as to the use of appropriate force

41. The standards which should apply in a situation such as the present are evident from several sources.

[22] ABOD, Tab 16 p 129-155
[23] ABOD, Tab 16: p 137.

42. The Code of Conduct was updated in January 2014 between the first incident with LME at Whakatakapokai in November 2013 and the assault on Mr Bennett in May 2014. However, the relevant sections of the Code of Conduct and the Code of Conduct Guidelines for Social Workers were substantially unchanged.

43. Both versions of the Code acknowledged that the Code "set minimum professional standards of behaviour, integrity and conduct" and that no code could prescribe, in detail every behaviour that is expected of a professional social worker.

44. Relevantly, the Code of Conduct stated:

> **1. To uphold high standards of personal conduct and act with integrity a social worker is expected to:**
>
> - Refrain from any professional or personal behaviour that puts at risk the individual's and/or the profession's reputation and compromises the social worker's ability to work with the client in a fully professional and caring manner;
>
> …
>
> - Not in any way harass a client, nor encourage or condone any form of harassment by others toward any client or colleague
>
> …
>
> **2. To provide services at a competent level of professional practice a social worker is expected to:**
>
> **a. Competence**
>
> - Provide services to clients at a professional and competent level of practice
>
> **…**
>
> **b. Professional Development**
>
> **…**
>
> - Ensure that their practice skills and knowledge are improved and updated through continuous professional development and advancement;
> - Be prepared to cooperate with colleagues to explore and endeavor to resolve professional concerns;
> - Remain open to constructive and informed collegial comment on professional matters and any private matter that impacts on or has the ability to impact on the social worker's service to a client or clients;

…

3. To respect and uphold he civil, legal and human rights of clients a social worker is expected to:

- Respect the worth and dignity of clients…

45. The charge alleged that Mr Esera breached the standard set out in the first bullet point under the heading **'To uphold high standards of personal conduct and act with integrity'** however the Tribunal accepts the CAC's submission that all of the above extracts are relevant to the conduct which the Tribunal has reviewed in this case.

46. The Tribunal considered that if it formed the view that a registered social worker's professional or personal behaviour would be considered by members of the profession and the public as unacceptable, or inappropriate then it is conduct which puts at risk the individual's or the profession's reputation (and potentially compromises the social worker's ability to work with clients in a professional and caring manner).

47. The personal responsibility and accountability of each social worker for his or her professional practice and personal behaviour is emphasised in the Code of Conduct Guidelines for Social Workers. In that regard the Guidelines are clear that:

> *"While employers have a duty to support social workers to comply with the Code of Conduct, employees have a reciprocal duty to ensure that they take personal responsibility for their behaviour and strive to work in accordance with both the objectives of the Code of Conduct, and those of their employing organisation."*

48. The Tribunal was also assisted by the expert evidence of Mr Manning as to the principles of NVCI which the Tribunal considers are useful indicators of best practice and appropriate standards for the use of physical force in the social work sector. In particular:

a. NVCI training provides safe, respectful, non-invasive methods for managing disruptive and assaultive behaviour in a way that is compatible with the duty to provide the best possible care[24];

b. Use of physical force should be a last resort, only when there is a real and imminent risk to an individual; for example, if a young person is punching. kicking or biting[25];

[24] Manning BOE [33]
[25] Manning, BOE [35] and [40]

c. A large portion of the NVCI training therefore focusses on verbal and non-verbal interventions to help de-escalate potentially violent situations [26] including body language and positioning in relation to young people[27]

d. Where a physical intervention is required, NVCI teaches a variety of safe physical holds which are generally carried out by two or more people as part of a coordinated team approach [28]

49. The NVCI model recognises that in some circumstances the use of force may be appropriate, but it equips social workers with techniques designed to avoid those situations and to ensure that when the use of force is necessary, it is used safely and appropriately. The Tribunal accepts the submission from the CAC that the model is consistent with the professional standards expected of social workers in relation to the use of force.

50. In considering the professional standards expected of a registered social worker in relation to the use of force the Tribunal was also assisted by cases relating to the use of force in the context of the teaching and nursing professions. These are referred to in detail in the penalty section of this decision.

51. The application of self-defence in the professional discipline context was considered and the applicable principles summarised by the Health Practitioners Disciplinary Tribunal in *Nurse S*[29] at [32]:

> *"In summary therefore, the Tribunal must consider the defence raised under s.48 [of the Crimes Act 1961] and then place it in the professional discipline context. The Tribunal will ask what Nurse S believed were the circumstances at the time she grabbed Mr N's arm. What threat did she perceive? Was she acting in her own self-defence or not? Were the steps taken by Ms S in self-defence or were they retaliation/retribution/revenge rather than an intervention or use of force to protect herself from an immediate threat? If she did act in self-defence, would a "reasonable and responsible nurse" have acted as she did or in another way which was not violent. As a specialist Tribunal it is for the Tribunal to determine what a reasonable or responsible nurse in Nurse S's shoes would have done"*

52. In that case the Tribunal did not consider that self-defence was made out because Nurse S had grabbed the patient's arm after the incident in the room, when she had

[26] Manning, BOE [34])
[27]Manning, BOE [38]-[39]
[28] Manning, BOE [41]
[28] (128/Nur07/62P (liability 18 September 2007)

got away from him and was wheeling him along. She was not acting to defend herself. In asking what the nurse should have done the Tribunal stated:

> *"The Tribunal needs to ask what a reasonable nurse would have done in this situation? The answer is that she should have removed herself from the situation as soon as she could do so. She needed to get away from Mr N and needed time to calm down. It is the Tribunal's view that a reasonable nurse would not have wheeled Mr N while holding his arm through the hospital wing. She would have recognised that as a professional it was her obligation to de-escalate the situation. She did not do so but chose to prolong it and then claim her restraint of Mr N was self-defence. The Tribunal does not accept this and finds that that a reasonable nurse would have walked away from the situation. The Tribunal accordingly finds that the defence of self-defence is not made out."*

53. This Tribunal considers that a registered social worker is expected to conduct themselves with absolute self-control and an exemplary standard of behaviour even when they are under stress or faced with a client who is difficult or unpleasant. It is the responsibility of a registered social worker to walk away or de-escalate a difficult situation as it is the social worker who is in the position of power and authority.

Particulars 1, 2 and 5: acted aggressively towards a young person, LME, who was a resident of the Child, Youth and Family Whakatakapokai Care and Protection Residence in Manurewa; then used inappropriate physical force on the young person; and thereby breached the Code of Conduct

54. It was not disputed that the incident on 25 November 2013 occurred at Whakatakapokai Care and Protection Residence in Manurewa, Auckland. Nor was it disputed that Whakatakapokai provides safe and secure care for up to 20 young people, most of whom are severely at risk and have varied and complex needs[30]. At the time of the incident, the young person involved, LME, was 16 years old and a resident at Whakatakapokai[31].

