

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Mina Uzan-Greer (Applicant)
AND The Kohimarama School Board of Trustees (Respondent)
REPRESENTATIVES Peter Andrew, Counsel for Applicant
Ray Parmenter, Counsel for Respondent
MEMBER OF AUTHORITY Tom Woods
INVESTIGATION MEETING 20 May 2002
DATE OF DETERMINATION 19 July 2002

DETERMINATION OF THE AUTHORITY

The Employment Relationship Problem

Mina Uzan-Greer says she was unjustifiably dismissed by her former employer, the Kohimarama School Board of Trustees (“Board”). The Board says that the dismissal was justified. Mrs Uzan-Greer is claiming lost salary including interest as well as \$30,000 compensation for humiliation and injury to feelings.

Factual Background

Mrs Uzan-Greer commenced employment with the Board on 4 October 1999 in the position of Senior Teacher/Syndicate leader. The applicable employment contract is the Primary Teachers Collective Employment Contract 1998-2001. Not long after Mrs Uzan-Greer’s appointment, the School Principal apparently resigned. An Acting Principal was appointed. In early April 2000 issues were brought to the Board’s attention regarding Mrs Uzan-Greer. All I need to record is that the Board convened an employment committee to investigate the issues. On 2 June 2000, Mrs Uzan-Greer was invited to respond to the committee’s investigative findings. That meeting took place on 19 June 2000 and on 22 June 2000, the committee released its findings in a letter to Mrs Uzan-Greer. The relevant portion of the letter reads:

“The committee’s serious concerns about the impact of your behaviour on the school and on Syndicate C, in particular, have led us to the view that we must act quickly and firmly. We do not want the school to lose teachers and, as a natural corollary, we do not want the school to be unable to attract teachers. We have prided ourselves on our school being a place where teachers would be keen to work if only there was a vacancy.

In our view, you have a great need to change your approach to the carrying out of your functions. You must:

- a) *Treat every member of the staff, both below and above you in the structure, with respect and courtesy; and*
- b) *Cease responding aggressively to any issues affecting you; and*
- c) *Comply with directions from the school's management. (Of course, we are not saying that you should accept blindly a direction without having the right to put a different perspective to (say) the acting principal but, when a decision has been made, you have to accept it with good grace).*

Those requirements are so important and of such a pressing nature that we find we have to demand an almost immediate change in your demeanour. We do not have the time available to us to give you a first warning of two, for fear of what will happen to the school's morale if things do not improve rapidly; it is serious. Accordingly, we have decided that you should be given (as you are now given) a first and final warning that we expect you to modify your behaviour as set out above.

The letter then expressed a willingness by the committee to assist Mrs Uzan-Greer achieve the desired modification of behaviour. The letter then read:

"..Our advice is that a mediation involving those affected by your behaviour would be a good way to start mending bridges."

The letter then read:

" On a formal note, the warning we have given you shall be valid for one year. If during that year, you were to be in breach of our requirements of you, the matter would be investigated and a dismissal could ensue."

And concluded:

As a safety valve, we would like you to meet with Mrs Demler once a fortnight to work through your progress and to discuss, amicably, any irritants you might perceive."

The Acting Principal was advised of the Committee's decision by letter dated 29 June 2000. The letter instructed the Acting Principal to assist Mrs Uzan-Greer to meet the requirements the Committee had set for her. The instruction read:

" It is essential that you offer her every reasonable assistance to enable her to meet the requirements we have set for her. We note in particular, the importance of your having regular meetings with her to assist her in that regard.

We would ask that you accurately document all appropriate matters relating to Ms Uzan-Greer and notify us immediately, should there be any aspects, which do not comply with the requirements of our letter to her."

On 29 June 2000, Mrs Uzan-Greer applied for leave on medical reasons to take effect as from 31 July 2000 until 30 October 2000. She followed up her request by a letter dated 17 July 2000. It was Mrs Uzan-Greer's intention to commence leave one week after the commencement of term three on 24 July 2000. The reason as I understood it to be was that Mrs Uzan-Greer wanted to meet her syndicate to finalise the planning for the new term before she took leave.

On 19 July 2000, the Board advised Mrs Uzan-Greer by letter that her request for leave is granted. The letter read:

‘ The Employment Committee of the board has decided to grant your request for unpaid discretionary leave commencing Friday July 21 and continuing so long as monthly medical certificates are provided on the 14 of each month to support the need for this leave, until 30 October.’

The letter then significantly concluded:

“ The programme set out in our letter to you dated 22 June, including fortnightly meetings with the Principal etc. will resume on your return to work”.

Mrs Uzan-Greer however sought permission from the Acting Principal to attend school occasionally in the week commencing 24 July in order to meet her Syndicate team in preparation of her absence. That was denied.

In a letter dated 21 July 2000, the Acting Principal advised:

“ The members of the committee have asked that you adhere to the leave prescribed in their letter to you, which states that you are on leave as from the end of the school day today (Friday 21 July 2000) for medical reasons. It is their wish that you do not attend school next week.”

