IN THE EMPLOYMENT COURT OF NEW ZEALAND
CHRISTCHURCH

I TE KŌTI TAKE MAHI O AOTEAROA
ŌTAUTAHI

[2022] NZEmpC 136
EMPC 9/2021

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	THE BOARD OF TRUSTEES OF SOUTHLAND BOYS HIGH SCHOOL Plaintiff
AND	STEPHEN JACKSON First Defendant
AND	ALAN BAILEY Second Defendant
AND	LINDA DALZELL Third Defendant

Hearing:	17-18 March 2022 and further submissions filed on 11, 19 and 22 April 2022 (Heard at Wellington via Virtual Meeting Room)
Appearances:	R Harrison, counsel for plaintiff M-J Thomas, counsel for defendants
Judgment:	2 August 2022

JUDGMENT OF CHIEF JUDGE CHRISTINA INGLIS

Introduction

[1] The three defendants were longstanding teachers at Southland Boys High School (the school). They were dismissed for redundancy following a restructuring exercise. At the time of their departure, they had been promoted to Assistant Principals and were part of the school's Senior Leadership Team.

[2] The defendants contended that the restructuring process was flawed and that they had been unjustifiably dismissed. They took grievances against the Board of Trustees in the Employment Relations Authority.[1] The Authority found that, while termination on the grounds of redundancy was substantively genuine, the defendants' dismissals were procedurally flawed and unjustified on that basis. Their grievances were upheld and the following remedies awarded to each of the defendants:

(a) The sum of $28,000 under s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act); and

(b) lost remuneration calculated in accordance with three months' ordinary time (totalling $25,679.42) plus interest.[2]

[3] The Board was dissatisfied with the Authority's determination and filed a non-de novo challenge. The scope of the matters at issue on the challenge, as particularised in the plaintiff's statement of claim, narrowed at the hearing. Counsel for the plaintiff, Mr Harrison, confirmed that the Board was not pursuing an argument as to the justification of the dismissals based on the Authority's factual findings; rather the challenge was squarely directed at the Authority's reimbursement award.[3] In summary, the plaintiff argues that the Authority erred in reaching its determination as to lost remuneration in the following respects:

(a) when assessing lost remuneration for the purposes of s 123(1)(b) of the Employment Relations Act 2000, the Authority erred in failing to have regard to long service payments made to each of the defendants under the provisions of the collective agreement;

(b) there were alternative employment opportunities/options at the school which the defendants elected not to apply for; this effectively broke the

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1 *Jackson v The Board of Trustees of Southland Boys High School* [2020] NZERA 527 (Member van Keulen).

2 Mr Jackson was also held to be entitled to be paid the employer KiwiSaver contribution to be calculated by the Board (at [83]).

3 At the hearing, issues were raised about the proper scope of the challenge, which are referred to in more detail later in this judgment.

chain of causation – the Authority erred in finding that the loss suffered was caused by the grievance; and

(c) when assessing lost remuneration for the purposes of s 128(2) of the Act, the Authority erred in failing to have regard to earnings received by the defendants from other employment following termination.

[4] In order to assess the alleged errors made by the Authority, it is necessary to deal with the facts. While some evidence was given at the hearing in respect of the confined matters at issue, the facts largely emerge from the Authority's determination.

The facts

[5] The defendants are teachers. Each of them had worked at the school for many years. The school's management structure has been subject to change over time. Prior to 2015 the school had a Rector, a Deputy Principal and Assistant Principals. Each of the three defendants was an Assistant Principal in this structure. In 2015 the Deputy Principal resigned and the Board decided not to replace that position; rather, it looked to use the Assistant Principals in an extended capacity. That had implications for the three defendants. They, together with the Head of the Junior School and the Rector, formed the Senior Leadership Team. The Rector retired in 2017 and a new Rector, Mr Coe, was appointed. The relationship between Mr Coe and the three defendants did not go smoothly.

