**IN THE EMPLOYMENT COURT**
**AUCKLAND**

**[2013] NZEmpC 100**
ARC 68/10

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| IN THE MATTER OF | a challenge to a determination of the Employment Relations Authority |
| AND IN THE MATTER | of remedies and costs |
| BETWEEN | NEW ZEALAND LANGUAGE CENTRES LIMITED (FORMERLY GEOS NEW ZEALAND LIMITED)<br>Plaintiff |
| AND | DAVID PAGE<br>Defendant |

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| Hearing: | 26 March 2013<br>(Heard at Auckland) |
| Appearances: | Dean Kilpatrick, counsel for plaintiff<br>Garry Pollak, counsel for defendant |
| Judgment: | 5 June 2013 |

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**JUDGMENT OF JUDGE B S TRAVIS ON REMEDIES**

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[1] This judgment deals with the outstanding issue of remedies and costs. In my substantive judgment, issued on 14 December 2012,[1] I recorded what had happened in relation to remedies in the following passages:

> [131] At the conclusion of the hearing on 14 October 2011, it was agreed by counsel that the issue of remedies would be left to one side because of the unsatisfactory state of the plaintiff's records following a receivership in Australia. Counsel would then endeavour over the ensuing three months to agree on remedies and if they could not, then they would produce further evidence by way of affidavits initially, and supplementary submissions. I therefore adjourned the matter part-heard.
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> [132] On 29 November 2011 the defendant filed what was described as his "first supplementary evidence", which consisted of an affidavit annexing a 17 page document as Exhibit 1 and, as Exhibit 2, what he described as "a

[1] [2012] NZEmpC 215.

large bundle of documents which I have photocopied or printed which coincides with each chronological item". This totalled exactly 500 pages.

[133] Mr Page deposed that he was available to answer any questions, if any arose, as to any of these matters by video conference, telephone or email, the affidavit having been sworn in Brisbane, Australia.

[134] On 16 December 2011 Mr Page filed what was described as the defendant's "second supplementary affidavit". He deposed that he appreciated that aspects of his evidence about salary, accrued leave, superannuation entitlements and bonuses were complicated, due in part to the terms of his employment incorporating both Australian and New Zealand contractual provisions. He deposed that part of the confusion which he claimed resulted in the Authority partly determining his employment conditions incorrectly, was because the plaintiff did not provide accurate pay and leave entitlement documents despite being requested to do so on a number of occasions. He set out seven pages outlining the differences between the awards of the Authority and what Mr Page claimed he should have been correctly paid. He then provided further material, including comments on the various emails received concerning his bonus.

[135] On 21 December 2011, counsel for the plaintiff filed a memorandum in which he advised that counsel had consulted in regard to the materials provided by the defendant on 7 October 2011 and the subsequent affidavits with attachments filed on the defendant's behalf on 29 November and 16 December 2011. Counsel observed that the total number of pages to view was approximately 860 and that a reasonable amount of the documents related to financial claims and would require assessment by the plaintiff using both in house, and potentially external accounting advisors. Counsel advised that the plaintiff had to accommodate the Christmas break, its business commitments in Thailand and Taiwan and the fit out of its Auckland premises in March 2012. The plaintiff therefore required a reasonable amount of time to review the documents and arrange for a suitable method of questioning the defendant on any matters that arose and therefore requested the Court provide the plaintiff until 2 April 2012 to conduct its review. Counsel also agreed that if the need for questioning arose, they would agree on the best practical method of dealing with this. I approved this timetable.

[136] A joint memorandum of counsel was filed on 19 April 2012 advising that the plaintiff had completed its review of the further evidence and also sought additional documentation from the defendant. Counsel for both parties agreed that the plaintiff had no questions of the defendant in respect of the supplementary evidence he had provided to the Court. They agreed that the plaintiff would give evidence of its review of that material, and other relevant matters, by affidavits to be filed by 27 April 2012, and any further responses by the defendant would be provided by affidavit. They also agreed that any questioning in respect of the evidence of the parties would be addressed and responded to by further affidavit and, for ease of reference, all the additional documents referred to by the parties and not already provided to the Court, would be compiled into a further joint bundle, which would be filed with the plaintiff's affidavit. Counsel for both parties noted that if any questioning was required, it was likely to be limited, given a large part of the evidence provided by the parties was an explanation of the documentation provided. By a minute of 23 April 2012, I recorded that the agreed directions

in the joint memorandum were acceptable to the Court and reserved leave to apply for further directions.

[137] On 27 April 2012 a further joint bundle of documents was filed, running to 39 pages together with affidavits of Mr Mastoyo and Miles MacGregor Stewart, both sworn on 27 April. Mr Page responded by an affidavit filed on 11 May 2012 and Mr MacGregor Stewart replied by an affidavit sworn on 17 May 2012.

[138] Counsel then advised the Court by way of email correspondence, that the evidence was finally concluded and could be referred to me for judgment.

[139] When I commenced work on the judgment, I viewed all this material and the plaintiff's affidavits from Mr Mastoyo and Mr MacGregor Stewart made detailed attacks on the defendant's supplementary evidence including various statements which went to the defendant's credibility. In turn, the defendant's affidavit of 10 May, attacked the two affidavits of the plaintiff and asserted that they were wrong in material respects. This included an attack on Mr MacGregor Stewart's qualifications for expressing an opinion on the quality of the defendant's application. Mr MacGregor Stewart in turn purported to answer that in his subsequent affidavit.

[140] Counsel having communicated with the registry and advising that the matter could be referred for judgment, presumably did not seek the opportunity to question the deponents on their affidavits although this was never expressly stated. Because of the conflicts of evidence I deduced from those affidavits I was left in the position of being unable to resolve questions of credibility and the accuracy of the various allegations. I therefore required counsel[2] to provide supplementary submissions dealing with these matters and indicating how the various conflicts in the evidence and in the submissions contained in the affidavits should be resolved. I also allowed counsel to consider a timetable for those submissions and whether they ought to be the subject, once they had been reduced to writing, of a further oral hearing to enable the Court to address questions of counsel. Mr Kilpatrick had advised by that stage that he would be on leave until 30 July 2012 and I suggested that the resolution of the matters in my minute be postponed until after his return.

[141] Counsel for the plaintiff and the defendant filed a joint memorandum on 8 August confirming that neither the plaintiff nor the defendant had any further questions for the witnesses in respect of the affidavits filed by Mr Page, Mr Mastoyo and Mr MacGregor Stewart. In regard to further submissions, they advised that counsel were unclear as to how they could assist the Court in respect of the conflicts of evidence, whilst acknowledging that there were differences in the evidence of Mr Page against the evidence of Messrs Mastoyo and MacGregor Stewart. They advised that Mr Page's affidavits provided an analysis of his claimed remuneration entitlements, including arrears claimed and details of his claimed attempts to secure new employment. They advised that Mr Mastoyo's affidavit of 27 April 2012 provided "a counter-analysis to Mr Page's analysis of his remuneration entitlements confirming what the plaintiff believes Mr Page's entitlements are". They advised that Mr MacGregor Stewart's first affidavit challenged

[2] In a minute of 19 July 2012.

> Mr Page's attempts to obtain secure employment based on Mr MacGregor Stewart's experience as an employer, as he outlined in his second affidavit of 17 May. In each instance, counsel noted that there is documentary evidence which has been provided, reviewed and analysed by the witnesses.
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> [142] Both counsel acknowledged that the evidence of Mr Page, in essence, disagrees with the evidence of Messrs Mastoyo and MacGregor Stewart. Counsel indicated that they understood that the Court would need to assess the evidence of the witnesses to determine what evidence is to be preferred and which analysis is preferred against the documentation. Counsel stated that they were unclear how they may assist the Court further, although if I had any specific questions, they would be prepared to attend a telephone conference at the Court's convenience.
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> [143] I took the view, following that exchange, that counsel were not in a position to assist me any further in this matter at that stage and that I would need to issue this judgment dealing with the challenge and the allegation of contributory conduct and the plaintiff's claim for reimbursement of credit card expenses.
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> [144] To obtain the benefit of counsel's submissions on remedies, which I have not yet received, I direct the resumption of the hearing to address these. Counsels' submissions will need to address the precise figures sought and rejected, and the relevant evidence, the decisions of the Court of Appeal in *Sam's Fukuyama Food Services Ltd v Zhang*,[3] and Mr MacGregor Stewart's expertise.[4] A telephone directions conference will be convened to set a timetable for the conclusion of the hearing.