55. The incident occurred in the afternoon break at Whakatakapokai. Mr Esera was on shift working as a Residential Social Worker. He prepared ice-cream for afternoon tea for the residents. LME had previously declined the offer of a muesli bar for afternoon tea, but when she saw the other young people having ice-cream, she wanted ice-cream too.

[30] ASOF: 4
[31] ASOF: 9

56. The incident which was a live issue for the Tribunal was how the incident that followed unfolded and the appropriateness of Mr Esera's conduct.

57. As above, the incident that followed was captured on CCTV footage which the Tribunal considered. The footage viewed by the Tribunal depicted LME retreating away from Mr Esera, walking backwards, and Mr Esera appeared to be shouting and walking toward her as she does so, with his arm raised up and towards LME. When viewed objectively, the Tribunal was satisfied this was aggressive body language and behaviour on Mr Esera's part. Mr Esera was obviously angry and frustrated (as described by Ms Williams and Mr Johnson) and he was escalating or inflaming the situation, rather than calming it down. The CCTV footage (stills 15-17) makes clear how close Mr Esera was to LME as he continued to walk towards her, with his arm raised, even as she retreated. The size and power imbalance between the two only adds to the aggression apparent in Mr Esera's conduct which the Tribunal observed as evident in the footage.

58. The footage then showed Mr Esera grabbing LME first by her left wrist (stills 21-23) and then around her neck and chest (stills 25-26). LME struggled to be released and fell to the floor. Mr Esera stood over LME who got up again and they again engaged physically. When LME fell to the floor a second time, Mr Esera sat on top of her chest, holding her down.

59. The evidence of witnesses Williams and Johnson was consistent with the CCTV footage which the witnesses stated they had not seen. Their evidence was also consistent with the incident reports and interview given during the CYF employment investigation in early 2016[32].

60. The Tribunal preferred the CAC's evidence over Mr Esera's account in his interview with the CAC, on the key issue of whether he acted aggressively towards LME. Mr Esera's description that LME punched him out of nowhere is not borne out in the CCTV footage which shows that at the time when he alleges she took a swing at him, he was within a metre of her, with his arm stretched out towards her (having previously raised it above his head) (stills 20-21).

[32] ABOD Tab 5 (incident reports of Keren Williams, Paremata Willis and notes of interview with Keren Williams)

61. Satisfied that Mr Esera had acted aggressively towards LME, and that he had in fact used physical force on LME, the Tribunal then considered whether the physical force he used was inappropriate. The Tribunal was satisfied that the force used by Mr Esera was inappropriate for the following reasons:

a. LME was a vulnerable young person who resided in a care and protection unit. Her vulnerability and age undoubtedly satisfied the Tribunal that there was a significant departure from expected standards;

b. The Tribunal considered that the footage depicted that there was no need for Mr Esera to have used any physical force to restrain LME or to defend himself. Rather than continuing to approach LME as she walked backwards Mr Esera could at any time have walked away from the situation [33]. While there was evidence that LME took a swing at Mr Esera before he made physical contact with her, any physicality was precipitated by Mr Esera's angry and aggressive physical approach to her. The Tribunal asked what a reasonable registered social worker would have done in this situation? The answer is that he should have removed himself from the situation as soon as he could do so. He needed to get away from LME and needed time to calm down. It is the Tribunal's view that a reasonable social worker would not have moved towards LME in an aggressive way with his arms raised. He would have recognised that as a professional it was his obligation to de-escalate the situation. He did not do so but chose to prolong it and then claim his use of force on LME was self-defence. Having reviewed the CCTV footage the Tribunal does not accept Mr Esera acted in self-defence.

c. Even after LME raised her arms and took the initial swing at Mr Esera, and even when she struggled as he grabbed on to her, the Tribunal considered that Mr Esera could have stepped back or walked away to disengage rather than using force, continuing to grab LME[34]. There were three other staff members in the immediate vicinity who could have assisted or intervened as required and

[33] BOE, Williams [45]; Brief of Evidence, Johnson [51])
[34] BOE, Manning, [34]

there were also opportunities to disengage or walk away when LME fell to the floor for the first time (still 32) and the second time (still 34).

d. The Tribunal considered that the degree of physical force used was disproportionate in that it was more aggressive and extensive than was required in the circumstances. The CCTV footage showed Mr Esera conducting himself in an out of control (rather than self-controlled), angry, aggressive manner. The Tribunal considered that a reasonable social worker in Mr Esera's shoes would not have conducted him or herself in this manner and would have walked away from the situation.

e. The Tribunal accepts the CAC's submission that the conduct depicted in the CCTV footage and as described by the CAC witnesses, was a significant departure from the NVCI principles of best practice which Mr Esera had been trained in, in that:

   i. Mr Esera was in constant movement and advancing towards LME rather than adopting neutral body language or only engaging verbally[35];

   ii. There is no evidence Mr Esera adopted any non-physical de-escalation on which a large portion of NVCI training is focused[36] and which witnesses Johnson and Williams referred to including "change of face", change of context and removing the audience of other young people[37]. The Tribunal considered that by contrast, Mr Esera added pressure to the situation and reacted in a frustrated and rushed way, raising his voice and repeating his instructions, aggravated by his body language;

   iii. There was no imminent risk of harm warranting the use of physical force[38]; Mr Esera could have addressed any such risk simply by stepping away;

[35] BOE, Manning at [59]
[36] BOE, Manning at[34]
[37] BOE, Johnson at [25-28) and BOE, Williams at[5])
[38] BOE, Manning at [23])

iv. Even if LME did swing at Mr Esera, he did not utilise the recommended NVCI restraint which is designed to create a moment of control for the staff member to move to safety[39].

v. Instead, Mr Esera remained physically engaged with LME, continuing to pursue and grab her when there were proper opportunities to disengage. When LME fell to the floor Mr Esera appeared to pin her to the ground for approximately 10 seconds (stills 35-37). The Tribunal accepted Mr Manning's opinion that Mr Esera's grabbing and holding of LME over this period of time were not NVCI techniques.

vi. Both CAC witnesses stated that Mr Esera did not call for other staff for assistance. He could have done as other staff members were present at the time of the incident.

vii. In this case the evidence was that LME had been offered a muesli bar for afternoon tea while other young persons were offered icecream. The Tribunal was left wondering what might have happened if LME had been offered icecream after the original offer of a muesli bar. The NVCI Participant Workbook[40] relates to the 'Supportive Staff Response' which is recommended during Anxiety crisis development. The booklet states that the Supportive Staff approach requires the staff member to "be empathetic and to actively listen to what is bothering the individual".

62. In summary, the Tribunal is satisfied that Mr Esera's use of physical force was a serious failure to meet the professional standards expected of a registered social worker, and was unnecessary and disproportionate. Mr Esera did not use any techniques to de-escalate the situation (NVCI or otherwise) and, by contrast, his body language was aggressive and inflammatory. When he resorted, unnecessarily to the use of physical force, he did so disproportionately and without employing techniques designed to minimise the force used or ensure the safety of the young person. The Tribunal is satisfied that this was not a legitimate use of force in self-

[39] BOE, Manning at [61-61]
[40] ABOD, Tab 6, page 84

defence, in the context of a trained professional who was in a position of power and trust and whose role was to provide care and oversight to a vulnerable young person.