[6] In May 2018 the Board put forward a restructuring proposal, effectively reverting to a more hierarchical management structure. The proposal had Mr Coe's firm support. The proposed restructuring involved disestablishment of the three Assistant Principal positions and the establishment of an Associate Rector role, sitting directly below the Rector. Three positions would then sit below the Associate Rector, namely the Head of Junior School, Senior Kai Arahi (Dean) and Senior Curriculum Leader.

[7] The defendants raised a number of concerns about the proposed restructuring, including that the process was not genuine and the consultation process unfair. None

of them applied for the new positions in the structure. The Senior Kai Arahi and Head of Junior School positions were not open to them; they otherwise considered that they did not have the required skill set and that, even if they had applied, they would not have been appointed. Ultimately the defendants were given notice that their positions had been disestablished effective from 29 January 2019.[4]

[8] The Secondary Teachers' collective agreement (the collective agreement) specifies four voluntary options in the face of the disestablishment of a teaching position:

> 3.9.3 Voluntary Options
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> Any teacher … whose position as a permanently appointed secondary … teacher is disestablished … as a result of voluntary election or otherwise, has the following options available where applicable as provided for in Appendix G or Appendix H and clause 3.9.4 of this part. The options will become available at the date of disestablishment. … If no selection is made by this date the teacher will be deemed to have supernumerary status. The options are:
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> (a) Supernumerary employment;
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> (b) Retraining;
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> (c) Severance payment; and
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> (d) Long service payment.

[9] Each of the defendants elected option (d) and received a long service payment calculated in accordance with the formula provided for in the collective agreement. The formula for teachers with between 25 and 30 years of service, the category into which each of the defendants fell, was a payment equivalent to 25 weeks' ordinary pay.

[10] The purpose of the long service payment following the disestablishment of a teaching position is expressed to be to assist the teacher to "withdraw from the teaching service".[5] That purpose is reflected in cl 3.9.4(4)(d), which provides that:

> Where a teacher having received a long service payment commences permanent employment within a number of weeks which is less than the

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4 As at these dates each of the defendant's remuneration was $110,500.
5 Clause 3.9.4(4)(a).

> number of weeks of payment received by the teacher as a long service payment under clause 4(a) above, the teacher shall refund the difference between the number of weeks for which they were without employment and the number of weeks for which long service payment was received; provided that, for the purposes of this clause, employment means employment as a teacher in a state or integrated school or employment as a manual training teacher in an approved manual training establishment.

[11] The evidence disclosed that while each of the defendants tried to find alternative employment within three months of their dismissal, they were unable to do so. They each gave evidence, which the Authority accepted and which was repeated in the Court, of their struggle to recover from the process they had gone through, the significant impact on their sense of self-worth and confidence, and the shortage of other employment opportunities of a similar nature to the roles they had held prior to their departure from the school.

[12] The defendants subsequently pursued a personal grievance for unjustifiable dismissal against the Board, claiming (amongst other things) reimbursement of three months' lost wages.

[13] The Authority found that the Board made a number of errors, the most significant of which was the failure to provide adequate information to the three defendants to enable them to properly engage in the process.[6] There were additional failures, including a failure to provide adequate time to respond, a failure to provide submissions and feedback from other staff on a consultation document, and a decision that the three defendants could not apply for two of the positions created under the new structure. The Authority also found that the Rector, and therefore the Board, had predetermined that the proposed restructure was the right structure for the school. The Authority went on to find that, whilst the restructure was genuine (in that it was motivated by, and responded to, a perceived need and problem in the school), once the Rector had settled on a solution, that was going to be the outcome:[7]

> [i]n short, the Board did not have an open mind and consultation was a charade.

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6 *Jackson*, above n 1, at [51].
7 At [53].

Analysis

[14] As I have said, the Board elected to pursue its challenge by way of non de novo hearing, contending that the Authority had erred in fact and law in the way in which it had dealt with the claim for reimbursement of lost wages. It did not pursue a challenge to the findings that the defendants' dismissals had been unjustifiable.

