

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** Geraldine Hitchiner` (Applicant)  
**AND** New Zealand Management Academies Limited (Respondent)  
**REPRESENTATIVES** Christie McGregor, Counsel for Applicant  
Tom O`Conner, Advocate for Respondent  
**MEMBER OF AUTHORITY** Ken Anderson  
**INVESTIGATION MEETING** 14 October 2005  
**DATE OF DETERMINATION** 27 January 2006

**DETERMINATION OF THE AUTHORITY**

**Employment Relationship Problem**

- [1] Mrs Hitchiner claims that she was unjustifiably dismissed on 5 October 2004. Mrs Hitchiner says that the termination of her employment on the grounds of redundancy was not genuine, that there was an absence of good faith behaviour, and that the dismissal was not carried out in a procedurally fair manner. Mrs Hitchiner also contends that that she was not afforded equal opportunities in her employment because she was paid on a substantially lower pay scale than male counterparts with similar experience, responsibility and ability. Mrs Hitchiner seeks that the Authority finds that she has a personal grievance and award her various remedies. In addition, Mrs Hitchiner seeks to be paid the difference in salary, between what she was paid compared with that of her male colleagues, for the period that she was employed.
- [2] New Zealand Management Academies Limited (NZMA) says that redundancy of Mrs Hitchiner was genuine, that a common selection criterion was used across the business, and hence the dismissal of Mrs Hitchiner was justified. In regard to the remuneration received by Mrs Hitchiner during her employment, NZMA says that Mrs Hitchiner was paid appropriately for her skills and abilities in comparison with other NZMA Hospitality Tutors.

**Background Facts and Evidence**

- [3] Mrs Hitchiner commenced her employment with NZMA as a Hospitality Tutor, on 13 January 2003. The letter of appointment dated 5 December 2002, from Mr Tom O`Conner, the Human Resources Manager for NZMA, contained an error. The error is a reference to seeing Mrs Hitchiner on 28 October 2002. It appears that this was an extract from a letter of an earlier date to another employee and the "model" had been used for the letter to Mrs Hitchiner. Nothing in particular can be construed in relation to what was a simple error, except that sometime in April 2003, Mrs Hitchiner sought to take some bereavement leave but given her

short period of service, she did not have a special leave entitlement. The evidence of Mr O’Conner is that Mrs Hitchiner attempted to manipulate the mistake in her letter of appointment to obtain paid bereavement leave.

- [4] There is conflict in the evidence of Mr O’Conner and Mrs Hitchiner about this matter but the only relevance of that evidence to this determination, is that the issue appears to have injected an element of distrust into the early stages of the employment relationship as Mr O’Conner was of the view that Mrs Hitchiner had attempted to “blackmail” him.

### **The salary issue**

- [5] Mrs Hitchiner underwent a performance review on or about 30 May 2003. While the review appears to have been very good she did not receive an increase in salary. The evidence of Mr O’Conner is that this was because Mrs Hitchiner was still within a probationary period of employment and the policy of NZMA was not to grant salary increases during that period.
- [6] A further performance review took place in mid-2004. The outcome was that Mrs Hitchiner received a 4% increase in her salary, taking it to \$33,290 per annum. Mrs Hitchiner was not satisfied that her abilities and skills had been adequately recognised by her employer. She conveyed her dissatisfaction in a letter to Mr O’Conner on 26 July 2004. In this letter Mrs Hitchiner stated that:

“I am aware of the difference in salary considering that I teach more units than the other two tutors and because I am a female and they are male it could be looked upon as sexual discrimination. I am therefore seeking a meeting with you to discuss my salary that is equal to the hospitality tutors, if I do not get a speedy and mutually acceptable response then I will be left with no option but to seek advise [sic] elsewhere.”

- [7] Mr O’Conner responded to Mrs Hitchiner via an email the same day. He conveyed to Mrs Hitchiner that the 4% increase in her salary was in recognition of the “extra effort” that she had put in. He also indicated that he would be prepared to meet with Mrs Hitchiner to discuss the matter when he next visited Hamilton from Auckland where he was based.

