IN THE EMPLOYMENT COURT
WELLINGTON

[2013] NZEmpC 1
WRC 37/11

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	JENNIFER GINI Plaintiff
AND	LITERACY TRAINING LIMITED Defendant

Hearing:	11 and 12 July 2012 (Heard at Wellington)
Appearances:	Patrick O'Sullivan, advocate for the plaintiff Tim Cleary, counsel for the defendant
Judgment:	22 January 2013

JUDGMENT OF JUDGE A D FORD

Introduction

[1] The background to this case was explained in an interlocutory judgment[1] of this Court dated 15 June 2012. In brief, in a determination[2] dated 3 November 2011, the Employment Relations Authority (the Authority) upheld claims by Ms Jennifer Gini that she had been unjustifiably dismissed from her employment with the defendant on 2 October 2009 and that the defendant had breached its obligations of good faith to her. The Authority found no contributory conduct on the part of Ms Gini. It awarded Ms Gini remedies of $10,140 for lost remuneration and $5,000 on account of her non-economic loss. In this proceeding Ms Gini challenges the determination seeking an increase in the quantum of both awards.

---

[1] [2012] NZEmpC 94.
[2] [2011] NZERA Wellington 169.

[2] It is necessary to record that the course of the proceedings was somewhat more complicated than indicated in the previous paragraph. Before the Authority, Ms Gini had also named Ms Linda Sturgess, the managing director of the defendant company, as a party to the investigation and had sought a penalty against her but the Authority dismissed the claim for a penalty on the grounds that it was out of time.

[3] On 30 November 2011, the defendant, Literacy Training Ltd (Literacy Training), filed a challenge to the whole of the Authority's determination save as to the dismissal of the claim against Ms Sturgess who was no longer a party to the proceeding. Chief Judge Colgan then issued a minute confirming that the challenge would be regarded by the Court as a non de novo challenge in terms of s 179 of the Employment Relations Act 2000 (the Act). On 9 December 2011, Ms Gini filed a statement of defence which included a cross-challenge seeking, inter alia, an increase in the quantum of the Authority's awards for both her economic and non-economic loss.

[4] The matter was then referred to mediation. On 30 April 2012, the Court convened a directions conference in which the parties confirmed that the mediation had been unsuccessful. At the same time, the hearing was scheduled for 11 and 12 July 2012 and a timetabling order was made for the filing of briefs of evidence.

[5] On 3 May 2012, the defendant filed a notice of withdrawal of proceedings. Further procedural steps followed which it is unnecessary for me to detail. Suffice it to say that the end result was that the matter proceeded on the basis that the plaintiff's cross-challenge was treated as a de novo challenge to the remedies awarded by the Authority.

[6] The interlocutory judgment referred to in the opening paragraph dealt with two issues. First, following on from the discontinuance, the plaintiff had sought a costs order in respect of costs incurred in the investigation before the Authority. I declined that application pending the outcome of the substantive hearing in July. Secondly, the plaintiff had sought to add Ms Sturgess as a second defendant to this proceeding to enable a costs order to be made against her. For the reasons set out in my judgment, I also declined that application.

Background facts

[7] Although the challenge was confined to issues of quantum, those issues in turn inevitably require an analysis of the material facts, against the background, of course, that the defendant no longer challenges the Authority's conclusions that Ms Gini was unjustifiably dismissed and not treated in good faith by the defendant.

[8] The defendant provides literacy and other life-skills training for clients, which at the relevant time included the Department of Corrections. The Court was told that Literacy Training is one of 24 such organisations in the country. They are funded by the Tertiary Education Commission to teach literacy and other life-skills to employees within the workplace. Ms Sturgess was the owner and General Manager of Literacy Training. The Operations Manager was Ms Terry Dalziel.

[9] Prior to her employment with Literacy Training, Ms Gini worked as a relief teacher at Aotea and Tawa Colleges. She also carried out some after-school tuition and had her own small costume hire business. At the same time, she was completing a course at Massey University. Ms Gini's employment agreement with Literacy Training was signed in May 2009 and she commenced work on 28 May 2009. She had a fixed-term contract of one year's duration which was due to expire on 30 June 2010. On 2 June 2009, Ms Gini commenced teaching classes at Arohata Prison at Tawa two days' a week for four hours' a day. From 27 July 2009 she also taught two classes two days' per week at Mt Crawford Prison (Wellington).