[15] Nor did the Board seek to argue that the Authority member had made an error of law in the way in which he calculated the quantum of compensation for humiliation, loss of dignity and injury to feelings. That is unsurprising given the Authority member expressly applied the banding approach set out in, and approved by, numerous Court judgments[8] to arrive at a figure considered appropriate (namely $28,000).

[16] The defendants essentially argued that, while aspects of the approach adopted by the Authority might give rise to legitimate argument, the ultimate relief alighted on in terms of lost remuneration (namely a sum equivalent to three months' lost remuneration) was fair and ought not to be disturbed.[9]

[17] While evidence was heard afresh on the limited matters before the Court on the challenge, the Authority's factual findings, including as to the deficiencies in the process and predetermination, are relevant to the remedies awarded by the Authority and to the challenge more generally for reasons which will become apparent.

[18] The framework for assessing remedies in respect of personal grievances is set out in Part 9 of the Act, in particular ss 123 to 128 (inclusive). Of particular relevance in this case are ss 123 (Remedies) and 128 (Reimbursement). Section 123 provides that:

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8 See for example *Richora Group Ltd v Cheng* [2018] NZEmpC 113, [2018] ERNZ 337; *Chief of New Zealand Defence Force v Darnley* [2022] NZEmpC 4; *Restaurant Brands Ltd v Gill* [2021] NZEmpC 186; *Stenhouse v Towman Towing Group Ltd* [2021] NZEmpC 183; *Gafiatullina v Propellerhead Ltd* [2021] NZEmpC 146, [2021] ERNZ 654; *Zara's Turkish Ltd (in liq) v Kocaturk* [2021] NZEmpC 117, [2021] ERNZ 530; *Concrete Structures (NZ) Ltd v Rottier* [2021] NZEmpC 95, [2021] ERNZ 418; *Butler v Ohope Chartered Club Inc* [2021] NZEmpC 80, [2021] ERNZ 312; *Smartlift Systems Ltd v Armstrong* [2021] NZEmpC 66, [2021] ERNZ 166; *Concrete Structures (NZ) Ltd v Ward* [2020] NZEmpC 219, [2020] ERNZ 495; *Labour Inspector v Chhoir* [2020] NZEmpC 203, [2020] ERNZ 479.

9 A position reiterated in supplementary submissions filed following the hearing.

123 Remedies

(1) Where the Authority or the court determines that an employee has a personal grievance, it may, in settling the grievance, provide for any 1 or more of the following remedies:

…

(b) the reimbursement to the employee of a sum equal to the whole or any part of the wages or other money lost by the employee as a result of the grievance:

(c) the payment to the employee of compensation by the employee's employer, including compensation for—

(i) humiliation, loss of dignity, and injury to the feelings of the employee; and

(ii) loss of any benefit, whether or not of a monetary kind, which the employee might reasonably have been expected to obtain if the personal grievance had not arisen:

…

[19] Section 128 provides that:

128 Reimbursement

(1) This section applies where the Authority or the court determines, in respect of any employee,—

(a) that the employee has a personal grievance; and

(b) that the employee has lost remuneration as a result of the personal grievance.

(2) If this section applies then, subject to subsection (3) and section 124, the Authority must, whether or not it provides for any of the other remedies provided for in section 123, order the employer to pay to the employee the lesser of a sum equal to that lost remuneration or to 3 months' ordinary time remuneration.

(3) Despite subsection (2), the Authority may, in its discretion, order an employer to pay to an employee by way of compensation for remuneration lost by that employee as a result of the personal grievance, a sum greater than that to which an order under that subsection may relate.

[20] The Authority member approached the issue of lost remuneration as follows. He took as the starting point two calculations – three months' ordinary time remuneration and the amount each of the defendants had lost. He said, correctly, that

the lesser amount would apply unless he considered it appropriate to award more. The third calculation involved a discretionary exercise.