### **Meeting on 4 August 2004**

- [8] Mr O’Conner met with Mrs Hitchiner – she was accompanied by her support person Ms Michelle Allison. There were two issues discussed; the matter of the level of salary being paid to Mrs Hitchiner, and a complaint about a male colleague, made at an earlier date by Mrs Hitchiner. The three people present at the meeting have given evidence to the Authority about what transpired.

- [9] (a) *The salary issue*

On the matter of the salary level the evidence is reasonably consistent. Mrs Hitchiner had prepared a document that outlined what she wished to discuss. Effectively, Mrs Hitchiner was seeking pay parity with other tutors. This matter was discussed – the impression gained from the overall evidence is that a certain degree of tension arose. Mrs Hitchiner and Ms Allison say that the attitude of Mr Hitchiner was abrupt and dismissive.

Mr O’Conner says that Mrs Hitchiner’s attitude changed from being pleasant to being angry.

- [10] What is clear is that while Mr O’Conner gave an explanation regarding why Mrs Hitchiner was being paid at the salary level she was receiving, this explanation was not accepted by her.

[11] (b) *The sexual harassment issue*

Apparently earlier in 2004, Mrs Hitchiner and a male colleague had attended a culinary fare in Auckland and Mrs Hitchiner had become uncomfortable about her colleague being in her “space” and being touched on the arm by her colleague, albeit it appears that she did not view his actions as sexual harassment. The evidence of Mr O’Conner is that following a meeting with Mrs Hitchiner and the male concerned, the matter was amicably resolved.

The evidence of Mr O’Conner is that following the discussion about the wages issue, Mrs Hitchiner then raised the issue again in the context of it being a sexual harassment matter and that NZMA had done nothing about her complaint.

[12] The contrary evidence from Mrs Hitchiner and Ms Allison is that it was Mr O’Conner that raised the sexual harassment issue.

[13] There is also an email sent by Mr O’Conner to Mrs Hitchiner at 8:11am on 5 August 2004, the day following the above meeting. Mr O’Conner conveys that:

“I was very disappointed with the way yesterdays [sic] meeting went, it appeared to be very legalistic from the start and obviously because of that, developed into an adversarial approach by both of us. The other matters you raised (not listed) regarding a prior sexual harassment claim came as a shock to me as they were never viewed by me or voiced by Joan as being sexual harassment. If they had been the matter would certainly have been addressed very differently.

Your last statement to me was that “*you will be hearing from me*” so I guess I will await your contact.”

[14] While Mrs Hitchiner and Ms Allison say that the words quoted were not used by Mrs Hitchiner, the overall content of the email tends to lend support to Mr O’Conner’s version of the events at the meeting on 4 August 2004, as there does not appear to be any reason for him to “construct” this message.

[15] While this matter occupied some time at the investigation meeting, it is not particularly relevant to the issues that the Authority has been asked to determine. At best, the evidence pertaining to this matter may be seen as only one factor in regard to assessing the overall credibility of the evidence given by the respective witnesses, but more probably, is demonstrative of the tension that existed pertaining to the relationship between Mrs Hitchiner and Mr O’Conner.

### **The student complaint**

[16] Some time in August 2004, the Academy Manager for NZMA, Ms Joan Saywell, received a written complaint from a student. The Authority has viewed the written complaint. It is undated and unsigned. Indeed, there is no evidence before the Authority of the identity of the student, and the date of the complaint has not been established. The evidence of Ms Saywell is that the complaint was made in “early September” but that cannot be correct, as a meeting to discuss the complaint with Mrs Hitchiner was held on 30 August 2004. There are also two other student statements pertaining to the matter, obtained by Mrs Hitchiner, dated 27 August 2004. The overall evidence suggests that Mrs Hitchiner was probably made aware of the complaint on or about 18 August 2004.

[17] Unfortunately, the lack of detail pertaining to the student complaint is indicative of a gross mishandling of this matter by the management of NZMA, particularly by Mr O’Conner, in his role as the Director of Operations and Human Resources.