[10] In September 2009, Ms Gini was teaching prisoners budgeting skills. As part of that teaching, she took into Mt Crawford Prison KiwiSaver forms and other materials with the intention of using the forms to demonstrate to the prisoners a practical means of improving their financial literacy. Two of the prisoners wished to enrol with KiwiSaver and began filling out their forms. Ms Gini took the partially completed forms home with her as there was nowhere for her to securely store them at the prison. One of the prison unit managers became concerned about Ms Gini's actions in taking personal material relating to prisoners from the prison and her unauthorised use of the prison photocopier, prison markers, pens and the like. The manager was also concerned that Ms Gini had failed to mention to custodial staff that she had noticed some students in her class paying particular attention to the roof

of the prison which was, in the manager's view, the kind of intelligence which could possibly prevent future prison escapes. The unit manager raised his concerns with Ms Gini and they were also passed on to Literacy Training.

[11] In response, Literacy Training initiated an investigation. By letter dated 24 September 2009, Ms Gini was requested to attend a disciplinary meeting on 29 September 2009. She was invited to bring a support person or representative. The principal issue of concern was said to be Ms Gini's use and removal from the prison of the KiwiSaver forms. It was alleged in the letter that the forms did not pertain to her employment. It was also pointed out that the KiwiSaver forms contained personal information about the prisoners and acting in the way she did could compromise not only her own safety but the safety of her colleagues. The other issue of concern was said to be Ms Gini's failure to report to management the various issues that had been raised with her by the site manager at Mt Crawford Prison in apparent breach of a contractual provision which required her to report any incidents. She was also accused of failing to report her missing journal.

[12] Ms Gini responded in writing. She said that in using the KiwiSaver forms she was "just helping prisoners with their numeracy." She asked for an explanation as to why it was alleged that the use of the forms did not "pertain to my employment". She queried how she could compromise safety when she had the documents in her possession "for security as there are no locks on the cabinets in the room and other groups go in there." In relation to the missing journal, she said that she had not reported it missing because she did not know whether it had been stolen. It later turned up at her home.

[13] Following the disciplinary meeting on 29 September 2009, Ms Gini was telephoned by the operations manager of Literacy Training on 1 October 2009 informing her that she was to be summarily dismissed with effect from the following day. In her evidence, Ms Gini spoke about the disciplinary meeting in quite vitriolic terms. She alleged that Ms Sturgess "turned the meeting into an interrogation about whether I should even have been teaching budgeting. This was unbelievable because the *'W19 - Running a Budget'* module was one of the first we had ever been given." Ms Gini accused Ms Sturgess of mocking and ridiculing her for not knowing the name of the module. She claimed that Ms Sturgess adamantly denied that there was

a lesson module on budgeting and she tried to persuade her (Ms Gini) to admit that she was using "an unauthorised document."

[14] This issue was picked up by the Authority who noted:

> [16] The meeting then digressed into a long and unhelpful discussion about what module Ms Gini was teaching at the time. It seemed to be held against Ms Gini that she could not point out what the module was. It was not until the investigation meeting had almost commenced that a copy of the module *W19 - Running a Budget*, which Ms Gini was responsible for teaching at the time, was able to be provided to the Authority.

[15] In reaching its conclusion that Ms Gini's dismissal was substantively unjustified, the Authority found that the KiwiSaver forms were "entirely appropriate material" for use in connection with the budgeting module and that Literacy Training should have accepted the explanation that Ms Gini had no place to safely store the forms. As to Ms Gini's alleged failure to report the incidents, the Authority held that as the unit manager had informed Ms Gini that he would report to her management, it was reasonable for her not to make a formal report to her employer. The Authority stated that the issues around photocopying and the use of prison service stationary were not matters that could ever constitute serious misconduct.