[21] As to the first calculation (ordinary time remuneration), the Authority applied the ordinary time figure used by the Board in calculating the long service payment each of the defendants had received following their departure. That is uncontentious and amounted to $1,975.34 per week for each defendant; $25,679.42 for three months.[10] The second calculation (actual loss) was said to be complicated by the long service payment. The Authority expressed the issue, and preferred the following approach:[11]

> [76] The calculation of actual loss for each applicant is complicated by the long service payments they received and the impact on loss and whether it should be considered in that calculation, i.e. *should I effectively give credit to each applicant for the long service payment as remuneration received in the period between dismissal and my determination*. In my view the answer to this question turns on what the long service payment is for – is it to compensate the employee for lost wages or is it to compensation for loss of the job?
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> [77] The STCA identifies the intention of the long service payments as being to assist the teacher to withdraw from teaching service. This suggests it is compensation for loss of the job. In addition, the amount paid is linked to years of service and this also suggests *compensation is for the loss of the job rather than compensation for lost remuneration*.
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> [78] So, *my view is the long service payments should not factor into the calculation factual lost remuneration for each applicant*. On this basis after reviewing the evidence of actual loss I am satisfied that each applicant's actual lost remuneration exceeds $25,679.42. This means I must award $25,679.42 unless I think, in the exercise of my discretion, each applicant should be awarded more.
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> [79] I am not satisfied that it is appropriate to award more for lost remuneration to each applicant. There are a number of factors that influence this conclusion including:
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> (a) The long service payments – despite the payments not being remuneration for calculation of lost remuneration I accept counsel for the Board's submission that the applicants electing to take the payment is incompatible with them claiming lost remuneration. However, I believe the Act requires me to award as a minimum 3 months ordinary time remuneration, notwithstanding this.
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> (b) It is arguable that the applicants may have been able to mitigate their loss by applying for the Associate Rector position or looking for other roles in the School, including some supernumerary or retraining scenario.

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10 At [74].

11 Footnotes omitted. Emphasis added.

> (c) Given the Rector's view on the SLT and the need for change, which I have determined was genuine, there was every possibility that the applicants would not have remained employed at the School for a long period of time even if this flawed restructure had not occurred.
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> [80] So, I award each applicant 3 months' ordinary time remuneration, which I calculate to be $25,679.42.

[22] The plaintiff submits that the Authority erred in finding that long service payments made to the defendants under the collective agreement were irrelevant to the calculation of actual loss (the second calculation). It does not take issue with the Authority's finding that the payments were relevant to the exercise of its discretion to award more than the lesser of three months' remuneration or actual lost remuneration (the third calculation). In essence, the plaintiff says that the defendants incurred less financial loss as a result of their grievances because they each received a long service payment under the collective agreement.

[23] Support for the plaintiff's argument was said to emerge from two judgments of the Court. It is convenient to deal with these judgments at this point. In *Queenstown-Lakes District Council v Edmonson* the Court observed that:[12]

> The payment of redundancy compensation, whether as a voluntary payment or because of an express obligation imposed upon a particular employer to pay such compensation to an employee made redundant, is simply a factor which should, upon a case by case basis, be justly brought to account in a remedy setting where a particular dismissal for professed reasons of redundancy has been held to be an unjustifiable dismissal.

[24] A similar approach was said to have been followed in *Wallace Corp Ltd v Paalvast*.[13] Mr Harrison, counsel for the plaintiff, drew analogies (which were accepted by the Authority) between the long service payment made in this case and the redundancy payments made in *Queenstown Lakes* and *Wallace Corp*.