- [18] Mrs Hitchiner was informed by Mr O’Conner that the complaint was serious and could result in disciplinary action or dismissal. It subsequently transpired that there was no substance to the complaint and Mrs Hitchiner was completely exonerated, largely by her own efforts. Mr O’Conner made no attempt whatsoever to investigate the substance or otherwise of the complaint before informing Mrs Hitchiner that her dismissal was one possibility. The consequence was that Mrs Hitchiner was placed under unnecessary and avoidable stress. I cannot help but conclude that Mr O’Conner’s motives, at best, were suspect, particularly given that Mrs Hitchiner was left to make her own enquiries about the substance and circumstances of the complaint, and was then unreasonably challenged by Mr O’Conner for doing so.

### **The redundancy of Mrs Hitchiner’s position**

- [19] The evidence of Mr O’Conner is that in August 2004, the private education business sector went into a decline with a reduction in student numbers. Mr O’Conner held a meeting with each of the Academy Managers at the NZMA locations in Auckland, Henderson, Otahuhu and Hamilton. The intention was to ascertain how NZMA could reduce costs and maintain viability. It became apparent that a reduction in staff numbers would be required.
- [20] A meeting was arranged at the Hamilton Academy for 20 September 2004. Mrs Hitchiner was absent that day due to a medical appointment. Mr O’Conner had prepared a written statement for Mrs Hitchiner, the two other Hospitality tutors, and Ms Saywell. The statement was marked “**Strictly Confidential**” and conveyed that student numbers were falling and that there was a need to restructure the Hamilton operation, in particular the Hospitality section. It further conveyed that:

“The possible options available at this time are job sharing, voluntary severance or if no solutions can be found then possible redundancy.

Firstly I am asking if there are any of you that wish to take voluntary severance, If so, I would ask you to express your interest by **9 am Thursday 21 September confidentially**. Should there be no volunteers I will review each position within the Academy and discuss the possible outcomes with you individually.

You may wish to contact an outside representative regarding this matter.

I will be in touch later in the week to discuss the matter further with you all.”

- [21] Because Mrs Hitchiner was absent when Mr O’Conner discussed the possible redundancy situation on 20 September 2004, Ms Saywell had the task of conveying the situation to Mrs Hitchiner the next morning. Mrs Hitchiner also received an email conveying the same information received by the other staff. Mrs Hitchiner also discussed the matter with one of the other tutors, Mr Hatchard, and then again some time later with another staff member, Mr Pereira.
- [22] The evidence of Mrs Hitchiner is that a further meeting regarding the redundancy situation took place on 29 September 2004, between Mr O’Conner and the three hospitality tutors. Mr O’Conner says that the meeting took place on 3 October 2004 but he would appear to be mistaken about that (as revealed by his email of 30 September to the three tutors). That email also conveys that as no one had nominated voluntary redundancy, one of the hospitality tutor positions is to be made redundant. There does not appear to have been any information conveyed to them as to the criteria that would be taken into account.

[23] The evidence of Mr O’Conner is that out of the three tutors, he considered that the other two had more experience than Mrs Hitchiner and furthermore, he says that Mrs Hitchiner had some difficulty keeping order in her classes if the numbers got to more than 10 to 12 students. It was also considered that the other tutors were more capable of teaching more of the units available to students. Mr O’Conner says that he relied on the information conveyed to him by Ms Saywell and that they discussed who would be most suitable to teach all units. Ms Saywell confirmed that a general discussion took place between her and Mr O’Conner about the overall suitability of each tutor. However, her further evidence is that she was not aware of the overall experience of Mrs Hitchiner, particularly in the management area, as the curriculum vitae of each person was sent to the office in Auckland. Ms Saywell also says that she was not in control of the process and that Mr O’Conner was “handling it” and that he made the final decision that the position of Mrs Hitchiner would be made redundant.