Legal principles

[16] The principles applicable to any assessment of economic loss and compensation under s 123 of the Act are now well established. They were conveniently summed up by the Court of Appeal in *Sam's Fukuyama Food Services Ltd v Zhang*[3] in these terms:

> [24] We now deal briefly with the applicable principles. In *Telecom New Zealand Ltd v Nutter,* this Court approved the principle that compensation for lost remuneration is discretionary and that there is no automatic entitlement to an award reflecting the balance of the expected working career of an employee. The Court said:
>
>> "... it is now well-established in New Zealand that a 'full' assessment of the financial loss suffered by an employee as a result of an unjustifiable dismissal merely sets the upper limit on an award of compensation (in that no award can be for more than has been lost) and there is no automatic entitlement to 'full' compensation."

[3] [2011] NZCA 608; (2011) 9 NZELR 216.

> [25] The Court said that moderation is appropriate in setting awards for lost remuneration because:
>
> "...
>
> 1. The discretionary nature of the remedy is obviously inconsistent with any principle requiring 'full' compensation to be awarded.
>
> 2. The concept of unjustifiable dismissal is flexible and a full compensation approach may be disproportionate to the nature of the wrong.
>
> 3. Full compensation may be unnecessarily and inappropriately damaging to the employer (and indirectly to the position of the other employees of the same employer).
>
> 4. Rules of thumb as to appropriate measures of compensation can facilitate both the efficient dispatch of litigation and reasonably predictable outcomes...
>
> 5. A community expectation of 'full' compensation extending to compensation for years of foregone remuneration could discourage employment and personal rehabilitation."
>
> [26] The Court said that the employee's actual loss "sets an upper ceiling on any award and it is plainly a logical starting point for assessment". The assessment of compensation in any particular instance "must be individualised to the circumstances of the case", and the assessment "must allow for all contingencies which might, but for the unjustifiable dismissal, have resulted in termination of the employee's employment" (that is, counter-factual analysis). We note that the observations in *Nutter* were made in the context of a case in which the employee had not been reinstated. Nevertheless they are logically applicable even where the employee has successfully obtained an order for reinstatement. ...

[17] Other relevant principles confirmed in *Telecom New Zealand v Nutter*[4] which have application to the present case are:

1. In the exercise of its discretion this Court must "act judicially and on the basis of principle. Reasonable consistency is required: established patterns should not be departed from without good and enunciated reasons."[5]

2. "A just and reasonable award must reflect the circumstances and the legitimate interests of both parties."[6]

---

[4] [2004] 1 ERNZ 315 (CA).
[5] At [75].
[6] At [76].

3. While emphasising "the need for moderation and the appropriateness of reasonable consistency, any award must address the actual consequences for the employee of the dismissal".[7]

[18] Another principle having particular relevance to the facts of this case is that stated by Cooke P in *Telecom South Ltd v Post Office Union (Inc)*:[8]

> Nevertheless the discretion to award compensation falls to be exercised reasonably, in that the amount should not be extravagantly large by contemporary standards and indignation at the employer's conduct should have no influence on the assessment of monetary loss.

Claim for lost remuneration

[19] Under s 128(2) of the Act, where an employee is found to have lost remuneration as a result of a personal grievance then, subject to subs (3) and s 124, the Authority must order the employer to pay the employee the lesser sum equal to that lost remuneration or to three months' ordinary time remuneration. Subsection (3) provides that the Authority may, in its discretion, order an employer to pay the employee a greater sum for lost remuneration. In *Sam's Fukuyama* case, the Court of Appeal confirmed that the Court has the same discretion as the Authority under s 128 of the Act.

[20] The Authority accepted that Ms Gini was earning $780 per week gross at the time she lost her job and it also accepted that she had made reasonable attempts to mitigate her loss by looking for alternative employment. It went on to say:

> [36] In all the circumstances of this case, I consider that Ms Gini is entitled to three months' lost remuneration, but find no reason to extend that, given the fact that she did get some other work and could not have done both jobs at the same time. Her lost remuneration therefore totals $10,140 gross.