63. The Tribunal considered that the conduct was behaviour that involved Mr Esera not working with LME in a fully professional and caring manner and that it seriously compromised Mr Esera's ability to do so going forward.

64. The Tribunal considered that a social worker working in the care and protection context may well face challenging and difficult behaviour and incidents involving anger and violence on the part of the young person. However, it is for the professional social worker to maintain self-control and adhere to an exemplary standard of behaviour even when under stress.

65. The Tribunal considered that the appropriate response of a registered social worker in this situation was de-escalation. The Tribunal was concerned that Mr Esera did not appear to recognise that he was becoming frustrated and angry and needed to walk away rather than allowing those emotions to cloud his judgement and guide his reaction.

66. The background of the young people who resided in Whakatakapokai was one of the reasons why the use of unnecessary and inappropriate force was considered by the Tribunal to be a significant and serious departure from the standards expected of a reasonable social worker in Mr Esera's shoes. The Tribunal accepts the evidence of Ms Williams[41] and Mr Manning[42] that as well as the risk a young person will be physically hurt, the traumatic background of a young person means the psychological effects of physical intervention can be significant. The immediate effect of the incident on LME is evident in the CCTV footage where LME remained on the floor and as Ms Williams stated was "distraught". The Tribunal accepted the submission of the CAC that it is inherently likely that such a distressing experience would affect LME's trust in and respect for Mr Esera, and compromise his ability to work with her productively in the future.

67. For these reasons, the Tribunal was satisfied that Mr Esera's use of aggression and inappropriate physical force on LME amounted to a breach of the Code of Conduct in a manner that warrants disciplinary sanction.

[41] Williams, BOE at [23]
[42] Manning, BOE [48]

68. Further it was conduct which in the Tribunal's opinion put at risk Mr Esera's reputation and the reputation of the social work profession because it demonstrated a significant failure to uphold high standards of personal conduct and the expectation that he would act with integrity.

69. The Tribunal considered that as particulars 1 and 2 related to a single incident they should be considered cumulatively in the context of the overall charge that Mr Esera had professionally misconducted himself by breaching the Code of Conduct. When particulars 1 and 2 are considered cumulatively including with particular 5, the Tribunal is satisfied the established particulars, were significant breaches of the Code of Conduct and brought significant discredit to the social work profession.

70. Turning to threshold the Tribunal had regard to a range of factors including the inappropriate and unsafe use of force used on LME, the setting in which the incident occurred, the vulnerability of the young person involved, Mr Esera's blatant disregard for the relevant NVCI principles in which he had received training and re-training, and to a lesser extent the reaction of LME and others when they witnessed the incident (including Ms Williams who described her state of shock; her evidence was that she "froze" during the incident[43]). Accordingly, the Tribunal is satisfied the conduct was of sufficient gravity to warrant disciplinary sanction to protect the public, to maintain professional standards and enhance the professionalism of social workers.

71. The charge of professional misconduct as it related to this incident was accordingly established. The Tribunal considered that the professional misconduct was so serious it was at the level of gross professional misconduct. This conclusion was announced at the hearing.

[43] Transcript, page 49

Particulars 3, 4 and 5: on 2 May 2014, assaulted Grant Bennett, the General Manager of the Child, Youth and Family Residential and High Needs Service, by punching him in the head and face; was found guilty of a criminal charge of common assault under s 196 of the Crimes Act 1961 (in respect of that assault) and thereby breached the Code of Conduct

72. The Tribunal considered particular 3 and 4 cumulatively including with particular 5 as the particulars related to another single event in the context of the overall charge that Mr Esera was guilty of professional misconduct by breaching the Code of Conduct.

73. Mr Esera admitted particulars 3 and 4. Further, Mr Esera accepted that his conduct amounted to professional misconduct in that he had breached the Code of Conduct (particular 5), including because it was conduct that put at risk his reputation and has brought or was likely to bring discredit to the social work profession [44].

74. The Tribunal's role when receiving an admission of a charge is to make a decision as to whether or not the evidence supports the admission, whether or not the test for professional misconduct has been made out, and if so, whether the conduct is of sufficient gravity to warrant disciplinary sanction. The Tribunal has done so in its consideration of this case.

75. The CAC submitted these particulars were clearly established factually on the (agreed) evidence. The Tribunal agreed. In this regard the Tribunal considered the narrative of the assault admitted by Mr Esera in the agreed statement of facts as well as the reasons of Judge Recordon for finding Mr Esera guilty of the criminal charge of common assault on Mr Bennett[45]. The Tribunal focused on Mr Esera's admitted conduct rather than Judge Recordon's decision to grant him a discharge without conviction. The photographs of Mr Bennett's injuries[46] are consistent with the admitted facts.

76. As to the appropriate standards the Tribunal was assisted by the Code of Conduct and the reference to conduct "that puts at risk the individual's and the profession's reputation" as well as by cases in other professions including in the teaching

[44] ASOF [39]
[45] ABOD: tab 10
[46] ABOD: tab 9

profession (including *Complaints Assessment Committee v X*[47]; *Complaints Assessment Committee v Sami*[48]) that discuss how violent behaviour reflects adversely on a professional person's fitness to practise their profession, whether or not that behaviour occurred in the professional's personal or professional life.

77. The Tribunal accepted the following submissions from the CAC:

a. Mr Esera's violent and frenzied assault on Mr Bennett breached the Code of Conduct and was of sufficient severity to warrant disciplinary sanction;

b. Mr Esera's violent and persistent use of force, in anger, when viewed objectively by members of the social work profession and the public was unacceptable.

c. Although the assault did not occur while Mr Esera was performing social work duties, the conduct reflects on his fitness to practise as a social worker. His reaction was inconsistent with the standards of self-control and care for others which the Tribunal considers to be of the utmost importance to the proper practise of social work, as recorded above.

d. The conduct put at risk the reputation of Mr Esera and the social work profession as a whole;

e. The conduct amounted to a breach of the Code of Conduct including to the extent that the Code requires a social worker to cooperate with colleagues to explore and endeavour to resolve professional concerns, and to remain open to constructive and informed collegial comment. Mr Esera's violent response to the decision made that his behaviour in relation to LME was unacceptable and that his employment was to be terminated as a consequence, was the complete opposite to that.

78. As to threshold the Tribunal had regard to the very serious departure from the expected standard of self-control and care for others, Mr Esera's blatant disregard and complete lack of respect for a senior professional colleague, as well as the extent to which Mr Esera used force on Mr Bennett and inflicted physical injuries upon him. The conduct is clearly of sufficient seriousness to warrant disciplinary sanction and

[47] NZTDT 2009/5

[48] NZTDT 2017/14, 27 September 2017

the Tribunal had little difficulty finding the charge of professional misconduct established.