#### **Meeting on 5 October 2004**

[24] The evidence of Mr O’Conner is that the agenda for this meeting had two aspects to it. Firstly, (and most inappropriately in my view), there was a disciplinary matter he wished to raise pertaining to Mrs Hitchiner discussing the redundancy circumstances with Mr Pereira, a staff member that was not affected. Mr O’Conner viewed this discussion as a breach of confidentiality as he had given an express instruction that the matter of redundancy was not to be discussed with staff that were not affected, and the written notices emphasised that the matter was strictly confidential. Secondly, it was intended to notify Mrs Hitchiner of the loss of her position on the grounds of redundancy. Also present at the meeting was Ms Saywell, and Mr Mark Hammond, representing Mrs Hitchiner.

[25] The evidence of Mr O’Conner is that he raised the confidentiality matter and Mrs Hitchiner denied there had been a breach. Mr O’Conner says that he indicated that he would discuss the situation with Mr Pereira later. The further evidence of Mr O’Conner (from his brief) is that:

“The decision to make Geraldine’s position redundant was already made and it would have served no good purpose for her or the Company to reverse the situation and terminate her employment for a disciplinary matter instead of making her redundant. Therefore I moved on to the redundancy aspect of the meeting and proceeded to explain Geraldine’s position had been declared redundant, as I was saying to her that she could if she wished work on through her notice period she just said “I don’t believe this , I’ll leave right now and we will see you in Court.”

[26] Mrs Hitchiner left the room followed shortly after by Mr Hammond. Mr O’Conner says that after about ten minutes had elapsed he asked Ms Saywell to request Mrs Hitchiner and Mr Hammond to return to the meeting. However, by then Mr Hammond had left the premises. Ms Saywell says that she found Mrs Hitchiner in her office at her computer – she reported this to Mr O’Conner and he then went to speak to her. Mr O’Conner says that Mrs Hitchiner informed him she wouldn’t speak to him without her lawyer present. Mr O’Conner says that he informed Mrs Hitchiner that she could not download any company information from the computer and then he left her office.

[27] The evidence of Mrs Hitchiner is that following the confidentiality matter being discussed, Mr O’Conner informed that her position was redundant.

“He said I would be given one month’s notice and could work it if I wanted to but he would prefer me not to. I said all I wanted was a day to say goodbye to my students. He said no he would not allow that. I left the meeting quite upset.”

- [28] Mrs Hitchiner says that she went to her office and was taking her personal files off the computer when Ms Saywell arrived. The evidence of Mrs Hitchiner is that Ms Saywell told her that Mr O’Conner had instructed that Mrs Hitchiner was to turn off her computer and “get out.” Mrs Hitchiner says that she telephoned Mr Hammond to convey what was happening and was advised that she was entitled to take her personal files – she duly informed Ms Saywell of this advice and Ms Saywell then left the office.
- [29] The further evidence of Mrs Hitchiner is that Mr O’Conner then arrived in her office and said: “[*turn that bloody computer off and get out now.*]” Mrs Hitchiner says that the situation felt like a dismissal and not a redundancy. Mr O’Conner denies using the language quoted and I am unable to reach any firm conclusion about exactly what occurred, but I do accept that it was made clear to Mrs Hitchiner that she should leave the premises as soon as possible.
- [30] Mr Hammond also gave evidence to the Authority, including a file note that he dictated soon after returning from the meeting on 5 October 2005. Mr Hammond’s evidence, up to the point of his departure from the Academy premises – and his subsequent telephone discussion with Mrs Hitchiner, is more detailed than the evidence of Mrs Hitchiner. I accept that evidence as a reasonable record of what transpired at the meeting on 5 October. I also understand that Mr O’Conner largely accepts this record also.