[25] The plaintiff submits that it is well accepted that the award of lost remuneration is to address actual loss; if an employer provides compensation for the loss of a job, then it must stand to reason that the payment is to relieve or negate the loss which would otherwise be the subject of remedy under s 123(1)(b) of the Act. That means

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12 *Queenstown Lakes District Council v Edmonson* (1995) 4 NZELC 98,324.
13 *Wallace Corp Ltd v Paalvast* EmpC Auckland AEC125/98, 22 November 1999.

that the payment is relevant to assessing what remuneration, if any, the employee has lost as a result of the grievance.

[26] Mr Harrison went on to acknowledge that, while it is possible for compensation for termination (provided for by an employer either voluntarily or under contract) to have a "dual function" (of giving recognition to both the loss of wages and other benefits accrued to the employee as a consequence of the loss of employment), they are not distinct and separate. It was submitted that the Authority fell into error in treating them as though they were. Had the Authority member followed the approach set out in *Queenstown Lakes* and *Wallace Corp*, he would not have referred to the purpose of the payment being controlling, and the payment itself being of limited relevance (namely as being restricted to the third (discretionary) part of the inquiry). Rather, the Authority should have treated the fact of payment as relevant to an assessment of the remuneration lost by the defendants as a result of their grievances.

[27] Counsel for the defendants, Ms Thomas, submits that there is no principle or rule that payments on termination linked to the loss of a job should be off-set against a claim for lost remuneration. In any event, the payment was not in the nature of remuneration; it was made in a lump sum, rather than weekly; no PAYE was deducted by the school prior to payment; and it appeared (from the face of the collective agreement, no evidence having been called in relation to the history of the provision) to be directed at compensating for long service. It is said that the overall sum alighted on, namely three months' ordinary time remuneration, was unobjectionable and ought to remain undisturbed.

[28] *Queenstown Lakes* was considered in *Muru v Coal Corporation of NZ Ltd*.[14] There Judge Finnigan observed that *Queenstown Lakes* needs to be read in its entire context – when read in context it is clear that redundancy payments do not extinguish the remedies of reimbursement for lost wages or for non-pecuniary loss. Rather, the Tribunal reduced the amount of compensation for humiliation, loss of dignity and injury to feelings for a varied number of reasons, and one of those was that redundancy compensation was paid. The actual amount of the payment was not the relevant factor;

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[14] *Muru v Coal Corporation of New Zealand Ltd* (1997) 5 NZELC 98 452 (EmpC).

rather, the fact that a redundancy payment was made at all meant that, in the particular case, slightly less emotional harm was suffered by the employee.[15] Judge Finnigan summarised the applicable principle emerging from *Queenstown Lakes* as follows:

> In some cases, paying money to a dismissed worker, particularly if the amount is substantial, may reduce the force of a claim that the employee suffered humiliation, loss of dignity and injury to feelings. Conversely, an overtly inadequate or unreasonably delayed payment of compensation might increase a dismissed employee's humiliation, loss of dignity and injury to feelings.

[29] The principle identified by Judge Finnigan, which I respectfully agree with, is unexceptional and is inapplicable in this case given that no challenge is made in relation to the relief ordered in the defendants' favour under s 123(1)(c)(i).

[30] It is also notable that in *Wallace Corp* the Court applied a global approach to remedies; the amount of lost remuneration that was assessed as having arisen from the grievance was reduced having regard to a gratuitous payment that the employer had made. The Judge explained the approach as follows:

> Although I propose to not alter the s 40(1)(c)(i) compensation ($10,000), I will reduce the figure for lost remuneration ($8,846.15) to reflect the gratuitous payment of seven weeks' remuneration made by the appellant. That reduction should not, however, be the subject of a precise accounting and I am satisfied that when remedies are considered globally, the amount of lost remuneration properly compensable should be $5,000.

[31] It appears that neither *Queenstown Lakes* nor *Muru* were drawn to the Court's attention in *Wallace Corp*. Further, *Wallace Corp* involved a gratuitous payment that the employer was not obliged to make, rather than a contractual payment that the employer was obliged to make. And it is apparent that the Court wished to mark out the "shabby" treatment of the employee and its impact on him, by maintaining the quantum of award that had been ordered under s 123(1)(c)(i).