[21] It is not clear from the determination how the $10,140 figure was arrived at in respect of the 12-week period based on weekly earnings of $780 gross. In all events, Mr O'Sullivan, advocate for the plaintiff, submitted that the Authority failed to exercise its discretion under s 128(3) appropriately in awarding Ms Gini only three months' loss of remuneration and he claimed that she was entitled to the balance she

---

[7] At [85].
[8] [1992] 1 NZLR 275 at 279.

would have earned under her fixed term employment agreement less the sum she earned from other employment in mitigating her loss.

[22] In this Court, the parties' representatives responsibly and helpfully were able to reach agreement as to the amount of Ms Gini's claim for full compensation. Mr O'Sullivan prepared a table showing a "range" of two lots of figures. The higher figure came to $21,673. The lower figure, based on actual payments Ms Gini had received, amounted to $18,545. The lower figure appeared to be more reliable and Mr O'Sullivan accepted that. Mr Cleary, counsel for the defendant, did not dispute the lower figure which, in brief, was made up as follows:

Gross weekly figure Ms Gini had been paid:	$725.00 per week
Balance of fixed term (October 2009 to 30 June 2010):	8 months (34 weeks)
Would have earned $725 pw x 34 weeks:	$24,650
Less amount earned from Sadlers:	$6,105
ACTUAL LOSS	$18,545

[23] Mr O'Sullivan referred to the evidence that Ms Gini's hours of work had increased from eight hours to 16 hours per week and he submitted that she had every expectation that she would at least have continued in employment with Literacy Training until 30 June 2010. Mr O'Sullivan referred to the evidence Ms Gini had given as to how she had taken out a mortgage to complete alterations to the bathroom of her home and he said that because of her financial commitments she had no choice but to continue with Literacy Training. In this regard, he made reference to relevant entries in Ms Gini's bank statements (which had been produced) confirming her financial commitments. Mr O'Sullivan further submitted that the only contingency which could have affected Ms Gini's employment with Literacy Training, apart from her resignation, would be if the Department of Corrections cut the funding but as he correctly pointed out that was never an issue.

[24] While Mr Cleary accepted that the $18,545 represented the total actual loss Ms Gini could claim for the balance of her fixed-term contract, he stressed that the Court then needed to factor in all contingencies and he submitted that there were several important contingencies that militated against any award in excess of the

three months' remuneration figure allowed by the Authority. The first contingency Mr Cleary relied upon was the fact that Ms Gini could, under her employment agreement, have had her hours reduced or her employment terminated at the discretion of the prison service if she was deemed unsuitable for the role of prison teacher with justifiable reason. The point Mr Cleary made in this regard was that on 18 September 2009, the prison manager of programmes made a complaint to Literacy Training about Ms Gini in relation to the issues canvassed at her subsequent disciplinary meeting. The prison manager suggested that she be replaced at Wellington and Arohata Prisons and transferred to Rimutaka Prison where there was more support and supervision available. The contingency, Mr Cleary highlighted was that, even if she had not been dismissed, if the prison authorities determined that Ms Gini was inept for the prison environment then Literacy Training would have been bound to act on such determination.

[25] The second contingency relied upon by Mr Cleary was that Ms Gini was likely to be dismissed for another reason completely unrelated to the incidents involving the KiwiSaver forms. This matter involved what was referred to as the "exit policy" introduced by Ms Sturgess in August 2009 whereby teachers were instructed to keep students on the literacy and numeracy programme until and unless they reached level five or six across all the strands on the progression charts. The evidence was that Ms Gini strongly objected to the introduction of that policy. She and some of the other tutors considered the prison students she taught would never be able to reach levels five or six which meant that they would never be able to qualify to study for other qualifications Ms Gini considered they required in order to assist them when, as she expressed it, "going back into the real world". Rather ironically, the evidence was that one of the other teachers who also took strong exception to the exit policy was Mr Patrick O'Sullivan, Ms Gini's advocate in this proceeding. Mr O'Sullivan was dismissed by Literacy Training on 24 September 2009.