79. The Tribunal then considered the two incidents, and the particulars relating to each, cumulatively. The Tribunal was satisfied that when considered cumulatively, Mr Esera's conduct amounted to gross professional misconduct which warranted disciplinary sanction.

80. Having announced that being the case at the hearing, the Tribunal moved to consider penalty issues in relation to the established charge.

Penalty

81. The Tribunal heard submissions from Counsel for the CAC at the hearing. As Mr Esera was not present at the hearing, the Tribunal requested the Executive Officer to make available the written submissions of Counsel for the CAC and a copy of the transcript, as well as costs information, to Mr Esera. Mr Esera was invited to make submissions and file any additional material he wished the Tribunal to consider as part of its consideration of penalty.

82. Prior to the hearing Mr Esera had filed signed statements of evidence from Lorna Te Rahora Payne and Paremata Macpherson (formerly Willis). However he elected not to call those witnesses to give evidence at the hearing. Prior to seeking leave to withdraw, Mr Esera's Counsel requested that those sections of the briefs of evidence that were relevant to penalty be taken into account by the Tribunal. This was in essence, character references. The CAC did not object to this approach and the Tribunal received the briefs of evidence only to the extent they contained evidence relevant to penalty.

83. Subsequently, Mr Nicholson advised that he had received fresh instructions from Mr Esera for the purposes of penalty and he filed written submissions and an affidavit from Mr Esera. Counsel for the CAC then filed written submissions in reply. The Tribunal reconvened by telephone conference on 16 May 2018.

Penalty evidence:

84. **Mr Esera**:[49] In his affidavit Mr Esera stated that since July 2017 he has been working on a casual basis as a whanau support worker at a primary school in Mangere, South Auckland. He provided a payslip showing his income from this work, as well as other financial information evidencing his limited means. He explained that from May 2014 (after he was dismissed from his employment at Whakatakapokai) until April 2017 he was on a benefit and had to rely on friends and family to support him.

85. He stated how he has benefitted from his work at the primary school and that he has a sense of purpose and feels he is contributing again.

86. Mr Esera urged the Tribunal to contemplate how members would have felt if they had been the "victim of an assault with a chair as they did their job with nothing happening about that, then in an excessive use of force situation against the person who assaulted them, and in which they were bitten right up their arm, they are drummed out of their profession". He deposed that he has moved on but there are still times when it occurs to him that it is easy for people who did not experience what he did "to blame me for flashes of being vulnerable and human". Mr Esera accepted he did not use the techniques he stated he had used for many years to de-escalate the situation with LME. He stated that his dismissal for his actions led to deep distress and the lack of control evident in his assault on Mr Bennett.

87. Mr Esera stated that his record in life shows he cares about people and his community and he referred to his voluntary work at a local Marae and in his Church when he was unemployed and on a benefit.

88. Mr Esera asked for assistance to address "the issues in his behaviour" rather than "just being thrown away" because social work is "something to which I still have a strong contribution to make".

89. **Lorna Te Rahora Payne[50]:** Ms Payne formerly worked as a social worker at Whakatakapokai (initially casually as a social worker from October 2000 and then permanently between 2005 until her retirement in 2015). Mr Esera was an

[49] Affidavit of Uila Foloi Esera sworn on 5 May 2018

[50] Brief of evidence signed and dated 27 March 2018;only paras [[1], [2], [9]-[18] received by Tribunal

operational manager when she commenced working there, at a time when Whakatakapokai was a dual site with a youth justice and a care and protection section. In 2007 the youth justice facility moved to a separate site.

90. Ms Payne stated that her observation was that Mr Esera is a very skilled social worker whose approach was such that he was "chief amongst his fellow workers in successfully de-escalating unacceptable behaviour in young people" (she referred to the "Papa Uila" dynamic). Ms Payne stated there was a widely held appreciation for Mr Esera's skills and experience, particularly in respect of Samoan and Pasifika people. She stated that he would not be manipulated by young people and was not "disarmed by verbal abuse" from them. She referred to his genuine capacity to join in with the young people and have fun and that what he offered earned him the trust of the young people to a "remarkable level".

91. Ms Payne disagreed with Ms Williams' evidence that Mr Esera was more dependent on restraint than he was on de-escalation. She stated that she never saw Mr Esera treat LME differently from how he had treated other young people and that his way was that if there had been a difficulty between him and a young person "the next day it was all forgotten. He did not hold grudges". Ms Payne referred to Mr Esera being generous with his advice and support to other staff and she stated it was her observation that he cared very much about the young people.

92. **Paremata Macpherson (Willis)[51]:** Ms Macpherson was employed as a youth worker at Whakatakapokai from 2007 until 2014. Ms Macpherson stated she worked with Mr Esera often and was able to observe his interactions with the young people. She stated she came to appreciate his seniority and experience. Ms Macpherson referred to the respect and admiration she had for Mr Esera's personal and professional demeanour and she stated that he was held in the highest regard by the young people who referred to him as "Papa Uila" (and to Ms Payne as "Whaea Lorna"). Ms Macpherson stated she had witnessed Mr Esera achieve "the most impressive de-escalation of young persons oftentimes appalling demeanour/behaviour" and she stated that Mr Esera was "no pushover".

[51] Brief of evidence signed and dated 20 March 2018; only paras [[1]- [5], and [12]-[13] received by Tribunal

93. Ms Macpherson stated that Ms Williams' characterisation of Mr Esera as having a "trigger happy" black and white approach to restraint was at odds with her appreciation and observations of him. Ms Macpherson stated that she did see Mr Esera restrain young people "justifiably applying appropriate physical measures and using assistance to do so". She stated that the workplace was one "where disorder, abuse, threats of violence and potential/actual acts of violence were just around the corner or could not be discounted." She noted that "the management were far too often far too wise after the event which was often received by staff as deflating and undermining; she stated it was the staff not the management who were "frequently faced with the agony of a particular moment."

CAC submissions:

94. For the CAC it was submitted:

a. The Tribunal has the full range of penalties in s. 82(1) of the Act available to it having found that Mr Esera has been found guilty of gross professional misconduct.

b. The penalty to be imposed must fulfil the functions connected to the purposes of the Act; namely, protecting the public and enhancing the professionalism of social workers.[52]

c. The relevant penalty principles are those in the decision of *Roberts v Professional Conduct Committee*[53] (summarised below).

d. The Tribunal should seek assistance from cases from the Health Practitioners Disciplinary Tribunal where there has been similar offending, involving patients. The Tribunal should also seek assistance from decisions of the Teachers Disciplinary Tribunal involving assaults and criminal assaults.

e. There are a number of aggravating features of Mr Esera's offending in relation to LME including the degree of force used on her, the fact that LME was a vulnerable young person by reason of her age, relative size and because she was sufficiently in need of care and protection to have been residing in Whakatakapokai (and as such, was inherently vulnerable); the visible effect of

[52] S. 3(a) and s. 3(d)
[53] [2012] NZHC 3354, at [44]-[51]