[32] I return to the circumstances of this case.

[33] A teacher whose position has been disestablished has four options to access payment under cl 3.9.3 of the collective agreement. Each of the defendants selected

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[15] Citing *GN Hale & Son Ltd v Wellington, etc, Caretakers, etc, IUW* [1991] 1 NZLR 151 (CA) at 156.

option (d), a "long service" payment. Although there is an obvious link to prior service (evident in the applicable calculation – the greater the years of service the greater the payment), it is clear that payment under cl 3.9.3 is directed at creating a financial bridge, or cushion, between disestablishment of the teacher's position and employment in another line of work. That primary purpose is expressly stated in the collective agreement and has a degree of similarity with ordinary redundancy payments in terms of purpose.[16]

[34] So, while labelled a long service payment, it is not simply a gratuitous payment based on years of service triggered by a departure from the teaching profession by, for example, a retirement or resignation. The requirement to repay a proportion of the payment in the event of re-employment in a permanent teaching position reinforces the point – in other words a return to full time teaching within the stipulated period is deemed to break the purpose of the payment, and accordingly requires repayment of the balance.

[35] The fact that the payment was made to the defendants by way of lump sum and the way in which it was treated by the parties for tax purposes may, in other circumstances, have been helpful indicators of the true character of the payment. In this case, however, the true character of the payment is clear from a reading of the collective agreement.

[36] I accept the plaintiff's submission that the payment under cl 3.9.3(1)(d) was relevant to an assessment of actual loss under s 123(1)(b). I regard the true character of the payment as pivotal. In this regard I detect nothing in s 128(2) to suggest that, for example, a payment designed to simply recognise long service is a factor that ought to be taken into account to reduce relief – compare s 124 which expressly provides for consideration of contributory conduct as a mechanism for reducing remedies that would otherwise have been awarded.[17]

[37] The following hypothetical reflects the point. Teacher W's position is made redundant and they become unemployed; Teacher W receives a $60,000 gratuitous

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16 This emerges from a reading of the Voluntary Options part of the collective agreement.
17 See *Nath v Advance International Cleaning Systems (NZ) Ltd* [2017] NZEmpC 101 at [66].

payment from the Parents' Association in recognition of their years of contribution to the school community; Teacher W pursues a personal grievance against the Board of Trustees claiming that their dismissal was procedurally flawed and their dismissal unjustified; Teacher W finds work one week after termination as a permanent teacher (or project manager) on an annual salary of $60,000; Teacher W does not have to pay back the $60,000 to the Parents' Association. Did Teacher W lose a week of wages as a result of termination of their position? Yes.

Failure to apply for positions

[38] The plaintiff says that there were alternative employment opportunities/options at the school (including the Deputy Rector position) which the defendants elected not to apply for and which broke the chain of causation. That meant that any remuneration lost by the defendants resulted from a choice they made rather than from the grievance. I understood the submission to extend to the decision to take up the long service payment under the collective agreement rather than, for example, the supernumerary or retraining option – both of which may have required the defendants to remain teaching for periods at the school.[18]

[39] The plaintiff takes issue with various factual findings of the Authority, including that the options available to the defendants during the consultation process appeared limited and that steps taken by the Board were "an exercise in completing formalities". It is also said that contrary to the position advanced by the defendants, it was not possible for the Board to indicate the genuineness of the process by "tapping them on the shoulder" – to do so would have been contrary to the express appointment provisions under the collective agreement and statute. It is further said that while the defendants say that they elected to take up the long service payment under the collective rather than applying for alternative roles because they would not have been appointed had they applied, and would not have wanted to work with the Rector or within the school environment, that is not consistent with the applicable timeline.