[2] After a telephone conference on 19 December 2012 I issued a minute which set out the directions for the parties and the matter proceeded to a hearing on 26 March 2013, following an exchange of written submissions.

[3] The following uses the headings provided by the defendant for his remedies claims. In each claim the defendant compared his current claim with the determination of the Employment Relations Authority (the Authority) although this was a de novo hearing before the Court which put remedies at large.

## Compensation for lost remuneration

[4] In its determination dated 25 May 2010,[5] the Authority had awarded the defendant six months remuneration of $55,000 based on an annual salary of $110,000 gross (that is before tax). The defendant now seeks an award for lost

[3] [2011] NZCA 608.
[4] See *Maritime Union of New Zealand v TLNZ Ltd* [2007] ERNZ 593 and *Hayllar v The Goodtime Food Company Ltd* [2012] NZEmpC 153.
[5] ERA Wellington AA 249/10, 25 May 2010.

remuneration of 12 months' salary. In one part of his submissions, Mr Pollak, counsel for the defendant, annexed as Appendix A, a list of the remedies claimed by Mr Page which shows that the salary should be $110,000 gross. Mr Pollak's submissions then annexed a second document described as Appendix B, which, he stated, contained an explanation for each of the claimed remedies. This time the defendant sought $130,000 gross, which, according to a note in Appendix B, was apparently based on the full salary specified in the defendant's contract.

[5] In the course of the resumed hearing on 26 March 2013 to deal with the issue of remedies and costs, I pointed out this discrepancy. It appeared that the defendant's contractual entitlements as set out in a letter of 10 April 2006, were to consist of a base salary of $110,000 per annum and an additional $20,000 per annum for a higher duty allowance for the defendant's role as regional director. Although it was not dealt with in the submissions, when the plaintiff purported to demote the defendant by an announcement made at a conference on 17 November 2008, this resulted in the allowance being stopped without any advice or notice.[6] The defendant raised a personal grievance about his demotion. The demotion was not justified by the plaintiff. I consider that the allowance should have continued to have been paid for the remainder of the defendant's employment and should also form the basis for calculating his lost remuneration claim and other related remedies. These will now proceed on the basis that the defendant's total salary was $130,000 per annum, gross.

[6] Mr Page gave evidence that in the period from his dismissal, on or about 20 April 2009, through to the date of the Authority's determination on 25 May 2010, he had earned a total of some $6,090 from other sources. This figure does not quite reconcile with a letter from his accountant which was produced in Court, dated 30 March 2012. It showed $7,328.14 made up as follows:

| **Period** | **Income** |
|---|---|
| April 2009-June 2009 | $Nil |
| July 2009-June2010 | $1,340.00 |
| July 2010-June 2011 | $495.00 |
| July 2011-October 2011 | $5,493.14 |

[6] See [2012] NZEmpC 215 at [23] and [24].

[7] Mr Pollak did not expressly address in his written submissions why the lost remuneration should be increased by six months from the amount awarded by the Authority, to twelve months. I take it that his submission for the increase was based on the defendant's claim that he had been unable to earn any substantial income other than that referred to above, in the period at least up until 25 May 2010. I was not directed to any evidence of any subsequent losses.

[8] As invited to by the Court, Mr Pollak addressed the Court of Appeal's decision in *Sam's Fukuyama Food Services Ltd v Zhang*[7] (*Zhang*) and the impact the *Zhang* case has had on the exercise of the discretion, conferred by s 128(3) of the Employment Relations Act 2000 (the Act), to award a grievant more than three months' ordinary time remuneration.

[9] Mr Pollak submitted that the Authority had before it clear evidence of loss. However, it is difficult to see how that assists the defendant in a de novo hearing before the Court, where Mr Page has the onus of proving his claims for remedies. Mr Pollak posed the question: how does the Employment Court's consideration change following the Court of Appeal's judgment in *Zhang*? He submitted that the starting point that Court must apply is three months' remuneration, under s 128(2) of the Act, and it then can exercise its discretion accordingly. He submitted that the six months' award of the Authority was modest in all the circumstances and did not reflect the defendant's actual losses. He submitted that the Court must, as a starting point, consider the actual loss "which in actual fact has not been claimed by the defendant". He submitted that the defendant's full financial losses set the upper limit of an award, that moderation is required,[8] and must take into account the individual circumstances of the particular situation. He submitted that there is a discretionary aspect and the awards of the Court must involve a broad brush approach. He noted that the employee in the *Zhang* case had a short period of employment which was fraught with difficulties and the Court of Appeal concluded that his employment may not have continued for a further thirty weeks.

[7] [2011] NZCA 608, [2011] ERNZ 482.
[8] *Zhang* at [36].

[10] Mr Pollak submitted that the considerations for Mr Page were quite different. He was a senior employee, invited to move to New Zealand, and had very long service with the business, albeit in a number of different forms. He contended there was no history of disharmony or antagonism, nor could it be said that the defendant contributed to his dismissal. He accepted there may have been some concerns about the defendant's management style but there was no evidence of misconduct. He noted in the *Zhang* case that the Court of Appeal was satisfied that the relationship between the employer and employee had plainly broken down and was dysfunctional. He contended that that was not the case here. He submitted that the Court should exercise its discretion to award the defendant twelve months' lost remuneration as that was still not close to his actual losses but within the general principles of moderation.

[11] Mr Pollak also addressed how the Employment Court in *Hayllar v Goodtime Food Company*[9] had applied the principles in *Zhang*. He submitted that in *Hayllar* the Court had re-emphasised the need to make allowances for all contingencies that might, but for the unjustifiable dismissal, have resulted in the termination of the grievant's employment.[10] In that case there was a very real likelihood of dismissal and therefore the Court would not exercise its discretion beyond the statutory three months' ordinary time remuneration. Again, he submitted, Mr Page's situation was quite different.

[12] Mr Kilpatrick, in his written submissions in opposition, relied on what the Court of Appeal in *Zhang* referred to as the "counter-factual analysis". The Court of Appeal quoted with approval, its earlier decision in *Telecom New Zealand Ltd v Nutter*[11] and the passage which stated that in assessing lost remuneration the assessment "must allow for all contingencies which might, but for the unjustified dismissal, have resulted in termination of the employee's employment".[12] Mr Kilpatrick referred to how the discretion had been used to reduce the remedies in the *Hayllar* case.

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[9] [2012] NZEmpC 153.
[10] At [83].
[11] [2004] 1 ERNZ 315 (CA) at [70]-[79].
[12] *Nutter* at [81].

[13] Turning to the present situation Mr Kilpatrick submitted that there was clear evidence in support of the plaintiff's submission that any remedies for lost remuneration should be reduced from those provided by the Authority to either nil, or at the most, three months. He relied on the evidence of Messrs Maserow and Mastoyo and Ms Wagener. In particular he referred to the evidence of Mr Maserow who provided the defendant with an opportunity to turn things around in Auckland in the five months from January 2009 until May 2009. He submitted that there was compelling evidence that, due to the failure of Mr Page to take any positive steps in the first three month period, there was little hope of his succeeding in doing so in the remaining time. He submitted therefore that Mr Page's employment would only have continued until the end of May 2009, at the latest. If, in the alternative, the Court took the view that it was appropriate to award remedies beyond that point, it should be limited to a total of three months.

[14] Mr Kilpatrick also relied on Mr Maserow's evidence that the defendant's style of management was autocratic and not well received. Mr Kilpatrick gave extensive references to the complaints obtained by the plaintiff about the defendant's management style, which were presented to Mr Page as attachments to the plaintiff's letter of 1 April 2009.

[15] There were additional matters which, on their face, indicated that the relationship between the plaintiff and the defendant had some aspects that were not unlike that of the parties in the *Zhang* case. There was the purported demotion of Mr Page at the 17 November 2008 meeting, which Mr Page claimed to have been humiliating.[13] Mr Page had raised a personal grievance on 19 December 2008 in response to his treatment during the conference and the implications for his current position and had also requested payment of his unpaid bonus for the 2006/07 year and had received no response.[14] At the next regional meeting, on 11 February 2009, Mr Page's evidence was that he was subjected to further denunciation by Mr Kusunoki who had publicly announced that Ms Wagener would be transferring to Auckland and taking over Mr Page's position.[15] It was after that meeting that Mr

[13] All subsequent paragraph references are to [2012] NZEmpC 215 at [26] unless otherwise indicated.
[14] At [28].
[15] At [30].