Mr Esera's conduct on LME (and the emotional effect on the other young people[54]) so that any traumatic harm to an already vulnerable client should be viewed seriously; and that Mr Esera has shown limited insight into the gravity of his conduct or its effect on LME.

f. In relation to the second incident involving Mr Bennett the aggravating features are the prolonged nature of the assault, the extent of the injuries suffered by Mr Bennett and Mr Esera's lack of insight or acceptance of responsibility (pointing to the fact that at his interview with the CAC, Mr Esera was unable to admit that he was angry or distressed at the time he walked into Whakatakapokai, saying he went only to return his keys and swipe card and say hello to a friend); and that a full admission was only accepted when the notes of evidence and the judgment from the criminal proceedings were obtained (which was in March 2018 as a consequence of an Order made by the Tribunal on 30 January 2018[55]).

g. The mitigating features were that Mr Esera had undertaken an anger management programme (although the CAC submitted that weight to be given to this factor should be assessed in the light of the lack of insight and minimisation of the criminal assault at his meeting with the CAC, which took place after the programme); and Mr Esera had not previously been the subject of a complaint during his long career as a social worker. The CAC submitted however, that the charge before the Tribunal did not relate to an "isolated event"; rather it shows Mr Esera reacting in a similar way on two occasions.

h. Taken together, both incidents show a quickness to become angry and a concerning resort to aggression and violence when frustrated. This reflects directly on Mr Esera's fitness and safety to practise social work which often involves working with difficult and/or vulnerable clients. Added to this, Mr Esera appears to lack insight into the gravity of his conduct.

i. Taking the first incident alone, based on the authorities, a suspension up to the maximum available would be the appropriate penalty. Taking the second

[54] ABOD, tab 5, at 49-56 (statements made by the young people during the CYF investigation)

[55] Minute 3 of the Tribunal dated 30 January 2018 in relation to application by CAC for further directions requiring provision of information

incident alone, a penalty of at least censure and suspension for completion of an anger management programme would be appropriate.

j. Taking both incidents together, unless the Tribunal is satisfied that the underlying issues of anger management and self-control have been fully acknowledged and addressed by Mr Esera, he poses an ongoing risk to the public. His pattern of violent behavior warrants a stern response to maintain professional standards and preserve the public's confidence in the profession. Cancellation is the only appropriate penalty and is proportionate to the serious professional misconduct in this case.

k. If the Tribunal were to consider a penalty short of cancellation is appropriate then the length of time Mr Esera was out of work after the dismissal from his employment as a result of the first incident may be a relevant factor[56].

l. The Tribunal should also impose an order of costs.

Mr Esera's submissions:

95. For Mr Esera is was submitted:

a. The appropriate penalty is one of suspension with conditions directed towards rehabilitation.

b. This submission is underpinned by Mr Esera's expression of remorse for his conduct.

c. There is "no ongoing, self-centred, uninsightful protestation of personal justification" in Mr Esera's affidavit[57].

d. Mr Esera pleas for a level of understanding of the pain and "agony of the moment" in both incidents; "a plea from a man in whom the wish to make professional and broader societal contribution is proven and runs deep.

e. Mr Esera had had a long and "otherwise faultless and successful record of two decades of service at Whakatakapokai providing guidance, care and protection to one child after another". He has an innate ability to engender trust as evidenced by the fact that he has been held in high regard by his Whakatakapokai peers and colleagues as a leader and a father figure.

[56] *McCaig v PCC* [2015] NZHC 3063
[57] Mr Esera's affidavit at [11]-[13]

f. Mr Esera has a number of "valuable qualities"[58] and reference was made to "impressive" character evidence in the briefs of evidence of Lorna Te Rahora Payne[59] and Paremata Macpherson (Willis)[60].

g. Reference was made to the Tribunal's need to impose a penalty which serves the purposes of the Act.

h. Just because there has been a finding of gross professional misconduct this does not mean that cancellation must follow. The penalty to be imposed must be fair, reasonable and proportionate[61].

i. The first incident is marked by a "unique entirety of circumstances" unseen in the cases referred to in the submissions of the CAC. Reference was made to a preceding incident in January 2011 when Mr Esera was hospitalised after LME's "unprovoked attack on him using a chair as a weapon". It was submitted "that for the second time [LME's] actions caused not insignificant injury" to Mr Esera. It was submitted there is no evidence he held a grudge against LME.[62]

j. The first manifestations of violence came from LME. Mr Esera's "failure to walk away" was "misfeasance rather than malfeasance" and cancellation is too severe and not a fair or proportional response for failing to take proper resort to de-escalation. There is insufficient in that "misfeasance" to suggest there is a presence/imminence of danger to the public.

k. The criminal assault on Mr Bennett resulted in a discharge without conviction and was described by the District Court Judge as Mr Esera blowing a fuse after having been told he had lost his employment. The real question is whether this conduct demonstrates unfitness to practise as a social worker. Given Mr Esera's "totality as a social worker, his impeccable record, that he never has faced charges of this nature, there is no such demonstration of his unfitness".

l. A lengthy period of time has passed since the incidents and Mr Esera has already suffered a significant and ongoing penalty in major areas of his life

[58] With reference to comments from Hurimoana Dennis, Director of Te Puea Memorial Marae, Mangere

[59] BOE dated 27 March 2018 at [1]-[2] and [9] – [16]

[60] BOE dated 20 March 2018 at [1]-[5] and [12]-[13]

[61] With reference to Collins J's dicta in *Roberts v Professional Conduct Committee* [2012]] 3354 at [51]

[62] Mr Esera's submissions at [22] and again at [24] and [41].

including the uncertainty associated with him not having been able to gain employment for almost three years, and the consequent financial hardship associated with that.

m. Mr Esera is the very sort of person the social work profession does not need to lose. He is bilingual and has something about his approach which "garners admiration". He "loves" social work.

CAC's submissions in reply:

96. The CAC submitted in reply:

a. Cancellation of Mr Esera's registration is the appropriate and proportionate penalty to his conduct on both occasions particularised in the charge.

b. The previous incident between Mr Esera and LME has limited relevance to penalty. Although on the one hand Mr Esera submits he held no grudge in relation to that incident, the frequent references to it in his submissions and affidavit as an explanation for why he feels so aggrieved by his current situation suggests there is some lingering hard feeling.

c. Mr Esera's characterisation of the incident on 25 November 2013 as the second occasion when he was assaulted by LME overlooks Mr Esera's role in escalating and essentially precipitating the violence on that occasion.

d. Mr Esera's failure on 25 November 2013 cannot be characterised as simply not walking away. He should have walked away but he also failed to employ any de-escalation techniques and then engaged in sustained and violent use of force on the young person, failing to take several opportunities to disengage.

e. In relation to the second incident, a lack of anger management where anger manifests violence is a grave concern in the social work context given the challenging behavior with which social workers may be faced. Even if the heat of the moment was seen by the District Court Judge as a mitigating factor in the criminal context it should not be seen as mitigating by the Tribunal.

f. Financial hardship suffered by Mr Esera is not a reason to mitigate penalty, although it may be relevant to costs.