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[18] See cl 3.9.4(1)(b) - supernumerary employment: "The teacher may elect to take up her/his supernumerary employment at the same school or at any other school at the request of the teacher and with the approval of the original employer and the board at the other school"; cl 3.9.4(2) - retraining: "Where the approved course of study is for a shorter period than forty (40) school weeks the teacher is required to attend the school as a supernumerary employee in periods when the school is open for instruction …".

[40] The fundamental building block in the submission is that the defendants' decision to take up the long service payment cut off the possibility of them receiving any ongoing salary or an opportunity for ongoing or alternative employment. While it is acknowledged that it was open to the defendants to elect any of the options under the collective agreement, and was an election they were freely able to make and that the Board had no say in, it had legal implications in relation to causation. The Authority erred in not having regard to this in reaching its determination regarding lost remuneration.

[41] I agree that there must be a causal connection between the claimed lost remuneration and the grievance – that much is clear from s 128. I do not agree that electing to take the long service payment rather than pursuing one of the other available options broke the chain in the way contended. I deal with each option in turn.

[42] The option of supernumerary employment would have involved ongoing employment on the defendants' existing salary for a period up to 30 school weeks, together with job search support.[19] Evidence was given as to why this option was not considered attractive, namely that it would have required the defendants to continue working within the school. I accept, and the Authority implicitly appears to have done likewise, that it was not unreasonable to decide against going down this route, including because of the extent to which the relationship had broken down. The Authority described the Rector's relationships with the defendants as "fraught and not effective". Clearly it was dysfunctional and the defendants felt emotionally unable to continue working at the school.

[43] The defendants could have taken up the option of retraining. This would have enabled them to have been continually employed at their existing salary for a maximum of 40 school weeks while undergoing a period of retraining.[20] Evidence was given as to why this option was not considered attractive, namely that each of the defendants was committed to teaching in their chosen field and that retraining options were, given their particular circumstances, limited.

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19 See cl 3.9.4(1) of the collective agreement.
20 See cl 3.9.4(2) of the collective agreement.

[44] More generally, evidence was also given as to why continuing with the school in any capacity was not a considered a viable option by any of the defendants. I accept that it was not unreasonable to decide against going down this route given the extent to which the relationship had broken down. It was also clear that each of the defendants believed that any application would not genuinely be considered. There is insufficient evidence to suggest that a process other than that set out in the collective agreement would have been followed and any application treated on its merits. But that is not a complete answer – the defendants' trust in their employer had been damaged and their relationship with the Rector and the Board was significantly fractured. It was not unreasonable in the circumstances to consider that a role within the school, and working with the Rector, was not a realistic option.

[45] The Authority referred to it being arguable that the defendants may have been able to mitigate their losses by applying for other roles in the school, and/or taking up the supernumerary or retraining scenario, and appears to have taken this arguable point into account in deciding against exercising the discretion to award more than three months' lost remuneration. I did not understand the plaintiff to be arguing that the defendants failed to take steps to mitigate their losses; rather the argument was firmly focussed on causation.

[46] There is a need for realism as to what can reasonably be expected of an employee facing the loss of their role in the midst of an unfair and predetermined process where the parties have become polarised. That is the underlying approach that the Authority appears to have taken and is one I agree with.

[47] The Authority concluded that the chain of causation had not been broken by the accepted failure of each of the defendants to apply for the Associate Rector or other positions within the school, or other options under the collective agreement. That conclusion was open to the Authority and does not amount to an error of fact or law.

Post termination earnings

[48] It is common ground that each of the defendants managed to secure some employment following their departure from the school. The evidence disclosed that

the first defendant had no alternative employment until 4 February 2019, when he secured a part-time position of 14 hours per week at an annual salary of $48,141. This lasted until 20 August 2019, when he obtained a full-time job (at a salary of $78,000). The second defendant started work on a fixed term basis in January 2019 (at a salary of $84,500), for one term, then extended through to December 2019. From January 2020 he was employed in a permanent position at an annual salary of $80,500. The third defendant found fixed term employment from 25 February 2019 to the end of 2019, at an effective salary of $48,141.