## **Analysis and Conclusions**

- [31] There are several issues that Mrs Hitchiner brings to the Authority for determination:
1. That her redundancy was not genuine. Effectively, Mrs Hitchiner says that Mr O’Conner disliked her and set about implementing a process with the intention of dismissing her.
  2. Alternatively, even if it was necessary to make a hospitality tutor redundant at the Hamilton Academy, the selection process was unfair and Mrs Hitchiner’s position should not have been made redundant. Mrs Hitchiner claims that Mr O’Conner had effectively predetermined that it would be her position that would be redundant.
  3. The selection process was unfair in that Mrs Hitchiner was not informed of the selection criteria and another tutor with very short service with NZMA, should not have been retained in preference to Mrs Hitchiner.
  4. That Mrs Hitchiner was not afforded equal opportunities during her employment particularly in regard to her remuneration. Mrs Hitchiner claims that NZMA breached the provisions of the Equal Pay Act 1972.

### **1. Was the redundancy genuine?**

- [32] The Authority has viewed some data pertaining to student enrolment numbers for the years 2002, 2003 and 2004. The problem with coming to any conclusions solely on the basis of such figures, is that there appears to be a number of variables that arise, such as the number of students returning. But in any event, in the absence of any tangible evidence that shows that the redundancy could not possibly be genuine, it is not the role of Authority to usurp the prerogative of an employer to make its business more cost efficient. The Court of Appeal in *G N Hale & Sons v Wellington etc Caretakers etc IUOW (1990) ERNZ Sel Cas 843*, held that the Courts and institutions such as the Authority; “[are not sitting on appeal as to how the

employer should run the business.” It is also well established that the Authority is not able to substitute its own opinion as to the wisdom or expediency of the employer’s decision.

[33] Nevertheless, the Court of Appeal in *Hale* also determined that:

“When a dismissal is based on redundancy it is the good faith and the fairness of the procedure followed that may fall to be examined on a complaint of unjustified dismissal.”

[34] Given the sparse information that was made available regarding the reasons for the requirement for redundancies within NZMA, and the very short time that elapsed from when Mrs Hitchiner was made aware of the possibility of redundancy and the notice of termination of her employment (two working weeks), it is understandable that the genuineness of her redundancy is viewed with some suspicion. There is also clear evidence of varying degrees of animosity between Mrs Hitchiner and Mr O’Conner. However, on the balance of the overall evidence, including the fact that there were redundancies at the other facilities operated by NZMA, I am not able to find that the redundancy of Mrs Hitchiner’s position was other than genuine, in the sense that it was simply a vehicle to terminate her employment for reasons other than those presented by NZMA. However, because of the faulty selection process adopted by NZMZ, there is a question mark over whether or not it should have been Mrs Hitchiner’s position that was to be made redundant.

## 2. Was the selection process fair and reasonable?

[35] Given the indecent haste in which the decision to make the position of Mrs Hitchiner redundant was made, I find that the selection process was sadly wanting. Indeed, the evidence that emerged during the investigation meeting, revealed that there had been little analysis or consideration given to the overall skills and experience that Mrs Hitchiner possessed – in fact, to her credit, Ms Saywell acknowledged that she was not aware that Mrs Hitchiner was qualified and/or experienced in certain areas. It may well be that had more time been taken, and had Mrs Hitchiner been given the opportunity to express a view as to why her position should have been retained, then the same decision may have been made. But time and opportunity were not made available to Mrs Hitchiner and the overall selection criteria was not discussed with her prior to a decision being made to dispense with her position, hence I must find that the selection process was not fair and reasonable.

## 3. Was the procedure followed exercised in good faith and was it fair and reasonable?

[36] Section 4 of the Employment Relations Act 2000, requires the parties to an employment relationship to deal with each other in good faith. Specifically, as it pertains to a redundancy setting, the duty of good faith requires consultation about the affect on employees of changes to the employer’s business, a proposal by an employer that might impact on the employer’s employees, and making employees redundant.<sup>1</sup>

[37] Section (1A) (c) of the Employment Relations Amendment Act (No 2) 2004 takes the duty of good faith in a redundancy setting even further in that it:

[“requires an employer who is proposing to make a decision that will or is likely to, have an adverse effect on the continuation of employment of 1 or more of his or her employees to provide to the employees affected –

- (i) access to information, relevant to the continuation of the employee’s employment, about the decision; and

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<sup>1</sup> Section 4 (4) (c), (d) and (e) of the Employment Relations Act 2000.