Penalty – discussion

Principles

97. Where the Tribunal has made a finding under s. 82(1) of the Act it may make any of the following orders under s. 83(1):

    a. cancellation of registration (subject to s.82(2));

    b. suspension for a period not exceeding 12 months;

    c. conditions on practice, for a period not exceeding three years;

    d. censure;

    e. fine of up to $10,000; and

    f. costs.

98. The Tribunal may not order that a social worker's registration be cancelled unless it is satisfied that he or she is guilty of "gross or severe professional misconduct"[63].

99. The penalty which is imposed must fulfil the functions connected to the purposes of the Act which are:

    a. Protecting the public;[64] and

    b. Enhancing the professionalism of social workers.[65]

100. In previous decisions of this Tribunal, the Tribunal has adopted the sentencing principles which are applied in the Health Practitioners Disciplinary Tribunal. These principles were usefully summarised in *Katamat v PCC*[66]

> *"[49] In* Roberts v Professional Conduct Committee*, Collins J identified the following eight factors as being relevant whenever the Tribunal is determining an appropriate penalty.35 They are which penalty:*
>
> *(1) most appropriately protects the public and deters others;*
> *(2) facilitates the Tribunal's "important" role in setting professional standards;*
> *(3) punishes the practitioner;*
> *(4) allows for the rehabilitation of the health practitioner;*
> *(5) promotes consistency with penalties in similar cases;*
> *(6) reflects the seriousness of the misconduct;*
> *(7) is the least restrictive penalty appropriate in the circumstances; and*
> *(8) looked at overall, is the penalty which is "fair, reasonable and proportionate in the circumstances".*

[63] s. 82(2)
[64] s. 3(a)
[65] s. 3(d)
[66] [2012] NZHC 1633, 21 December 2012, per Williams J

[50] *In* Patel v Dentists Disciplinary Tribunal*, regarding the decision to de- register the practitioner specifically, Randerson J held that:*

> *... the task of the Tribunal is to balance the nature and gravity of the offences and their bearing on the dentist's fitness to practice against the need for removal and its consequences to the individual:* Dad v General Dental Council *at 1543. As the Privy Council further observed: [in* Dad*]*
>
> > *Such consequences [cancellation] can properly be regarded as inevitable where the nature or gravity of the offence indicates that a dentist is unfit to practise, that rehabilitation is unlikely and that he must be suspended or have his name erased from the register. In cases of that kind greater weight must be given to the public interest and to the need to maintain public confidence in the profession than to the consequences of the imposition of the penalty to the individual.*

[51] *Similarly in* A v Professional Conduct Committee*, Keane J derived the following five principles from the Privy Council speeches in* Taylor v General Medical Council*:*

> *First, the primary purpose of cancelling or suspending registration is to protect the public, but that 'inevitably imports some punitive element'. Secondly, to cancel is more punitive than to suspend and the choice between the two turns on what is proportionate. Thirdly, to suspend implies the conclusion that cancellation would have been disproportionate. Fourthly, suspension is most apt where there is 'some condition affecting the practitioner's fitness to practise which may or may not be amenable to cure'. Fifthly, and perhaps only implicitly, suspension ought not to be imposed simply to punish.*

[52] *Keane J continued, affirming the importance of considerations of rehabilitation:*

> *... the Tribunal cannot ignore the rehabilitation of the practitioner:* B v B *(HC Auckland, HC 4/92, 6 April 1993)* Blanchard J. Moreover, as was said in Giele v The General Medical Council *[2005] EWHC 2143, though '... the maintenance of public confidence ... must outweigh the interests of the individual doctor', that is not absolute – 'the existence of the public interest in not ending the career of a competent doctor will play a part.'*

[53] *In summary, the case law reveals that several factors will be relevant to assessing what penalty is appropriate in the circumstances. Some factors, such as the need to protect the public and to maintain professional standards, are more intuitive in their application. Others, such as the seriousness of offending and consistency with past cases, are more concrete and capable of precise evaluation. Of all the factors discussed, the primary factor will be what penalty is required to protect the public and deter similar conduct. The need to punish the practitioner can be considered, but is of secondary importance. The objective seriousness of the misconduct, the need for consistency with past cases, the likelihood of rehabilitation and the need to impose the least restrictive penalty that is appropriate will all be relevant to the inquiry. It bears repeating, however, that the overall decision is ultimately one involving an exercise of discretion."*

101. In the decision of the High Court in *Singh v Director of Proceedings*[67] Ellis J stated at [57]:

> *"On my own reading of Roberts, Collins J did not say that punishment was a necessary focus of the disciplinary penalty exercise. Rather he merely accepted (as I have above) that punishment may be an incident of such an exercise and acknowledged that a decision by the Tribunal to impose a fine appears, necessarily, to be punishment-oriented".*

102. At [62] Ellis J concluded on this point:

> *"In terms of the general approach to be taken and principles to be applied, it also seems clear to me that care must be taken not to analogise too far with the criminal sentencing process. As the Supreme Court noted in* Z *the relevant societal interests at play in each case are different. In cases where deregistration is on the table I consider that the proper approach continues to be that articulated in* Patel v Dentists Disciplinary Tribunal*. [above]."*

103. This observation of Ellis J is consistent with Gendall J's observation in *PCC v Martin*[68] when he noted that although the cancellation of a practitioner's registration had a punitive effect that is not why the order should be made.

Relevant cases

104. The Tribunal has been assisted by decisions of both the Health Practitioners Disciplinary Tribunal and the Teachers Disciplinary Tribunal. However the Tribunal considered that the nature of social work practice differs from the practice of nurses and teachers in terms of the settings in which those professionals work and the nature and extent of the contact they have with persons under their charge when compared with social work practice. Social work almost always involves practitioners having to work with difficult and/or vulnerable clients and often on a one on one basis, both supervised and unsupervised and in settings outside of institutions; the power imbalance between a social worker and a client can therefore be particularly significant.

105. The penalties available to the Health Practitioners Disciplinary Tribunal under s.101 of the Health Practitioners Competence Assurance Act 2003 are similar to those available to this Tribunal, with the exception that suspension can be ordered for a period of three years, and the maximum fine of $30,000. Under the Education Act 1989 a broader range of penalties is available to the Teachers Disciplinary Tribunal

[67] [2014] NZHC 2848

[68] 27 February 2007, High Court Wellington, CIV-2006-485-146, at [23]

including annotation of the register of teachers and referral of a teacher for a competence or impairment review; suspension can be for any specified period of time although the maximum fine is only $3000.