Page requested the opportunity to finally get Auckland into a profit making situation. Mr Maserow wrote to him on 17 February referring to three prior warnings, stating that the Auckland Language School needed to show a dramatic improvement and giving Mr Page the opportunity to have his performance measured over the first five months of the calendar year, from January until May 2009.[16] There were already personal grievance matters before the Authority and the parties were looking to attend mediation[17] when Mr Maserow wrote his 1 April letter advising that if Mr Page's alleged conduct resulted in a finding that trust and confidence had been destroyed, he might be summarily dismissed.

[16] Mr Maserow's evidence was that Mr Kusunoki was furious with Mr Page but had reluctantly agreed to give Mr Page the opportunity to fix the financial matters. I found that Mr Maserow was looking for a reason to dismiss Mr Page and this is why he solicited the statements from Mr Page's colleagues, which were annexed to the 1 April disciplinary letter. Mr Maserow admitted in evidence that he was directed by Mr Kusunoki at the 11 February 2009 regional management meeting to dismiss Mr Page.[18] Although Mr Page may not have been aware of these matters at the time, in the light of my findings, there was clearly something of a dysfunctional relationship not dissimilar to that in the *Zhang* case.

[17] The difficulty with *Zhang* is that although the dismissal was held to be unjustifiable and that the relationship had suffered because Mr Zhang was raising justifiable health and safety issues, nonetheless it was unlikely his employment would have continued. That might be taken to imply that, when looking at the counter-factual matters, if, but for the unjustifiable dismissal that had taken place, it can be shown that the employer might well have unjustifiably dismissed the employee at a later date, that would be a ground for not exercising the discretion to extend the reimbursement beyond the three month period. If that inference can be drawn from the decision in *Zhang* it suggests that an unfair and unreasonable employer can rely on its own wrongful conduct to prevent an employee having the benefit of either the Authority or the Court exercising its discretion to extend the

[16] At [33].
[17] At [35].
[18] At [110].

remuneration period. That would be a most unfortunate result and one that is difficult to reconcile with the exercise by the Authority or the Court, for the purpose of supporting successful employment relationships and promoting good faith behaviour, of their equity and good conscience jurisdictions under ss 157(3) and 189(1) of the Act, respectively.

[18] Mr Pollak submitted the financial situation was not as bad as Mr Page thought at the time of Mr Page's dismissal. He referred to his cross-examination of Mr Mastoyo, who became the owner of the business in February 2010, and his statement in his brief of evidence that:

> While a cash injection was required, this was not needed until a year later and even then, it was only half of what David had proposed.

[19] As I found in my substantive judgment, Mr Page had written to Mr Maserow on 2 March 2009 seeking a capital injection of $500,000 staggered over the next few months.[19] Mr Mastoyo's brief of evidence claimed that since Mr Page had left, the Auckland school had "improved dramatically with increased profits" and went on to state:

> Even with the significant impact of the Christchurch earthquakes which resulted in the closure of the Christchurch school, the business has improved across the whole of New Zealand and is operating well and profitably.

[20] From this material Mr Pollak submitted that the actions of Mr Page could well have contributed to the financial turnaround of the plaintiff's New Zealand business and, although the matter is far from clear, this may have addressed the plaintiff's financial concerns about the defendant's financial performance. I accept Mr Pollak's submission that this was a possible hypothetical outcome on Mr Mastoyo's evidence.

[21] I also found in the substantive judgment that financial issues were not the sole responsibility of the defendant, who was required to use outside accountants and could not employ the expertise he sought. He was also governed by a financial manager in Brisbane. I found that it was not fair to have blamed the defendant for all the plaintiff's financial problems.

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[19] At [36].

[22] Looking at the matter in a hypothetical way, as the *Zhang* case requires, there are two extremes which were both possible. The first is that Mr Kusunoki maintained his view that Mr Page needed to be fired, and that the financial position might not have improved sufficiently by the end of May 2009. This may have entitled Mr Maserow to take proper steps which might have resulted in Mr Page's justifiable dismissal. As I have noted in my judgment however, Mr Page was never given the opportunity to turn things around. Instead, while he was trying to deal with the financial matters, he was given the disciplinary letter of 1 April and required to deal with wide ranging allegations, including the complaints about his management style. That effectively prevented any remedial work being carried out. He was then dismissed a little over two weeks later.

[23] The other extreme is the possibility that the changes Mr Page was starting to make may have resulted in a turn around in profitability which might have persuaded Mr Kusunoki to resume the high regard in which he had previously held Mr Page.[20]

[24] As a midway between those extremes, if the financial situation had not turned around adequately, by the end of May then the plaintiff might well have been justified in engaging in either a performance review of the defendant or even redundancy consultation.

[25] I put to Mr Kilpatrick that such a process may have started sometime in June 2009, after the expiration of the five months given to Mr Page, and may well have continued into July and may have been completed as late as August 2009. Mr Page's employment agreement provided for three months' written notice on any termination, other than for serious misconduct and bankruptcy, and that would have taken the notice period out to the end of November 2009.

[26] Putting to one side for the moment the issues about management style and taking into account the *Zhang* counter-factual matters, for these reasons I agree with the Authority's determination that the remuneration reimbursement period should run for six months.

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[20] See for example [29] – the 28 December 2008 meeting at which Mr Page received an award.

[27] Turning now to the issue of management style, relied on by Mr Kilpatrick, the difficulty with this evidence, as I observed in the substantive judgment, is that Mr Page was never given the opportunity of addressing these matters, which were issues of perceived performance. He was never given the chance to remedy his management style or improve his relationship with those persons from whom complaints had been sought by the plaintiff. It is clear that the defendant had considerable ground to make up if those solicited complaints are taken at face value. I accepted Ms Wagener's evidence that her self-confidence was so affected that she thought about leaving her job and that since Mr Page's departure she has felt more confident in her role as Principal. She was not cross-examined by Mr Pollak.

[28] However, even in the unflattering comments about Mr Page's managerial style in the complaints obtained by Mr Maserow, there were positive statements about Mr Page's professionalism and his ability with systems, which I found may have enabled those relationships to have been repaired.[21]

[29] Had those complaints been addressed in a proper manner with the full opportunity for Mr Page to respond and remedy his perceived shortcomings, even if he had been unsuccessful in remedying the situation, this process would have taken at least three months before any dismissal could have been justifiably contemplated. Mr Kilpatrick fairly conceded that there would not have been a summary dismissal for the performance issues, if they had been properly worked through. With the three month notice period contained in Mr Page's agreement, it is therefore likely that even if his employment had been terminated justifiably on notice after a full investigation he would have remained in employment for, at the very least, an additional six months from the date of his summary dismissal.

[30] I will, like the Authority, therefore exercise my discretion under s 128(3) to reimburse Mr Page for a period of six months following his dismissal.

[31] This would take the period out to approximately 20 October 2009. To the end of June 2009 he had not earned any other income. From July 2009 to June 2010 he earned $1,340.00. I have no evidence as to what was earned in July to October

[21] At [78].

2009. That was for the defendant to show. I have calculated an average monthly figure of $112.00 for the twelve month period. For the four month period in 2009 I have deducted $448 from the reimbursement figure of $65,000 gross. This brings the figure for reimbursement to $64,552.00 before tax.

[32] Although other aspects of remuneration were sought, it is convenient before making a final determination of those issues, to deal with the claim by the plaintiff that the defendant failed to mitigate his losses.

[33] Mr Page filed an affidavit annexing voluminous documents showing what he described as his many attempts to find employment. He also prepared a 17 page chronology dealing with the events from his dismissal in April 2009 to 12 October 2011, the start of the Employment Court hearing.

[34] This material is addressed in an affidavit of Miles MacGregor Stewart, sworn on 27 April 2012. Mr Stewart is one of the directors of the plaintiff and was not present at the time of Mr Page's employment. Mr Stewart deposes that he has analysed the 488 job applications referred to in Mr Page's affidavit and has produced a spreadsheet summarising these. He purports to have provided an objective assessment of whether Mr Page was suitable for the roles he claims to have applied for.

[35] The difficulty with Mr Stewart's evidence in his first affidavit and his supplementary affidavit, sworn on 17 May, is that it contains extensive opinion evidence and is really in the nature of submissions.