- (ii) an opportunity to comment on the information to their employer before the decision is made.”

[38] While the dismissal of Mrs Hitchiner took place prior to the Employment Relations Amendment Act coming into force, it seems to me that the above provision is largely a codification of existing common law that requires employers to act in a fair and reasonable manner when anticipating the termination of the employment of an employee on the grounds of redundancy.<sup>2</sup>

[39] Having given close consideration to the overall evidence, I find that the procedure adopted by NZMA, when making the position of Mrs Hitchiner redundant, was fatally flawed for the following reasons:

- (1) As alluded to in paragraph [35] above, the selection criteria pertaining to the redundancy was not adequately conveyed to Mrs Hitchiner and she was not consulted or given an opportunity to have any input as to why it was her position that was to be made redundant, rather than the position of another tutor, Mr Pesch, whom had only been employed by NZMA for a number of weeks. Given the short period of time that Mr Pesch had been employed, and the evidence of the general regard that Mrs Hitchiner was held in by both students and others, she was fairly and reasonably entitled to a better explanation regarding the selection criteria, and an opportunity to respond to the perceived negative elements that Mr O’Conner had taken into account, such as the ability of Mrs Hitchiner to control larger classes and her perceived lack of competence to teach a variety of subjects.
- (2) The manner in which Mrs Hitchiner was treated on her last day of employment was most unfair and unreasonable. Firstly, Mrs Hitchiner was subjected to an unnecessary and unreasonable disciplinary process relating to an alleged breach of confidentiality. The confidentiality matter may or may not have had some validity, but given that Mr O’Conner had already determined that Mrs Hitchiner’s employment was to be terminated, one has to question why he felt the need to subject Mrs Hitchiner to a double dose of negative news. The evidence of Mr Hammond is that the tone of the meeting on 5 October 2004, was “cold and uncompromising” on the part of Mr O’Conner. I accept that evidence.

It appears that Mr O’Conner was not simply content with conveying to Mrs Hitchiner that her employment was to be terminated, he also decided that before conveying that unfortunate news to her, he would subject her to a disciplinary hearing that was never going to achieve any possible outcome. The attitude of Mr O’Conner towards Mrs Hitchiner is perhaps revealed by his evidence about why Mrs Hitchiner was made redundant. In addition to her perceived lack of skills compared with the other two tutors, Mr O’Conner says of Mrs Hitchiner, that: “Her attitude towards management and the difficulties encountered in trying to communicate with her contributed to that decision.”

While I gained the impression that Mrs Hitchiner was certainly no “shrinking violet” and could be quite forthright about expressing her dissatisfaction about certain matters, albeit she appears to have been somewhat misguided on occasions, there is no evidence of any conflict with anyone other than Mr O’Conner during her employment. And, while I do not accept all of the evidence pertaining to the attitude of Mr O’Conner towards Mrs Hitchiner, there is sufficient credible evidence to show that he was less

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<sup>2</sup> See for example: *Communication & Energy Workers Union Inc v Telecom New Zealand Ltd* [1993] 2 ERNZ 429.

than empathetic towards her in his human resources role in his various dealings with her, up to and including the meeting on 5 October 2004.

- (3) While Mrs Hitchiner was informed by Mr O’Conner that could she work out her notice period if she wished, the notes of Mr Hammond record that the preference of Mr O’Conner was that Mrs Hitchiner should finish that day. Mr O’Conner also refused Mrs Hitchiner the opportunity to farewell her students. Given the general tenor of the meeting on 5 October, it is not surprising that Mrs Hitchiner left the meeting suddenly and upset. Indeed, the overall evidence as to the conduct of Mr O’Conner is such that Mrs Hitchiner was entitled to conclude that Mr O’Conner wanted her gone with as little delay as possible.

Given the inevitable emotional atmosphere that can accompany even the most well managed redundancy situation, I have taken a cautious and measured view of the overall evidence pertaining to the final departure of Mrs Hitchiner from the Academy. Nonetheless, it is my conclusion that on 5 October 2004, Mrs Hitchiner was subjected to what can only be described as a harrowing and hurtful process. This, in itself, makes her dismissal unjustified.