[49] The plaintiff submits that the Authority erred in failing to take into account these earnings when assessing the "lesser of" three months' lost remuneration and the amount lost. In this regard it was submitted that s 128(2) requires: "… an assessment of any income received during the three-month period – to be taken into account and deducted from what would otherwise be three months' ordinary time remuneration."

[50] The submission invites words to be read into s 128 which are not there. The reference to "*that* remuneration" in s 128(2) is clearly a reference back to remuneration lost "as a result of the personal grievance" referred to in the previous sub-section.

[51] Section 128(2) is expressed in mandatory terms – the Authority/Court *must* order the employer to pay "the remuneration lost as a result of the grievance", or three months' ordinary time remuneration. The only means of ordering an amount less than the sum lost is if it exceeds three months' ordinary time remuneration or the employee is found to have contributed to the circumstances giving rise to the grievance.[21] The only means of ordering more is via exercise of the statutory discretion provided in s 128(3).

[52] In summary, the analysis required in a case such as this is as follows:

- step 1 – did the employee have a personal grievance?[22]

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21 Employment Relations Act 2000, s 124.
22 Section 123(1).

- step 2 – an assessment of lost remuneration as a result of the personal grievance = x;[23]

- step 3 – an assessment of what three months' ordinary time remuneration equates to = y;[24]

- step 4 – a comparison between x and y to see which is smaller; the smaller number (z) is the deemed figure for lost remuneration;[25]

- step 5 – nevertheless, should a greater sum than z be ordered in the particular circumstances? If so, that is the figure for assessed lost remuneration.[26]

[53] Applying that approach to this case leads to the following. The defendants' positions were disestablished; they each had a personal grievance; they each received a lump sum payment on termination of the character described above; the payment covered a 25-week period; none of them were able to find alternative work at the same salary level following their termination and beyond the 25-week period; each of the defendants lost remuneration as a result of their grievance (that is because, while each of them had received a lump sum payment to tide them over for a 25-week period of time, none of them had (as at the date of hearing) been able to secure work at the same salary level despite reasonable efforts to do so). The remuneration lost as a result of the grievance was more than three months' ordinary time remuneration for each of the defendants and so the three month figure applies (step 4). The residual discretion (step 5) is not at issue in this case in light of my findings as to the correct approach to calculating loss for the purposes of steps 2, 3 and 4 above and the position adopted by the defendants in respect of the Authority's ultimate award.

[54] For completeness, it is doubtful that either the general words in s 123(1), or the broader powers of the Authority and the Court to exercise their powers in accordance with equity and good conscience, provide latitude to adopt a pick and mix approach

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23 Sections 123(1)(b) and 128(1)(b).
24 Section 128(2).
25 Section 128(2).
26 Section 128(3).

to remedies – at least in so far as lost remuneration is concerned.[27] The position may differ in relation to an assessment of non-pecuniary loss. That is because the making of a payment may, as a matter of fact in a particular case, reduce the amount of humiliation, loss of dignity and injury to feelings experienced by the employee who suffers as a result of the grievance, as Judge Finnigan rightly pointed out.

Conclusion

[55] The Authority erred in failing to have regard to payments made to each of the defendants under cl 3.9.3 of the collective agreement in assessing lost remuneration, but the error makes no difference to the award ultimately made in the defendants' favour, which the defendants are content to abide by; the Authority did not err in finding that the losses suffered by the defendants were causally connected to their personal grievances; the Authority did not err in failing to take into account post termination earnings when assessing the "lesser of" three months' lost remuneration and the amount lost as a result of the grievance.

[56] The parties are encouraged to agree costs. If that does not prove possible I will receive memoranda.

Christina Inglis
Chief Judge

Judgment signed at 9.20 am on 2 August 2022

[27] Compare *Wallace Corp*, above n 11.