106. Bearing in mind those differences the Tribunal has been assisted by the following cases from those tribunals:

The assault on LME

a. *Edwards*[69]: a nurse had grabbed a patient by the wrists and pulled her along the floor. The assault was "at the lower end of the scale" but Mr Edwards had decided to use force when nobody else present at the time thought this was appropriate. The Health Practitioners Disciplinary Tribunal stated that the conduct of the nurse was "deserving of the highest condemnation" and imposed a penalty of 18 months suspension, a condition to undergo a competence assessment, conditions that for 18 months following the suspension ending, the nurse was to practise under supervision in a non-sole charge role and 25% of costs.

b. *Nurse S*:[70] the nurse used excessive force in holding a patient's hand/arm behind his back in a forceful manner, inflicting multiple bruising to his left arm, amounting to professional misconduct. Suspension of registration was ordered for six months, as was censure, a fine of $500 and 30% of costs. Although the offending was an isolated event in a long and unblemished career, the Tribunal was concerned the nurse had difficulty appreciating the reasons for the patient's behaviour and managing her own reaction to him in an appropriate way. Further, that she lacked insight and did not appear to appreciate the power imbalance inherent in the nurse/patient relationship.

c. *A*[71] : a nurse hit a patient on the forehead three times and slapped the patient on the arm. The Tribunal considered this was an out of character

[69] 28/Nur05/12P (penalty), 22 February 2006 (HPDT)
[70] 135/Nur07/62P (penalty), 5 November 2007 (HPDT)
[71] 75/Nur06/40P (penalty), 7 February 2007 (HPDT)

reaction and lapse, there was no ongoing risk to the public and the loss of job and disciplinary charge had been sufficient punishment for the nurse. The Tribunal ordered censure and a 25% contribution to costs.

d. *Bishop* [72] Nurse Bishop grabbed a patient by the arm and dragged her off a couch and on to the floor. There was no evidence before the Tribunal of insight or remorse because the nurse did not participate in the proceedings and the nurse had previously been the subject of disciplinary proceedings and supervised for a year, but had not learned from that. An order of cancellation of registration was made together with orders of censure and 30% costs contribution.

e. *Reid*:[73] Nurse Reid kicked a patient in the chest before using excessive force to restrain the patient. The Tribunal considered this to be very serious misconduct and a very serious assault. The nurse's registration was cancelled, together with orders of censure and 25% of costs. The nurse lacked insight and the Tribunal considered he continued to pose a significant risk to the public if he remained a nurse.

The assault on Grant Bennett

a. *Ainsworth*[74]: a nurse who had been convicted of common assault of a patient under his care was censured and had his registration cancelled.

b. *Janssen*[75]: a dental hygienist became involved in an altercation at a casino which ended in her hitting the victim in the head with a wine bottle and throwing a wine glass at his face. Ms Janssen was ordered a suspension of six months (suspended).

c. *Edwards*[76] a podiatrist was convicted of assaulting his ex-wife's new partner punching him five or six times. The assault was described as "serious" and the Tribunal considered cancellation and suspension. In the end the podiatrist was censured and ordered to undertake an anger

[72] 263/Nur09/124, 24 November 2009 (HPDT)
[73] 305/Nur09/136P (penalty), 4 June 2010 (HPDT)
[74] 295/Nur09/143P, 13 April 2010 (HPDT)
[75] 430/DH11/190P, 20 March 2012 (HPDT)
[76] 748/Pod1/325P, 15 December 2015 (HPDT)

management programme. A sterner approach was not taken because of the podiatrist's previous unblemished record, the offending occurred outside the professional context at a time when he was under considerable stress, and he accepted responsibility for his conduct and had voluntarily engaged in counselling.

d. In terms of the cases involving registered teachers who had been convicted of assault the Tribunal was assisted by *CAC v X* [77]where a teacher had been convicted in the District Court of three counts of assaulting a child and one count of assault with a blunt instrument relating to rough handling of children to compel compliance (the teacher was de-registered and censured despite the teacher having acknowledged the seriousness and inappropriateness of his conduct); CAC v X [78] where a teacher engaged in inappropriate conduct and behaviour management including grabbing children and hitting, tapping or slapping them in order to get their attention or make them concentrate (the Tribunal ordered that had she remained on the register at the time of the proceedings the teacher would have been de-registered); *CAC v X*[79]where the teacher had been convicted of domestic violence offending (a six month suspension was ordered and he was required to complete anger management counselling although de-registration was carefully considered); *CAC v Sami*[80] a 61 year old teacher with no previous convictions, was found to have committed serious misconduct in relation to assaulting a teenage member of her family with a vacuum cleaner pipe. She was subsequently discharged without conviction on a charge of assault with a weapon. She had completed an anger management course. The Tribunal imposed conditions requiring the teacher to work under a mentor and to provide any employer with a copy of the Tribunal's decision.

[77] NZTDT 2011/12, 5 May 2011
[78] NZTDT 2014/49, 20 May 2014
[79] NZTDT 2009/5, 11 May 2009
[80] NZTDT 2017/14, 27 September 2018

Aggravating and mitigating factors

107. The Tribunal accepted that the aggravating factors of Mr Esera's offending were those identified by the CAC in respect of each of the incidents (as discussed above in paragraph 94 e. and f.).

108. The Tribunal considered there are the following mitigating factors:

a. Mr Esera cooperated with the CAC by agreeing to a statement of facts and he admitted the charge as it related to the incident involving Mr Bennett. This avoided the need for evidence to be called by the CAC and for Mr Bennett to attend the hearing and give evidence;

b. There have been significant personal consequences for Mr Esera associated with the length of time he was able to find employment following his dismissal including consequent financial hardship;

c. Mr Esera had not previously been the subject of a complaint during his long career as a social worker.

109. Having regard to the above factors, the Tribunal was satisfied that the appropriate focus for penalty should be the protection of the public as well as the upholding of the professional standards expected of registered social workers.

110. The Tribunal considered the cases to which it was (and has) referred. None of the cases are directly analogous but they indicate that for serious offending in the nature of assaults the penalty imposed under other disciplinary regimes has been at the harsher end of the range of available penalties.

111. The Tribunal was concerned by the aggravating factors identified above particularly the fact the first incident involved a vulnerable young person with a care and protection history, and Mr Esera's apparent ongoing lack of insight into the gravity of his offending. The Tribunal was deeply concerned by Mr Esera's reference in his affidavit to him having twice been the victim of assaults on the part of LME. The Tribunal accepted the CAC's submission that although on the one hand Mr Esera submitted he held no grudge in relation to the earlier incident when he was assaulted by LME with a chair, the frequent references to it in his submissions and affidavit as an explanation for why he feels so aggrieved by his current situation does suggest there is some lingering hard feeling.