## **Determination**

- [40] For all of the above reasons, I find that the overall procedure followed regarding the redundancy of Mrs Hitchiner was not exercised with the requisite good faith required by Employment Relations Act and accepted legal precedent. Furthermore, I find that Mrs Hitchiner was not treated fairly and reasonably and that her dismissal on the grounds of redundancy was unjustified - she has a personal grievance.

## **Remedies**

- [41] Having found that Mrs Hitchiner has a personal grievance, I now turn to the remedies that may be available to her.

- [42] (a) **Reimbursement of wages**

While I have found that there is no evidence that the redundancy of Mrs Hitchiner was not genuine in the sense that it was designed to terminate her employment for reasons than those given by NZMA, nonetheless I have found that the selection process was indecently hasty. I also conclude that had further time and further consideration of the views of Mrs Hitchiner been allowed, there may have been a different outcome. Of course there is always the possibility the termination of Mrs Hitchiner’s employment may have still resulted. We simply will never know, but Mrs Hitchiner is entitled to the benefit of that doubt.

- [43] Section 123(b) of the Employment Relations Act 2000 (“the Act”) provides that where the Authority determines that an employee has a personal grievance, it may provide for:

[“the reimbursement to the employee of a sum equal to the whole or any part of the wages or any money lost by the employee as a result of the grievance.”

Then further, section 128(2) of the Act provides that:

“If this section applies then, subject to subsection (3) and subsection 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."

[44] Mrs Hitchiner is seeking to be awarded the payment of 3 months' salary less the one months' paid notice, that is, payment for 9 weeks, but less the net sum of \$410.00 earned – the sum claimed being \$5,128.60. There is some difference between gross and net earnings to be allowed for that I assess at approximately \$78.00 (allowing for tax @ 19%). Because of the uncertainty that I have found exists as to the eventual tenure of her position, as created by the faulty process adopted by NZMA, I conclude that Mrs Hitchiner is entitled to the remedy sought. New Zealand Management Academies Limited is ordered to pay to Mrs Hitchiner the gross sum of \$5,050.00.

[45] (b) **Compensation**

Mrs Hitchiner seeks to be awarded the sum of \$20,000. While I find this sum to be somewhat too high, I conclude that given the overall course of action adopted by Mr O'Conner regarding the redundancy process, in particular, the manner in which her dismissal was implemented, and the consequential overall affect upon Mrs Hitchiner, a reasonably high sum of compensation is warranted.

New Zealand Management Academies Limited is ordered to pay to Mrs Hitchiner the sum of \$15,000.00

### **The Issue of Salary Parity**

[46] My finding is that in the absence of proven unfair bargaining, the level of salary that applies where an individual employment agreement is negotiated, is a matter that is strictly between the parties and it is not for the Authority to interfere with the bargain struck.

[47] The Authority has been provided by NZMA (on a confidential basis), details of the salaries paid to other tutors in a similar position to that held by Mrs Hitchiner. For reasons of completeness only, I can say that on the information supplied, the salary paid to Mrs Hitchiner is similar to that paid to many other tutors, male and female, and there is no evidence of any inequality on the basis of sex or any other factor. I find that the claim advanced by Mrs Hitchiner is misguided and has no valid basis in fact or law.

### **Summary of Orders**

1. Pursuant to sections 123(b) and 128(2) of the Act, New Zealand Management Academies Limited is ordered to pay to Mrs Hitchiner the gross sum of \$5,050.00.
2. Pursuant to section 123 (1)(c)(i) of the Act, New Zealand Management Academies Limited is ordered to pay to Mrs Hitchiner the sum of \$15,000.00.
3. Costs are reserved. The parties are invited to reach a resolution of this matter. In the event that a resolution is not achieved, submissions may be made to the Authority for an order, within 28 days of the date of this determination.

**Ken Anderson**  
**Member**  
**Employment Relations Authority**