[26] The third contingency raised by Mr Cleary was perhaps the most significant. Counsel explained that he had only recently become aware of the situation following on from disclosure of documents. One of the documents made available on disclosure was email correspondence dated 7 September 2009 which confirmed that

Ms Gini had obtained work with Sadler & Associates (Sadlers) while working at Literacy Training and without notifying Literacy Training. Sadlers was one of Literacy Training's competitors. The email from Sadlers attached the staff training schedule which confirmed that Ms Gini would be working "from 4.30 - 8.30 pm on Thursday in addition to the Friday schedule". As part of her employment agreement with Literacy Training, Ms Gini had signed an addendum which stated, "I agree to notify Literacy Training Limited of any additional employment of a paid nature I will undertake over and above what is listed above." Ms Gini was rather vague about when she commenced her employment with Sadlers. She was asked in cross-examination whether it was after the date of her dismissal and she replied, "It was pretty much like that." She accepted, however, that Sadlers were in a competitive position with Literacy Training. The evidence was not clear as to whether she would have been able to carry out both jobs at the same time.

[27] Ms Gini said in cross-examination that she had taken the Sadlers position as "a hedge" because she could see what was happening. She said: "I wouldn't have applied to Sadlers if I hadn't been hauled through the disciplinary meeting etc." That explanation, however, seems to overlook the fact that the email from Sadlers confirming her employment was dated 7 September 2009 whereas the disciplinary meeting Ms Gini referred to did not take place until 29 September 2009. Ms Gini accepted in cross-examination that she had developed misgivings about Literacy Training by August 2009 and that she felt unsafe working there because of the way Ms Sturgess was treating staff. She described the working environment as "toxic".

[28] Mr O'Sullivan said that Ms Gini was "a planner" and in taking the position with Sadlers, which he described as "a backup plan", she had "hedged her bets". He responded to Mr Cleary's submissions in these terms:

> Why would Ms Gini in an environment like that, which at that point she says she didn't like, which is on any objective standard a fearful place to work, unsafe, we have a tyrannical general manager, we have an operations manager who is 100% pliant to that manager, why would you stay at a place like that. And the answer Your Honour is very, very simple, and it sits in document 61 the bank statements.
>
> Ms Gini was committed financially. She had burnt her bridges. She had committed to the bathroom renovations, the Sadler job was only a temporary job which is also evidenced in the bank statements, it had no certainty. She had no choice. She had nowhere to go. It's like battered wife syndrome.

[29] In reference to the contingencies outlined, Mr Cleary submitted:

> So if all of those contingencies Sir are weighed up, and they are mutually exclusive they don't overlap, we say Sir it is very unlikely Ms Gini's part-time fixed term employment would have lasted beyond three months after the dismissal.

[30] I agree with that submission. I consider it unlikely, having regard to the various contingencies referred to, that Ms Gini's employment with Literacy Training would have lasted beyond three months from the date of her dismissal. Admittedly she had financial commitments which I accept would have been a strong inducement for her to remain in employment, but not necessarily with Literacy Training. The fact that Ms Gini was making inquiries about other employment, and had obtained another position with a competitor company, before the disciplinary process had even commenced indicates to me that it is most unlikely that she would have remained with Literacy Training any longer than was absolutely necessary in order to obtain other employment with similar remuneration. I, therefore, uphold the Authority's decision to award Ms Gini three months' ordinary time remuneration subject to my conclusions in relation to contributory behaviour under s 124 of the Act. I would expect the parties' representatives to be able to reach agreement on the appropriate sum based on the figures produced by Mr O'Sullivan in exhibit 80.

Non-economic loss

[31] In relation to Ms Gini's claim for compensation under s 123(1)(c)(i) of the Act for humiliation, loss of dignity and injury to feelings, the Authority in its determination stated:

> [37] While Ms Gini gave little direct evidence of hurt and humiliation, it was clear from the record of the disciplinary meeting that the whole experience was very negative for her and had upset her very much. It was also patently clear from the investigation meeting that Ms Gini has been considerably upset at how she has been treated. In all the circumstances of this case I consider compensation in the sum of $5,000 is appropriate.