[36] I asked the parties to deal with Judge Ford's decision in *Hayllar* where at [50] following, he dealt with the evidence of a person presented as an "expert witness". Judge Ford referred to the High Court Rules which state that "An expert witness is not an advocate for the party who engages the witness".[22] Judge Ford concluded that he was not satisfied that the witness was not an advocate for one party or that

[22] High Court Rules, sch 4, cl 2.

her opinion evidence was sufficiently impartial. He determined to give it the weight which he considered it deserved.[23]

[37] I take a similar view of Mr Stewart's evidence. I was not assisted by his opinions and am not satisfied that he had the status of an expert, let alone an independent expert. I do not place any weight on his evidence.

[38] I record that I am satisfied that the plaintiff did make strenuous efforts to obtain employment in at least the six months following his dismissal. I also record my conclusion that his attendance for some few hours each day at a music school were not sufficient to break the chain of causation between his dismissal and his lost remuneration.

[39] For these reasons I order that the plaintiff pay to the defendant the sum of $64,552 gross, that is before taxation, for the six month period following the dismissal as compensation for lost remuneration from which I have already deducted an estimate of the defendant's earnings during that period.

***New Zealand Superannuation***

[40] The Authority awarded the defendant $2,750 being five percent of his salary as specified in his contract to be paid on his New Zealand salary for New Zealand Superannuation. The defendant now seeks that to be increased, based on the $130,000 salary, to $3,250 for a six month period or $6,500 for a 12 month period.

[41] Mr Kilpatrick accepted that the defendant was entitled to New Zealand Superannuation in accordance with the terms of his employment but, to participate in this entitlement, he submitted that the defendant had been required to join KiwiSaver, as was the practice at the time in the plaintiff company and is still the current practice. He relied on the affidavit of Mr Mastoyo dated 27 April 2012 for this submission. He submitted that it was apparent that the defendant did not joint KiwiSaver, or for that fact any other superannuation scheme in New Zealand, as the defendant had not produced any evidence of having done so. He therefore submitted

[23] At [53].

that the defendant was not entitled to claim KiwiSaver or any other New Zealand Superannuation entitlement.

[42] Mr Pollak, in his response, submitted that this was simply incorrect, as the defendant had joined "Sovereign Superannuation" in New Zealand as did many others of the plaintiff's senior New Zealand staff. He stated that the five percent was deducted and remitted by the plaintiff to the defendant's KiwiSaver scheme for a period but had stopped without notice.

[43] I asked Mr Pollak to refer me to the evidence in support of this submission. He could not do so and in the end conceded that although there was evidence that some superannuation was deducted over a number of years, he could not explain why the deductions had ceased. There was no evidence of any contemporary complaint by the defendant that the deductions had ceased. In the absence of any evidence that the defendant had joined a New Zealand superannuation scheme, although he had an entitlement to five percent superannuation if he had done so, this claim must be disallowed.

**Unpaid New Zealand Superannuation**

[44] Mr Page claimed what he described as unpaid superannuation between April 2006 and April 2009 and sought to support the Authority's determination that a contribution at five percent of his base salary, which was not paid, resulted in a shortfall of $14,557. The Authority awarded him this amount. I have read the determination and find that it was based on evidence Mr Page led about his membership of the Sovereign Superannuation Fund and what his contributions to that fund ought to have been in terms of his contractual entitlements. However, that evidence was simply not led before the Court. As I have outlined above, Mr Pollak was unable to point to any evidence which defeated Mr Kilpatrick's submission that although there was an entitlement to have a five percent contribution, Mr Page had not produced any evidence of having belonged to an appropriate New Zealand fund. For these reasons I disallow the claim of $14,557.

## Australian Superannuation

[45] The defendant claimed that the Authority's award of AUD$5,000, based on the nine percent per annum specified in the employment agreement, should be increased to at least AUD$10,000 or AUD$11,700, if he was awarded lost earnings for a twelve month period. In view of the remuneration award I have made the claim cannot exceed six months.

[46] As Mr Kilpatrick fairly conceded, there are real difficulties with endeavouring to calculate the Australian Superannuation entitlements. The position was not assisted, as Mr Pollak pointed out several times, by the inadequacy of the records available as a result of the plaintiff's receivership in Australia.

[47] I take the view, although not argued by counsel, that I should approach this matter by analogy with s 132 of the Act. This deals with the situation where a claim for arrears of money payable under an employment agreement is brought before the Authority and it is shown that the employer has failed to keep or produce wages and time records. Where that prejudices the employee's ability to bring an accurate claim, the Authority may accept, as proven, all the claims made by the employee in respect of the wages actually claimed or the hours, days and time worked. Because of the difficulties the defendant has experienced in proving his various claims due to the unavailability of crucial records as a result of the plaintiff's receivership in Australia, I intend to apply this approach to the calculations under s 123(1)(b) and (c)(ii) of the Act. These provisions allow for compensation for lost money or benefits, whether or not of a monetary kind, which Mr Page may reasonably have been expected to have obtained if the personal grievance had not arisen.

[48] For these reasons I accept Mr Page's evidence that there was no overpayment made to him as allegedly shown in Mr Mastoyo's calculations contained in what was described by the parties as "Tab 64".

[49] However, the plaintiff appeared to be on stronger grounds when Mr Kilpatrick, in his oral submissions turned to the terms and conditions of employment set out in the 10 April 2006 letter which, under the heading "Other benefits," stated:

"A$10,000 per year will be contributed to Super in Australia". The evidence, as best as I can follow, shows that this sum was paid during the period of the defendant's employment.

[50] In the Authority's determination dealing with the non-payment of Australian Superannuation payments, the following passages appear:

> [57] The Company has also not provided details of payments into the Australian Superannuation Fund. Mr Page's inquiries of that Fund indicate the Company's contributions for the period of his New Zealand employment amounted to $56,311.73. This amount is inclusive of the higher duties allowance which Mr Page elected to go into that Fund by way of a salary sacrifice. The amount of $8,076.92 should therefore be deducted from any underpayment into that Fund.
>
> [58] The total payments that should have been made into that Fund (by way of both the $20,000 salary sacrifice and the $10,000 contribution) should have amounted to $86,244, a difference of $29,932.27, less $8,076.92, with a resulting shortfall of $21,855.35.

[51] The Authority found that because the plaintiff had breached its statutory obligations under s 130 of the Act to keep proper wage records, it preferred Mr Page's claim that he was owed AUD$21,855.35 in respect of the Australian Superannuation payment shortfalls and directed that that sum was to be paid in Australian dollars, consistent with the relevant provision in the applicant's terms and conditions document of 10 April 2006.

[52] The defendant sought to have that sum increased to AUD$32,058.44 on the basis of the table he prepared and attached to his second supplementary affidavit of 14 December 2011. This table shows what Mr Page has described as a nine percent Australian Superannuation entitlement, a $10,000 supplement from the plaintiff and salary sacrifices which the table states should have been paid or accrued. The table was not addressed in any substantive form in either Mr Page's affidavit, which simply recorded it as a table he had prepared "to explain", nor was it explained by Mr Pollak in his written or oral submissions.

[53] In response to Mr Kilpatrick's submission that the defendant's claims for additional superannuation and superannuation shortfalls should be treated with great

caution and his reference instead to the Tab 64 pay reconciliation prepared by Mr Mastoyo Mr Kilpatrick submitted:

> …given the records available to the Court, the lack of any coherency by the defendant and the clear calculations and simple form provided by the plaintiff in the pay reconciliation, the Court can readily determine that the defendant has at the very least received all his entitlements, and in fact has been overpaid his entitlements in respect of the Australia Superannuation.

[54] Mr Pollak submitted that Mr Mastoyo was not privy to any negotiations regarding the defendant's employment package in 2006 and that clearly is so. He also submitted that Mr Mastoyo had not demonstrated in his evidence that he had any understanding of the defendant's employment remuneration package.

[55] These irreconcilable differences in the affidavits filed and served subsequent to the substantive hearing, could have been resolved by calling the deponents and subjecting them to helpful cross-examination. However, in spite of several suggestions from the Court that the parties adopt this course, both sides indicated that they did not wish to cross-examine any deponents of the affidavits.

[56] I have been left in the unenviable position of trying to resolve these differences from the evidence led at the substantive hearing, which I find did not directly address the point, and the oblique references to the tables prepared by Mr Mastoyo and Mr Page in their subsequent affidavits.