112. The Tribunal accepted the CAC's submission that when considered together, both incidents show a quickness to become angry and a concerning resort to aggression and violence when frustrated. The Tribunal agrees this reflects directly on Mr Esera's fitness and safety to practise social work which often involves working with difficult and/or vulnerable clients. Added to this, the Tribunal considered that Mr Esera does appear to lack insight into the gravity of his conduct.
113. The Tribunal considered the options available to it short of cancellation of Mr Esera's registration and had careful regard to the submissions made on behalf of Mr Esera and his evidence. In the end, the Tribunal considered that a period of suspension and the imposition of conditions would not be a proportionate response to the offending and nor would orders of those nature adequately protect the public. The Tribunal is not satisfied that the underlying issues of anger management and self-control have been fully acknowledged and addressed by Mr Esera and in those circumstances the Tribunal considers he poses an ongoing risk to the public. Further, the Tribunal considers that Mr Esera's pattern of violent behaviour warrants the sternest of responses to maintain professional standards, and to preserve the public's confidence in the social work profession.
114. For these reasons the Tribunal considered that cancellation is the appropriate penalty and is proportionate to the gross professional misconduct which the Tribunal has reviewed in this case. Cancellation of registration is the least restrictive penalty which the Tribunal considered can reasonably be imposed in order to fulfil the principal purposes of the Act and the disciplinary regime.
115. Finally, the Tribunal considered there should also be an order of censure to mark the Tribunal's disapproval for the gross professional conduct arising out of the incidents the Tribunal has assessed in this case.

Costs

116. For the CAC the following submissions were made as to costs:

    a. The CAC's costs were $39,109.35 excluding GST ($29,609 excluding GST for the CAC investigation (total actual costs) and an estimated further $9,500.00 excluding GST, for the hearing);

b. The Tribunal's costs were estimated at $32,108.00 excluding GST;

c. Any reduction from the starting point of 50% of total reasonable costs would depend on information presented to the Tribunal as to Mr Esera's financial position; and in reply, the CAC acknowledged that the financial hardship suffered by Mr Esera may be relevant to costs.

117. For Mr Esera it was submitted:

a. With reference to financial information disclosed in Mr Esera's affidavit, a costs order of 50% would be "ruinous" to him;

b. Mr Esera had "no option" but to defend the charge in relation to LME because "self-respect commanded it"; he deposed that he was "twice the victim in terms of physical injury while in respect of [LME] twice nothing happened";[81]

c. At no stage did Mr Esera contest his guilt on the assault on Mr Bennett;

d. Mr Esera cooperated in the preparation of an agreed statement of facts into this second incident and this avoided the need for Mr Bennett to give evidence before the Tribunal;

e. A costs order should not exceed $5000 given Mr Esera's "minimal, casual income" and other current financial circumstances.

118. Information as to Mr Esera's current financial position, including pay-slips and bank statements annexed to his affidavit, was considered by the Tribunal.

Costs - principles

119. The principles relating to the imposition of an order for costs in disciplinary proceedings are well settled.

120. In essence, the issue for the Tribunal is determining what proportion of the total costs should be borne by the social work profession as a whole and what proportion should be borne by the practitioner who has been responsible for those costs being incurred in the first place.

[81] Mr Esera's Submissions at [41]

121. The general principles which need to be taken into account when considering applications for costs in disciplinary proceedings include:

a. The fact that professional groups ought not to be expected to fund all the costs of a disciplinary regime; and members of the profession who come before disciplinary bodies must be expected to make a proper contribution towards the costs of the inquiry and hearing: *G v New Zealand Psychologists Board*[82] and *Vasan v Medical Council of New Zealand*[83];

b. Costs are not in the nature of a penalty or to punish: *Gurusinghe v Medical Council of New Zealand*[84];

c. Means, if known, are to be taken into account: *Kaye v Auckland District Law Society*[85];

d. A practitioner has a right to defend himself or herself: *Vasan*; and

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

122. The issue of costs in disciplinary cases was considered by Doogue J in *Cooray v Preliminary Proceedings Committee*[86]. Doogue J concluded:

> *"It would appear from the cases before the Court that the Council on other decisions made by it has in a general way taken 50% of total reasonable costs as a guide to a reasonable order for costs and has in individual cases where it has considered it is justified gone beyond that figure. In other cases where it has considered that such an order is not justified because of the circumstances of the case, and counsel has referred me to at least two cases where the practitioner pleaded guilty and lesser orders were made."*

123. The Tribunal proceeded on the basis of the figures indicated by Counsel for the CAC.

124. The Tribunal is satisfied that in this case Mr Esera's means are such that he has limited ability to meet an order of costs. Having considered the financial information provided as to Mr Esera's current means the Tribunal has determined that it would not be appropriate to order him to pay costs in excess of $5000. A costs order in the sum of $5000 is appropriate and is ordered accordingly.

125. Had financial means not been a significant factor then the Tribunal would have made a costs order in the region of 40% of total reasonable costs factoring in the mitigating

[82] Gendall J, 5 April 2004, HC Wellington, CIV-2003-485-217)
[83] 18 December 1991, AP43/91 at page 15
[84] [1989] 1 NZLR 139 at 195
[85] [1988] 1 NZLR 151
[86] unreported, AP23/94, Wellington Registry, 14 September 1995, at page 9

circumstance that there was at least some degree of cooperation with the CAC in relation to the charge as it related to the incident involving Mr Bennett.

Conclusion

126. The charge has been established as gross professional misconduct. The penalties are:
    a. An order pursuant to s. 83(1)(a)(i) that Mr Esera's registration be cancelled;
    b. An order of censure pursuant to s. 83(1)(b) to express the Tribunal's strong disapproval for the conduct it was required to consider with regard to Mr Esera's gross professional misconduct;
    c. An order pursuant to s. 83(1)(e) that Mr Esera pay a total of $5000 towards the costs and expenses of and incidental to the inquiry by the CAC, the prosecution of the charge by the CAC and the hearing.

127. The Tribunal seriously recommends to Mr Esera that if he wishes to seek re-registration in the future then he should undergo training related to trauma and its effects. This would enable him to become a trauma informed social worker. The aim of the training should be to allow Mr Esera to gain a better understanding of;

- the impact of trauma
- how best to respond and engage with those who have experienced trauma
- self-cares related to working with clients who have experienced trauma (i.e. the management of vicarious trauma).

128. The Tribunal recommends to the Social Workers Registration Board that should Mr Esera seek re-registration in the future then his competence should be assessed by the Board and in addition, he should be required to undergo a psychological assessment around vicarious trauma related to the incident in November 2013.

Non-publication order

129. An interim non-publication order was in place throughout the proceedings in respect of the names of LME and the other young people at Whakatakapokai who were mentioned in the evidence.

130. The Tribunal accepts the CAC's submission that it is desirable that the interim order be made permanent in respect of these vulnerable young people. Publication of their names would disclose their care and protection history and in the Tribunal's view that would be contrary to the private interests of the young people. There is no public interest in having their identities disclosed.

131. Accordingly the Tribunal orders pursuant to s. 79(2)(d) of the SWR Act that the names of LME and the young persons mentioned in the evidence are permanently prohibited from publication.

132. The Tribunal directs that a copy of this decision and a summary be placed on the Board's website. It further directs that a notice stating the effect of the decision be placed in the Board's newsletter to registered social workers.

DATED at Wellington this 30th day of May 2018

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Jo Hughson
Chairperson
Social Workers Complaints and Disciplinary Tribunal