[32] Before me, Mr O'Sullivan accepted that the Authority did not have evidence in front of it in relation to these issues. He explained that it was "a protracted case" and he took full responsibility for the failure on the plaintiff's part to produce evidence of her stress resulting from the dismissal. In this Court, considerable evidence was produced in relation to Ms Gini's claim for non-economic loss.

[33] There are two preliminary matters raised by Mr Cleary which I need to deal with at the outset. First, in reliance on the statement I previously referred to of Cooke P in the *Telecom South*[9] case, Mr Cleary correctly submitted that in assessing the appropriate level of compensation, it is the consequences for the employee which must be taken into account. Indignation at the employer's conduct is not a consideration. Mr Cleary submitted that that principle has particular application in the present case where Ms Gini was obviously incensed over her treatment by Ms Sturgess and was anxious to see Ms Sturgess punished because of the way she had acted towards her. I accept that submission. It was obvious from the steps Ms Gini had taken to join Ms Sturgess in the proceedings for the purposes of pursuing a penalty against her. Later, after that action was dismissed for being out of time, Ms Gini sought unsuccessfully to have Ms Sturgess added as a party to the present proceeding for the purposes of seeking a costs order against her. Ms Gini's indignation with Ms Sturgess clearly went back to the introduction of the "exit policy" by Ms Sturgess in August 2009 which is explained in [25] above.

[34] The second issue raised by Mr Cleary is more problematic. There is no dispute that Ms Gini was extremely upset over the way she had been treated by Ms Sturgess in the course of the disciplinary meeting on 29 September 2009. She said in evidence:

> 89. The real shock came at the disciplinary hearing when Linda tried adamantly to convince me there was no such lesson module (as) a budgeting one and so wouldn't I admit I was using an unauthorised document. She was trying to make me feel like a naughty schoolgirl. Patronising and intimidating by turns. Mocking I would even say because she would say to me verbatim "Any proper teacher would know the name of the module they were teaching." I did know the name it was a budgeting module. She who authorized it pretended it didn't exist however.
>
> 90. It didn't matter how hard I insisted that there was a budgeting lesson Linda kept twisting away from it suggesting that I had got confused with old long dead programmes which I would never have seen. She scoffed at me and said I would just confuse everyone. Which is obviously what she was trying to do to me.

[35] Mr Cleary did not try to downplay the extent of the humiliation Ms Gini had to endure at the disciplinary meeting but he submitted that the personal grievance

[9] [1992] 1 NZLR 275 at 279.

that was before the Authority and now this Court was unjustified dismissal and, while the disciplinary meeting and the dismissal were "undoubtedly connected" the "compensation must be for the decision of the employer which is in this case to dismiss. It must result from that action." Mr Cleary submitted that it would have been possible for Ms Gini to claim as a disadvantage grievance the fact that the employer had "breached its duty by focusing on, for ulterior motives perhaps, an unsustainable allegation" at the disciplinary hearing, but she had not done so.

[36] It seems to me that the disciplinary process, including the meeting on 29 September 2009, was so closely related and interwoven with Ms Gini's summary dismissal on 1 October 2009 that it would be quite unrealistic to try and separate out and apportion a degree of humiliation and hurt feelings in respect of each.

[37] Of even more significance, however, was Mr O'Sullivan's submission that Ms Gini's claim before the Authority was based not only on her unjustified dismissal but on an alleged disadvantage grievance she had in respect of the events leading up to that dismissal. The statement of problem filed with the Authority on 17 November 2010 confirms the accuracy of Mr O'Sullivan's submission. The difficulty with the submission, however, is that the alleged grievances particularised in the lengthy statement of problem include complaints relating to the introduction of the exit policy in mid-2009 and those events are clearly statute barred. This issue was not canvassed before me but under s 144 of the Act a personal grievance must be raised within 90 days. The personal grievance in this case was raised with the defendant by Mr O'Sullivan in a letter dated 8 December 2009. In other words, any alleged grievance prior to 8 September 2009 is statute barred. The Authority, nevertheless, did have jurisdiction to deal with Ms Gini's claim for hurt and humiliation arising out of the disciplinary process, including the disciplinary meeting on 29 September 2009, as well as hurt and humiliation arising out of the subsequent unjustified dismissal.