[57] I have found from the defendant's evidence led at the substantive trial that he was asked by Mr Pollak about his claim for loss of Australian Superannuation, which the Authority had awarded in his favour and was asked to explain it. He replied:

> **A.** Part of my contractual agreement was that because I was relocating to New Zealand and I was only going to get 5 percent of superannuation and in Australia its regularly 9 percent when I started the position it was at regularly 9 percent, so therefore Ms Miyamoto agreed to supplement my superannuation at a rate of $10,000 Australian per annum.

[58] That evidence is supported by reference to the original employment agreement when he was working for GEOS Gold Coast Pty Ltd in Queensland and was carried forward in to New Zealand by the wording of the 10 April 2006 letter.

[59] The defendant was asked by Mr Pollak whether he agreed with the Authority's award of AUD$21,855.35. He said he did not agree with it because since doing the calculations he had discovered that it had included his own salary sacrifice amounts or other payments that he had elected to put in from other sources and that the plaintiff was including these in the final amount to calculate the shortfall. Mr Page was not cross-examined on that evidence. It was agreed between counsel that they would reserve the position regarding remedies for further affidavits and a further hearing which would most probably include the opportunity to cross-examine the defendant on his evidence. The matter was adjourned part-heard. In spite of being offered the opportunity, the plaintiff did not elect to cross-examine Mr Page.

[60] I accept Mr Page's testimony and find that on balance there is sufficient evidence to demonstrate that, in addition to a contribution from the plaintiff of nine percent of his salary, a further AUD$10,000 was to be added to his Australian Superannuation fund by the plaintiff. I also accept Mr Page's calculations of the amounts actually owing, on which he was not cross-examined. I therefore award the plaintiff under this head AUD$32,058.44, as sought in Appendix B. When this is converted to New Zealand dollars using the published New Zealand Inland Revenue Department's currency conversion rates, as at 20 April 2009, being the date of dismissal, of AUD$0.7976 to the New Zealand dollar, it totals $40,193.63.

[61] In addition, I consider the defendant has made out a claim for nine percent of his base salary and 50 percent of the AUD$10,000 per annum for the six months' remuneration period I have determined. Under this head Mr Page is entitled to nine percent of $64,552, which is $5,809.68. In addition, as did the Authority, I award the defendant AUD$5,000 for the six months which, when converted to New Zealand dollars on the formula above, amounts to $6,268.81.

## Higher duties allowance

[62] Mr Pollak's submission was that the Authority's award of $8,076.92 under this head for the period between November 2008, when the defendant was

unjustifiably demoted, and 20 April 2009, when he was dismissed, was correct and should be awarded by the Court.

[63] As far as I have been able to ascertain from the state of the evidence presented on behalf of the defendant the higher duty allowance was paid to the defendant as the regional director in terms of the letter of 10 April 2006 and was unjustifiably stopped in November 2008. For the six months following the dismissal it has been included in my first award. I therefore allow the defendant's claim, as did the Authority, under this head and award him, for the period from November 2008 to the dismissal on 20 April 2009, $8,076.92.

## Long service leave

[64] The Authority awarded $31,849.99 gross under this head. This was said by the Authority to have been awarded because Mr Page was just over two months shy of completing ten years continuous service with GEOS Corporation and was based on the statutory entitlement set out under the Queensland legislation and in particular that state's Industrial Relations Act 1999. The Authority records that this legislation provides that where an employee's employment is unjustifiably terminated after the completion of seven years service, with less than ten years continuous service, then the employee is entitled to that leave calculated on a pro-rata basis. Mr Page claimed in the Authority 98 percent of three months leave due after ten years of service which totalled $31,849.99. The Authority also found that the applicant's terms and conditions were effectively imported into his New Zealand employment and therefore his claim was accepted.

[65] In the de novo hearing this legislation was not addressed on behalf of the defendant, it apparently being assumed that the claim was not disputed. It was disputed, although this may not have become apparent to the defendant until the plaintiff filed the affidavit of Mr Mastoyo sworn on 27 April 2012. In that affidavit Mr Mastoyo asserts that Mr Page's total entitlement for long service leave should have been $11,231.11, assuming that Mr Page even had an entitlement to such leave.

[66] I was not persuaded by Mr Mastoyo's affidavit that he was in the position of being an expert on Australian Superannuation and therefore put his submissions to one side.

[67] Mr Page in his affidavit in response, sworn on 10 May 2012, contested Mr Mastoyo's calculations and deposed that his Australian long service leave conditions were paid out at ten years on his final salary rate determined and awarded by the Authority.

[68] If other issues as to Australian entitlements were difficult to follow I found the respective submissions in this area frankly impossible to follow. I was not provided with the copies of the Queensland legislation to which the Authority referred in its decision, nor any expert evidence to assist me as to how the Australian figures are calculated.

[69] Mr Kilpatrick endeavoured to limit me to the calculations in the Queensland Government's help sheet, which he had attached to two sections of the Industrial Relations Act 1999. Bravely, but not necessarily accurately, he calculated the defendant's entitlement at $17,951.46 gross rather than $31,849.99.

[70] Mr Pollak in his oral submissions advised that he had been instructed by Mr Page that all Australian employees understood that if they had ten years of service they would receive twelve week's pay. No evidence or statutory documents were provided by Mr Pollak to support that assertion.

[71] I returned to the transcript of evidence. Mr Page gave evidence that having been with GEOS for ten years, when he was promoted to New Zealand he ensured that his long service leave accruals were going to be continued. He gave evidence that his understanding of Australian law was that if you had worked in excess of 7.25 years and were then unjustifiably dismissed, you are deemed to be entitled to the leave and there is a pro rata calculation for the period worked less than ten years. He claimed that this condition of employment was transferred to him in New Zealand and pointed to the letter of 10 April 2006.

[72] In that letter, under the heading "Other benefits", the following words are found "Continuation of Long Service Leave in Australia". That clearly supports Mr Page's evidence. Again he was not cross-examined on this aspect.

[73] I would have been greatly assisted had this matter been probed in more detail and the opportunity to cross-examine Mr Page had been taken. I clearly received far less material than the Authority did to assist in the calculations.

[74] Whatever the Australian legislation may have provided, under s 123(1)(c)(ii), of the Act I can award Mr Page with compensation for the loss of any benefit, whether or not of a monetary kind, which he might reasonably have been expected to obtain if the personal grievance had not arisen.

[75] For the reasons I canvassed for exercising my discretion under s 128(3) for a greater period of three months, and to avoid doubt I find that, but for the dismissal, Mr Page would have reached ten years continuous employment with the plaintiff.

[76] Not without some considerable reservations I find that the defendant has just succeeded in tipping the balance of probabilities in his favour to the effect that the Authority's determination of his entitlement to $31,849.99 was correct. I now make that award, under s 183(2) of the Act, in place of the Authority's determination.

## Incentive bonus

[77] For the years ending 2005/2006 and 2006/2007 the Authority found that Mr Page should have enjoyed the payment of a bonus for the profitable years and awarded him $1,673 and $12,883 respectively, a total of $14,556. Mr Page now seeks $32,146.86 based on what he claimed were a number of non-payments at various times during 2006-2009 when the plaintiff's incentive bonuses were calculated.

[78] Mr Kilpatrick relied on Mr Mastoyo's affidavit of 27 April 2012 which contained calculations allegedly based on the evidence that Mr Page had provided. Based on that material Mr Kilpatrick submitted that the total bonus entitlements for

Mr Page should not have exceeded $12,386.81. He also submitted that given the dire financial position of the Auckland school, the Court could readily have concluded that the defendant would not be entitled to a bonus for the 2006/2007 year at all.

[79] Mr Pollak in response contended that the defendant was entitled to a pro-rata amount for the business in Gold Coast Australia up until 17 March 2006, and then a pro-rata amount from 20 March 2006, being the defendant's New Zealand commencement date for the whole of the GEOS Gold Coast's financial year, or a bonus for the whole of the GEOS New Zealand financial year. He contended that the parties had agreed that using GEOS New Zealand's financial year bonus would have been the simplest way to calculate the bonus and that was what was sought. He also contended that the plaintiff's financial manager had understated the revenue for GEOS Auckland by some $500,000 and that the audited figures from the accountants Inspired Business Solutions (Inspired)[24] revealed a substantial profit for 2006/2007.

[80] The terms and conditions contained in the 10 April 2006 letter stated "Incentive bonus would be offered under the same policy as it has been". Mr Page in his second supplementary affidavit, sworn on 14 December 2011, annexed correspondence which confirmed the receipt of a bonus and some material in support of his bonus claims. In light of the suppression orders that I made with the consent of the parties, which prevent disclosure of the plaintiff's financial information, I am left in some difficulties in referring to the actual amounts claimed as the various profits in the various years. The parties will be aware of the evidence to which I am referring.

[81] I find, however, for the reasons that I canvassed with Mr Kilpatrick during the course of his submissions, that I can act on the figures provided by Inspired which was an independent accounting firm employed by the plaintiff before the defendant even commenced work in New Zealand. This established the profitability on which Mr Page's calculations were made.

[24] [2012] NZEmpC 215 at [17].

[82] I also returned to the transcript and found that Mr Page had given evidence which supported his bonus claims. He had relied on an email from Ms Miyamoto which had been sent to him after she had left the plaintiff company. Mr Kilpatrick at the time took objection to the production of that document as Ms Miyamoto could not be called. However, there appeared to be no real basis for challenging its authenticity and, on the basis of the Court's jurisdiction to admit such evidence and information as in equity and good conscience it thinks fit, whether strictly legal evidence or not,[25] I find that it did corroborate Mr Page's account. It had also been produced at such an early stage in the proceedings, namely in the Authority, that the plaintiff had had ample time to have called conflicting evidence had this been available.

[83] Mr Page explained in the evidence he gave to the Court that the reason he had not claimed the bonuses until after dismissal was because they were to be based on finalised accounts and he had sought to have them finalised. Now that the audited accounts had been finalised, he had calculated his bonus entitlements for the 2005/2006 financial year. Without indicating the percentage to which he was entitled, which would enable the calculation of that profit by a competitor in breach of the suppression order, I simply record the figure he claimed as $2,491.69. For the 2006/2007 year he found that this should have resulted in a bonus of $31,363.47. He conceded that these were different amounts to those provided to the Authority, but stated that the revised figures were now based on the actual audited accounts that were signed off in November 2008. He acknowledged that the 2007/2008 and 2008/2009 years both produced losses and therefore there was no bonus entitlement. Again, although Mr Kilpatrick may have reserved his position regarding cross-examination, he did not avail himself of that opportunity at any resumed hearing I was prepared to hold, to exercise that right. In these circumstances I accept Mr Page's evidence and award him a total of $33,855.16.

## Holiday pay

[84] The Authority noted that, by way of oral evidence, Mr Maserow had accepted that Mr Page was owed holiday pay of $5,303.48 and received assurances that sum

[25] Employment Relations Act 2000, s 189(2).

would be paid, as it was, eventually, in October 2010. The Authority noted the absence of time and wage records and found that Mr Page was owed $5,303.48 or otherwise as calculated in the event that the plaintiff finally provided wage and time records, including annual leave information. The Authority reserved leave for the matter to be returned to the Authority for recalculation in the event that the records were provided.

[85] Mr Kilpatrick relied on Mr Mastoyo's affidavit of 27 April 2012, where he explained his analysis of the payroll records and payslips, as provided by the defendant, because apparently they were never made available by the plaintiff. He observed that, in summary, Mr Mastoyo had concluded after examining the many pages of pay advice slips, that Mr Page was mistaken in claiming that he was entitled to a further AUD$47,824.93 and that Mr Mastoyo's calculation of NZD$5,303.48 was correct. Mr Kilpatrick submitted that the most compelling information in support of the correct amount having been paid to the defendant was the evidence provided by the defendant himself. Mr Kilpatrick claimed that on the pay advice slips on pages 154-199 the defendant had ticked the amount of holiday pay, amongst other amounts, on the basis that it was correct. Again, Mr Page was not cross-examined so as to confirm this submission which has never been put to him.

[86] Mr Pollak's response was that the defendant maintained that the plaintiff's records were highly inaccurate and the defendant's ticks did not mean what Mr Kilpatrick contended.

[87] I am still left in considerable doubt as to whether the claim for holiday pay has been proven. The amount that the parties are apart is high, $49,344.18 against $5,303.48, and I have not been provided with the means to resolve the issue as I would have been at a resumed hearing with appropriate oral testimony.

[88] The plaintiff should not be allowed to benefit from its inadequate record keeping. However because of the absence of clarity as to how the defendant made his calculations, I cannot increase the Authority's award, which has now been paid. If the defendant wishes to take this matter further he should adopt the suggestion of returning to the Authority, under the leave it reserved, to enable the true figure to be

determined. I do not have sufficient compelling material to do so and therefore reserve this matter for further determination, either by the Authority or, as a result of the leave which I now grant, for the matter to be referred back to the Court, after a direction to mediation.

## Underpaid salary for financial year 2008/2009

[89] The Authority referred to an IRD personal tax summary reporting the defendant's taxable income for the year ending 31 March 2009 as $103,998 when the applicant's employment agreement stated his base salary was $110,000. The Authority records that no explanation was provided for the shortfall, nor had the company challenged that record and therefore allowed a claim for a shortfall of $6,002.

[90] Mr Kilpatrick in opposition to this award relied again on the Tab 64 analysis by Mr Mastoyo and maintained the claim, which I have already rejected, that the defendant was overpaid by $3,469.67. He also submitted that the defendant should refund to the plaintiff PAYE which apparently was not deducted by the plaintiff in making some payments to the defendant. He also noticed a difference in the two appendices of $60. The amount claimed, however, is $6,002 not, as appears on Appendix A, $6,062.

[91] Although the matter is not precisely clear, it appears that the sum of $6,002 has subsequently been paid to the defendant as part of a composite payment and I therefore make no separate award under this head.

## Final pay (for final working week)

[92] Mr Kilpatrick noted that Mr Mastoyo, in his 27 April 2012 affidavit, agreed with the calculations provided by the defendant and accepted that he was entitled to $2,210.54 for the final week. He purported to offset what he claimed were the overpaid monies to the defendant. For the reasons I have given above, I have rejected the claim that there has been an overpayment and find the sum of $2,210.54 is owing by the plaintiff to the defendant and award that amount.

## Compensation for stress and humiliation

[93] The Authority awarded Mr Page $21,000 under s 123(1)(c)(i) of the Act, noting that while Mr Page had provided little written evidence of the distress and humiliation occasioned him by his demotion, final warning and unjustified dismissal, that he and his wife did provide persuasive oral evidence during the Authority's investigation.

[94] Mr Pollak appeared to wish to rely on that finding, although he had to concede that the oral evidence before the Authority was not provided to the Court. Notwithstanding this, he sought an increase in the award of $21,000 to $40,000. He accepted that this would be at the very high end of such awards, but again suggested that the Authority had accepted to a very significant degree the defendant's evidence about the distress he had suffered and in particular the terrible way in which the defendant was dismissed. He observed that one unusual aspect of the case was that, as a result of the dismissal, the defendant had to leave New Zealand to return to Australia where he had family support and friends. He submitted that Mr Page's distress at having to leave his adopted home and return to Australia was compounded because of these specific factors. Mr Pollak complained that the various points of submission raised by Mr Kilpatrick had not been put in cross-examination and should not now be addressed as part of last minute submissions.

[95] Mr Kilpatrick submitted that there were no aggravating features in the present case. It was unlike cases such as *Strachan v Moodie*[26] where the Court awarded a lawyer $30,000 for hurt and humiliation as a consequence of destructive warfare between two people who were once colleagues with significant mutual admiration for each other. After referring to a series of cases with rather modest awards[27] Mr Kilpatrick submitted:

a) there was no vindictiveness on the part of the plaintiff or any bad faith;

b) any inappropriate behaviour was short lived;

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[26] *Strachan v Moodie (aka "Miss Alice") t/a Moodie & Co* [2012] NZEmpC 95.
[27] *Munro v NS Security formerly known as Hibiscus Coast Security Ltd* [2012] NZEmpC 38 - $4000; *Dalley v Norrell Building Ltd* [2013] NZEmpC 4 - $6,000.

c) the adverse affects on the defendant's family were normal;

d) that although the defendant claimed to have suffered from depression, he provided in cross-examination no independent evidence to support this or in support of any other medical condition;

e) while there may have been consequences in respect of the financial position as a result of the summary dismissal there was nothing to indicate other than a normal award should be made.