[38] In its conclusions, the Authority dealt with Ms Gini's hurt and humiliation from "the whole experience" which included the disciplinary meeting as well as her dismissal. In assessing compensation, therefore, it is appropriate for this Court to take into account the humiliation and hurt feelings Ms Gini sustained as a result of the disciplinary meeting as well as her unjustified dismissal. I accept, however, that

Ms Gini's indignation over Ms Sturgess' conduct cannot be a consideration nor can Ms Gini be compensated for any hurt or humiliation she may have sustained earlier in the year arising out of the introduction of the "exit policy".

[39] The effects of the unjustified dismissal on Ms Gini were canvassed at length at the hearing and I accept that the evidence was quite compelling. By way of background she explained that her life career was to teach. In her words, "That is what I love doing - that is why I did relief teaching for some local schools. That is why I mark papers for Massey University and that is why I did and am still doing more study today and still working in the education sector where I have been told I am making a big difference." I accept that, in Ms Gini's own words, "being mocked and ridiculed" at the disciplinary meeting and then unjustifiably dismissed from a job she had dedicated her life to would have been an intensely humiliating experience.

[40] Ms Gini explained that she was dismissed at a time of the year when it was very difficult for teachers to obtain work. She explained the efforts she made to obtain other employment and I accept that she did her best to mitigate her loss. After one particular job interview, Ms Gini said she was given the impression that she would be starting with the company but the next thing that happened was that she "received a very terse rejection letter from them which bordered on rude". She told the Court she was certain that Ms Sturgess had had something to do with the rejection because the company in question and Literacy Training had worked together and had split the delivery of Literacy Training to the Department of Corrections into two regions, Wellington North and Wellington South. This allegation was not rebutted by Ms Sturgess who did not give evidence in the case.

[41] The loss of her job also had a serious effect on Ms Gini's financial situation. She had to borrow money from her daughter, her brother and a friend to keep afloat. She said:

> 68. ... I felt awful having to borrow, like I had failed and was dependant again - like a child. I am a woman with a grown family - fiercely independent and capable and here I was having to take personal loans from my family just to stay afloat. I felt desperate and despondent.
>
> ...

> 73. I come from an Italian family which is very proud and not too forgiving of failure as it can affect the family name and sense of stature. I daren't tell my parents about the strife I was in and feared they would find out.

Ms Gini explained that her father was "very, very ill" at the time and "very old" and she did not want to aggravate his condition. She told about the steps she had taken to avoid publicity when she received a call from a reporter after she had won the case before the Authority because "of my fear, of things leaking out to my family and especially my Father."

[42] Ms Gini also explained the significant stress she had suffered since her dismissal. She said:

> The stress from all this finally cracked me. I thought I was having [a] heart attack and had to go to the doctor this year. She was so concerned she put me through a series of tests - ECG and blood and so on ... the symptoms were all stress related.

[43] Mr Cleary highlighted the fact that Literacy Training had discontinued the proceeding in May 2012 and it could not be held responsible for subsequent stress suffered by Ms Gini in relation to the litigation. I accept that submission.

[44] Mr Cleary was critical of the medical evidence relating to Ms Gini's stress symptoms. He pointed out that the medical report produced in evidence was dated 1 July 2012 about, "something which happened two and a half years ago" and he described it as "unpersuasive". Given defence counsel's reaction to the report, Ms Gini's doctor should have been called to give evidence in person. The doctor did confirm in her report, however, that Ms Gini had consulted her on 13 April 2012 (before the discontinuance) by Literacy Training "about workplace stress and subsequent chest discomfort". That information confirms the evidence from Ms Gini herself, which I found convincing, about the level of the stress she suffered as a result of the disciplinary process and her unjustified dismissal.

[45] Although Ms Gini's employment was for a fixed-term I do not consider that that factor alone should result in reduced compensation for hurt and humiliation. Each case will depend upon its own facts, but I accept that there may be occasions, and I think that this is one of them, when an employee may endure greater hurt and humiliation in the knowledge that she or he was summarily dismissed and unable to

complete the term of even a temporary employment agreement. Having regard to all the considerations I have referred to, as well as the extensive and helpful submissions from the parties' representatives, I consider the appropriate amount to allow as compensation under s 123(1)(c)(i) of the Act is $12,000.