[96] Mr Pollak, in response, submitted that there was predetermined, harsh and unconscionable activities on the part of the plaintiff, there was no evidence of any good faith being displayed towards the defendant, the defendant had not acted improperly and a more substantial award was therefore justified.

[97] Mr Pollak's submissions came close to attempting to penalise the plaintiff for its unjustified disadvantage and dismissal instead of concentrating on the level of compensation needed to address the defendant's humiliation, loss of dignity and injury to feelings as a result of what had happened.[28] Mr Kilpatrick was not required to have first cross-examined Mr Page on the aspects he raised, before making submissions on the subject. He did question Mr Page as to whether there was any independent medical evidence to support his claims and there was not.

[98] I accept Mr Kilpatrick's submission that the defendant's claim that he was diagnosed, in the week before his dismissal, with reactive clinical depression, and directed to check into a hospital for treatment, was not supported by any independent medical evidence. Had it been so, and had that evidence established that the alleged depression was as a result of the defendant's disadvantage and dismissal grievances, this may well have justified a substantial award of compensation.[29]

[99] I have read again the evidence of the defendant and his wife. I am satisfied that he was distressed and humiliated by the way he was dealt with at the meetings to which I have referred, which were publicly humiliating experiences. The statements accompanying the 1 April letter he said made him physically ill and he wanted to run

[28] See *Air New Zealand Ltd v Johnston* [1992] 1 NZLR 159, [1992] 1 ERNZ 700 (CA).
[29] See *Aoraki Corporation Ltd v McGavin* [1998] 3 NZLR 276, [1998] 1 ERNZ 601 (CA).

away and hide. The loss of his high position within the plaintiff organisation affected his professional standing and led to his becoming reclusive and questioning his own competence. He has had financial worries as a consequence of his dismissal.

[100] Mr Page's wife, Ms Patel, gave evidence that the dismissal came as a real shock and that her husband was devastated. He was facing unfounded allegations which caused despair and they were away from home and did not have friends or family to whom they could turn to in time of need. She talked of the signs he showed of reactive clinical depression: mood swings, insomnia, lockjaw, eczema, hyperventilation and digestive disorders for which many treatments had been tried and there was continuing anxiety, stress and financial uncertainty.

[101] This evidence was read out to the Court from prepared briefs. It did not have the same impact as apparently the oral evidence had had on the Authority.

[102] These matters are greatly ones of impression but on the way the evidence was presented in the Court I consider an award of $20,000 would be justified under this head.

[103] The award would have been higher had the medical evidence been available to support the defendant's claims.

## Out of pocket expenses

[104] At the substantive hearing the defendant claimed $12,084.01 as out of pocket expenses and confirmed that this claim had not been before the Authority. It appeared to have been based on credit card accounts but the dockets were no longer available as they had apparently been sent to the plaintiff's office in Australia. Mr Page was cross-examined quite closely on this issue.

[105] I note that neither Appendix A nor Appendix B nor any of Mr Pollak's submissions make any further reference to this claim and therefore I take it that it has been abandoned. For clarity's sake, it is dismissed.

## Employment Relations Authority costs

[106] On 24 September 2010,[30] the Authority ordered the plaintiff to pay to Mr Page, as a contribution to his fair and reasonable costs, $12,000 and the $70 filing fee. This was based on an investigation which was incomplete after two full days and where outstanding maters had to be dealt with by way of affidavits and further submissions.

[107] The plaintiff challenged this determination. At the conclusion of the substantive hearing, Mr Kilpatrick submitted that this was well above the normal awards of the Authority and had not been justified by any submissions made by the defendant at the time. He relied on *PBO Ltd (formerly Rush Security Ltd) v Da Cruz*[31] and *South Tranz Ltd v Strait Freight Ltd*[32] where the Court commented that costs in the Authority should be modest and that the rate of $2,000 per day was a reasonable starting point. Mr Kilpatrick also complained about the way in which the Authority had dealt with the counter-claim, which was substantial.

[108] The notional daily rate referred to in Mr Kilpatrick's submissions is somewhat out of date and Authority awards in excess of $3,500 as a daily rate are not at all unusual.

[109] I am also in the difficult situation of not having before me the material that was presented to the Authority in support of the claims. However, I accept Mr Pollak's submission that this case clearly required extensive preparation and documentation, both before the investigation and in the submissions following it. This was a complex case, as I trust my substantive decision and this decision on remedies indicates. The award of costs made by the Authority was well within its discretionary jurisdiction and I can see no basis for finding that the discretion was not properly exercised. The challenge against the Authority's determination on costs is therefore dismissed.

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[30] ERA Wellington AA249A/10, 24 September 2010.
[31] [2005] ERNZ 808.
[32] CC 3/08, 8 April 2008 at [11].

[110] To avoid any doubt as a result of the effect of s 183(2) of the Act, the award of $12,070 is confirmed.

## Interest

[111] The defendant has sought interest from 25 May 2010 for all unpaid amounts until the payments are made by the plaintiff.

[112] Mr Kilpatrick has opposed that application, contending that a number of delays were outside control of either party, for example as a result of the receivership in Australia and the Canterbury earthquakes and therefore interest should not be awarded for the entire period. He also contended that the defendant had been late in providing documentation and that penalising the plaintiff for such delays would be unduly prejudicial and unequitable.

[113] Mr Pollak submitted that the defendant had gone to extraordinary lengths to establish that he had been unjustifiably disadvantaged and dismissed since the dismissal on 20 April 2009. He contended that the defendant had been met at every step with objections and disagreements and that, apart from as a result of the Court's orders, nothing had been paid of consequence and that the plaintiff has been able to accrue its obligations for a significant period of time.

[114] Mr Pollak observed that the defendant, who resides in Australia and is an Australian citizen, had to change counsel once it became apparent that Mr Harrison who appeared for him in the Authority could no longer act for the defendant as he had to give critical evidence in support of the defendant's claim.

[115] I accept Mr Pollak's submissions that the delays in this matter cannot be brought home to the defendant. The plaintiff has known, at least since the date of the Authority's determination, that it was under the risk of having to pay substantial amounts by way of remedies. Mr Pollak did not address the amount of interest sought or the relevant periods it should cover.

[116] Clause 14 of Schedule 3 of the Act provides that in any proceedings for the recovery of any money, the Court may, if it thinks fit, order the inclusion in the sum for which the judgment is given, interest at the rate prescribed under s 87(3) of the Judicature Act 1908, on the whole or any part of the money for the whole or part of the period between the date when the cause of action arose and the date of payment in accordance with the judgment.

[117] I do not consider that interest can be paid on the compensation awarded for distress and humiliation, which is in the nature of non-economic loss.[33] The prescribed rate at present, under s 87(3)[34] of the 1908 Act, is five percent per annum.

[118] I consider the plaintiff should pay to the defendant until the sums are paid, interest at the rate of five percent per annum on the monetary awards totalling $192,816.13 from date of the Authority's determination on 25 May 2010, until the date of payment.

## Employment Court costs

[119] Because of my impending retirement I invited counsel to address the question of costs by way of submissions at the 26 March 2013 hearing. In the written submissions on costs filed beforehand I noted at first glance that they had included reference to a Calderbank offer. I immediately ceased reading those memoranda and, with the agreement of counsel at the hearing, the procedure was that these costs submissions would be put to one side unread and, when I had made a determination on the remedies then, in a separate judgment, I would address the Employment Court costs. This I will do in a supplementary judgment on costs. I now formally reserve costs.

## Payment by instalments

[120] The plaintiff applied to have any orders for remedies paid by way of instalments. It relies on s 123(2) of the Act which states:

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[33] See *Reynolds v Burgess* CC 5/07, 2 March 2007 at [114], cited in *Gini v Literacy Training Ltd* [2013] NZEmpC 53 at [6].

[34] The Judicature (Prescribed Rate of Interest) Order 2011.

> When making an order under subsection (1)(b) or (c), the Authority or the court may order payment to the employee by instalments, but only if the financial position of the employer requires it.

[121] This application has been opposed on behalf of the defendant on the basis that the plaintiff has known since the Authority's determination that it has a substantial risk of having to pay out substantial remedies and that, in spite of Mr Mastoyo's evidence that he has restored the plaintiff to financial stability, no provision has been made against that contingency. A more fundamental difficulty is, as counsel finally agreed, that the Court can only make an order under s 123 "if the financial position of the employer requires it".

[122] Again this is an area that is affected by suppression orders as to the plaintiff's financial situation, but what I will state will be known to the parties.

[123] In anticipation of the hearing, Mr Kilpatrick filed a formal application for the payment of remedies, relying on an affidavit of Mr Mastoyo sworn on 20 March 2013. This affidavit gave considerable detail as to the plaintiff's financial situation and its current trading situation. He claimed that the plaintiff would not be able to pay the full award as it does not have large capital reserves to pay a lump sum of over $50,000. Mr Mastoyo claimed that if it had to pay more than $50,000 in a lump sum, this would affect the financial stability of the business. I do not choose to give any further detail of the material set out in Mr Mastoyo's affidavit.

[124] The defendant's notice of opposition was filed on 25 March and refers to a substantial affidavit of Mr Page, affirmed on 25 March 2013, which contends that Mr Mastoyo's evidence was not reliable without any impartial or objective accounts supporting his claims. Mr Pollak also filed a substantial memorandum referring to my judgment[35] of 14 September 2010 staying the enforcement of the Authority's awards which, as a condition, required the payment into Court of $20,000.

[125] In that judgment I noted at the outset that the awards made by the Authority exceeded $170,000 in total and the stay was being sought without the plaintiff being able to provide payment into Court of anything approaching that sum. The most it

[35] [2010] NZEmpC 124.

said it could afford because of its then current trading situation was $20,000 and it was at present under threat of demand from the defendant which might move into winding up proceedings, if it was not satisfied. I found there was material before me which supported the plaintiff's concerns about its ability to continue to trade if it was required to pay the full amount but noted, at that time, that the material was not provided by adequate financial information or deposed to on oath. Insufficient material was provided by the plaintiff and I made certain directions that it be provided. On those conditions the interim stay was granted. I reserved costs.

[126] On 2 April 2013 Mr Kilpatrick filed a further memorandum stating that the plaintiff would provide an affidavit with a copy of the end of the year audited accounts but that was unlikely to be able to be provided until the end of June 2013. He invited the Court to commence its judgment and leave the application for instalments for another Judge to determine, after my retirement.

[127] Mr Pollak responded by memorandum filed on 5 April 2013, continuing the defendant's objection to payment by instalments, observing that there was still no suggestion of any payments and that, although the Court had expressed some concerns about the jurisdictional issues, it appeared that the Court had the jurisdiction to issue such orders by instalment, although it was common ground that it had never done so. The defendant was also opposed to any matter being left for further consideration and requested that my order should not be dependent upon the plaintiff producing an audited set of accounts.

[128] In a minute to counsel, I advised that it was clear that the Court has jurisdiction to make an order under s 123(2) but the difficulty was that another Judge may not have that jurisdiction to do so, as the discretion had to be exercised when the Court makes an order under sub-section 123(1)(b) or (c) of the Act. I observed that if counsel had a different view of the matter they could attempt to persuade a subsequent Judge to deal with it.

[129] Mr Pollak filed a memorandum on 10 April 2013 in which he stated that, despite the plaintiff's offer to provide audited accounts and the defendant's questioning of the figures provided in Mr Mastoyo's affidavit, the defendant did not

want to wait for the audited accounts to be provided and apparently accepted the figures provided. He suggested that affidavits in reply to the defendant's affidavit should be filed by Thursday 18 April, which would meet the timing requirements noted in my minute and negate the need to persuade any subsequent Judge to deal with the issue.

[130] On 18 April Mr Kilpatrick filed a further memorandum and a second affidavit of Mr Mastoyo, sworn on 12 April, and an affidavit of Gordon Hanson, a chartered accountant of a firm that acts for the plaintiff, which he swore on 20 March 2013. Mr Hanson confirmed that the exhibits to Mr Mastoyo's affidavit corresponded to those reflected in the plaintiff's accounting system and, although it would be preferable to provide the end of year financial statements, the timing prevented these from being available. He also confirmed that his accounting firm was assisting the plaintiff in reaching an agreement with the IRD for payment by instalments.

[131] Mr Mastoyo's second affidavit states that the plaintiff had a profitable year in 2011 and could have paid the defendant then, but that subsequent events, in spite of planning for the possibility of paying Mr Page, had been affected by a change in financial circumstances and profitability.

[132] Based on this material, Mr Kilpatrick submitted that the plaintiff had taken the best action it could and, although bank loans are currently on terms favourable for businesses, the plaintiff did not have the ability to secure a loan, having had previous applications rejected and, for reasons in relation to student numbers, about which I will not detail, the application for payment by instalment was still being pursued.

[133] Although there have been determinations in the Authority on the issue of instalments, counsel were agreed, and the Court's research supported their advice, that the Court itself has never apparently made such an order. Mr Kilpatrick relied on obiter comments of the Court in *Butterworth v TBA Communications Ltd.*[36] Mr Kilpatrick submitted that any award in excess of $50,000 placed the plaintiff's

[36] [2012] NZEmpC 24 at [22] and [23].

business at risk and the associated consequences that flowed, affected the continuing employment of 50 employees and the debts owed to other creditors.

[134] The plaintiff sought an order from the Court that any award of up to $50,000 is paid by way of a lump sum, inclusive of the $20,000 plus interest currently held in the Court's trust account, and that the balance of any award would be paid by instalments of $6,000 per month. This was based on Mr Mastoyo's affidavits.

[135] Mr Pollak's response, by memorandum on 19 April, continued to make the defendant's position clear, which was that his dismissal was some four years ago and that he had done everything to facilitate and prosecute his personal grievance and any delays were as a result of the plaintiff's poor record keeping, that inadequate provision had been made, that the offer being put forward did not deal with the defendant's costs, that it was also unfair that there was also no suggestion of an interest component on any remedies. The defendant, therefore, submitted that from the date of the Court's judgment the remedies plus costs total should be paid on the following basis:

- 30 days from the date of this judgment, one third of the total sum;
- 30 days from the above, the second third of the total sum plus interest at the rate set by the Court;
- 30 days from the above, the third and final sum plus interest to complete full payment.

[136] This would complete the payment of instalments within three months following the Court's judgment in three instalments, two of which would include interest.

## Ruling on instalments

[137] I find that there is sufficient information before the Court, although not in the form of audited accounts, to satisfy me that the financial position of the plaintiff requires payment to be made by way of instalments. I have considered the material put before me and now make the following orders:

a) The sum of $20,000 paid into Court on 20 September 2010 is to be paid forthwith into the defendant's solicitors trust account. That amount is to be applied to satisfy the award of $20,000 under s 123(1)(c)(i) of the Act.

b) Any interest on that sum held by the Court is to be paid to the defendant's solicitor's trust account for the personal benefit of the defendant and the plaintiff is not to receive any credit from the remedies awarded for that interest.

c) The plaintiff is to pay to the defendant, at his direction, by Friday 14 June 2013, the sum of $50,000.

d) The sum of $50,000 is to be applied first towards interest and then the awards themselves.

e) One calendar month after that date, namely 14 July 2013, and thereafter on the 14th day of each ensuing month, the plaintiff is to pay to the defendant $6,000.

f) Interest will continue to accrue at the rate of five percent per annum on all outstanding sums.

g) The instalment payments must be strictly complied with and if they are not, the balance owing, including interest, will immediately become payable and may be the subject of enforcement.

**Summary of Awards**

| | | |
|---|---|---|
| (a) | Lost remuneration (Gross) | $64,552.00 |
| (b) | Nine percent Australian Superannuation on that figure | $5,809.68 |
| (c) | Australian Superannuation on increased remuneration award | $6,268.21 |
| (d) | Higher Duties Allowance | $8,076.92 |

| | | |
|---|---|---|
| (e) | Underpaid Australian Superannuation | $40,193.63 |
| (f) | Australian Long Service Leave | $31,849.99 |
| (g) | Incentive Bonuses | $34,855.16 |
| (h) | Holiday Pay - Leave Reserved | |
| (i) | Final Working week | $2,210.54 |
| | **SUBTOTAL** | **$192,816.13** |
| (j) | Interest on the remedies of $192,816.13 at the rate of 5 percent per annum from 25 May 2010 until the date of payment | |
| (k) | Compensation for Stress and Humiliation | $20,000.00 |
| (l) | Costs in the Employment Relations Authority | $12,070.00 |

[138] Costs in the Employment Court are reserved.

B S Travis
Judge

Judgment signed at 1 pm on 5 June 2013