Contributory conduct

[46] Under s 124 of the Act the Court is required to reduce remedies that would otherwise have been awarded to an employee if it considers that the actions of the employee contributed towards the situation that gave rise to the personal grievance. The Authority concluded that there could be no room for contribution by Ms Gini. Relevantly it stated:

> Even though she accepted that she would have done things differently in hindsight, particularly in relation to taking out the forms, that is a minor error that any employee could make and is not blameworthy behaviour worthy of a reduction in remedies.

[47] In this Court, Mr Cleary took issue with the Authority's conclusions in relation to contribution conduct. He referred to the concession he obtained from Ms Gini in cross-examination that a prison environment was different to an ordinary classroom environment and he submitted that Ms Gini did not seem to appreciate the risks involved as a teacher in "a potentially dangerous prison environment". Mr Cleary submitted that had Ms Gini "simply stuck to the modular training" there would have been no problems but he submitted there was contributory conduct on her part in taking the partly completed KiwiSaver forms out of the prison.

[48] A preliminary issue in relation to Mr Cleary's submissions on contributory conduct was that the defendant had not cross-challenged the Authority's determination that there was no contributory conduct on Ms Gini's part. Mr Cleary submitted, nevertheless, that once the Authority or the Court determines there is a personal grievance then s 124 becomes a mandatory consideration. Mr O'Sullivan indicated that he would have put more facts forward had he realised that s 124 was in issue but he relied on the fact that there had been no challenge to the Authority's determination on the point. At the same time, Mr O'Sullivan did not seek leave to call further evidence.

[49] Any consideration by the Court of contributory conduct pursuant to s 124 of the Act is, as Mr Cleary submitted, a mandatory consideration whenever the Authority or the Court determines that an employee has a personal grievance. The issue is not dependent upon the pleadings or submissions from the parties. I agree with Mr Cleary that a cross-challenge was not a pre-requisite and contributory conduct is, therefore, a relevant consideration in the present case.

[50] The document Mr Cleary referred to in support of his submission that there was contributory conduct on Ms Gini's part was a half page note Ms Gini had typed up herself following an orientation training course run by the Department of Corrections. It commenced:

> Getting Got
>
> This was a very useful "keep safe" orientation.
>
> It made me very aware of safety and how "advantage taken" is a very gradual process not a sudden one. The tutor/guard can be lulled into a false sense of security and friendship. You don't need to drop the caring about others but need to be aware that all is not always as it seems. ...

[51] The particular passage in the "Getting Got" document which Mr Cleary relied upon stated:

> Be careful of what you take in Even harmless things may not be.
>
> Always run the material past Literacy Training if you are not sure.
>
> AND never take anything out even a letter (it may be a softening up process - on you)

[52] The significance of these particular notes made by Ms Gini is that she had clearly been warned against taking anything out of the prison. I agree with Mr Cleary, therefore, that her subsequent action in taking the partly completed KiwiSaver forms out of the prison did amount to contributory conduct even though, in all circumstances, it would have to be rated as a relatively minor form of contribution. I assess Ms Gini's contributory conduct under s 124 of the Act at five per cent.

[53] In summary, I award Ms Gini lost remuneration in a sum equal to three months' ordinary time remuneration and compensation for humiliation, loss of

dignity and injury to feelings in the sum of $12,000. The remedies awarded are to be reduced by five per cent on account of Ms Gini's contributory conduct.

Summary

[54] I encourage the parties to try and reach agreement on the issue of costs. Ms Gini is entitled to costs assessed on the usual basis up until the date Literacy Training discontinued its challenge. Given the mixed results in this judgment, however, I am inclined to the view that any award for subsequent costs should be relatively modest. If agreement cannot be reached, Mr O'Sullivan is to file and serve submissions within 21 days of the date of this judgment and Mr Cleary will have like time from the date of service in which to respond.

A D Ford
Judge

Judgment signed at 11.45 am on 22 January 2013