Given the committee’s instruction not to turn up to work on 24 July 2000, Mrs Uzan-Greer understandably sought to meet with her syndicate on 21 July 2000. I heard evidence from Mrs Uzan-Greer that the Acting Principal prevented that happening and by all accounts on the evidence before me was unnecessarily obstructive. In the end, through the intervention of the Board Chairperson, Mrs Uzan-Greer was allowed to work at school over the weekend but under strict instructions not to turn up for week on the 24th. She did so in order to finalise matters in her preparation of taking leave.

I also heard evidence of the Acting Principal’s negative reaction to Mrs Uzan-Greer’s request for entitlement to use accumulated sick leave. The matter required the intervention of the NZEI. The matter was resolved by agreement. Mrs Uzan-Greer was able to exhaust her accumulated sick days. The balance of her leave would constitute leave without pay.

By a notice dated 21 July 2000, the parents and caregivers of Mrs Uzan-Greer’s pupils were notified that she was to take extended leave. The note read:

‘Mrs Uzan-Greer is taking discretionary leave for medical reasons from today (Friday 21 July). The school is making every endeavour to find a suitable long term reliever.’

In August 2000, the Board appointed Mr King as Principal. Understandably, he endeavoured to phone contact Mrs Uzan-Greer to introduce himself to her. Messages were left on Mrs Uzan-Greer’s phone as well as with her son, requesting that she contact him. Sometime between 29 August and 1 September 2000, Mr King received a call from Ms Hosking on account of his messages. Ms Hosking made the call in the presence of Ms Abreu. Both Ms Abreu and Ms Hosking presented written statements that were introduced by consent. In Ms King’s statement she said:

During the call I informed Mr King that Mina was out of Auckland and that she would be returning in October. I told him that I was helping to take care of her affairs during her absence. I asked Mr King if there was urgency to his call. He clearly answered that his call was not urgent. Mr King told me that he wanted to check how Mina was...He did ask that Mina get back to him urgently, nor did he say that he was expecting anything from her. He just said something along the lines of “ask her to get in touch with me when she can.”

Mr King in cross examination accepted that there was no urgency for him to talk to Mrs Uzan-Greer. Mrs Uzan-Greer did however contact Mr King by phone no later than 4 September 2000 or shortly thereafter. In his written statement, Mr King recalled his conversation with Mrs Uzan-Greer as follows:

“I said I was calling to introduce myself. I asked her how she was convalescing and her responses was that she was doing ok. I asked her if I could expect her to return to work at the conclusion of her sick leave and she indicated that she would be back at school. I wished her all the best and advised that if I could be of any assistance, she was welcome to contact me...I did not speak with Mrs Uzan-Greer until a mediation took place.”

Sometime prior to 4 September 2000, Mr King met and interviewed the teachers. In the course of those interviews, three teachers belonging to Mrs Uzan-Greer’s syndicate expressed concerns relating to the employment issues addressed in June. The three teachers indicated to Mr King that they might leave the school should Mrs Uzan-Greer return from leave. Mr King said in cross examination that he learnt of the teacher concerns independent from the Board action in June. That strongly indicates that the Board did not brief him at the time of his appointment of the disciplinary action it had taken against Mrs Uzan-Greer. He testified that he was invited to a meeting of the Personal Committee to be briefed on the disciplinary action against Mrs Uzan-Greer. At that meeting which took place no later than 4 September 2000, Mr King said that he disclosed his findings to the committee. The finding that he disclosed to the committee was that “each of the members of Syndicate C, would look for positions elsewhere if Mrs Uzan-Greer returned.”

In response to that, the committee wrote to Mrs Uzan-Greer on 4 September 2000 seeking confirmation whether she would be returning to work. The letter was addressed to her Auckland residence. The letter read:

“ The employment committee wishes to raise an important issue with you. We regret that the first contact on the subject has to be by letter, but the principal has tried to contact you several times without success (he advised us that he left messages both on your answer phone and with your son, however you have failed to respond”.

After identifying issues the letter read:

- “d) As the principal holds those three teachers in high regard, he approached this committee with his concerns that the three teachers might leave the school rather than face the risk of further unhappiness upon your return.*
- e) The committee has sought legal advice.*
- f) As a consequence of that legal advice, the principal met informally with the threeteachers together and, somewhat bluntly, asked them if he could rely on their return next year (you will be aware that it is about this time of the year when the Education Gazette starts advertising positions for next year and when teachers contemplate applying for fresh positions).*
- g) The response from the three teachers was that they would be leaving Kohimarama School. Upon our instructions, the principal pressed them further and learned that they would not contemplate leaving, if they were assured that you would not be returning to the school.*
- h) So, the essence of the issue is whether you are planning to return from sick leave to Kohimarama School.*

Mrs Birdsall stated in her written brief that Mr King contacted her shortly after the 4 September 2000 letter was sent advising that Mrs Uzan-Greer would be returning on 30 October 2000. In cross examination, Mr King said that he believed that he had no obligation to tell Mrs Uzan-Greer despite

holding real concerns of her ability to return. When asked why he did not raise the concerns, Mr King's response was that he assumed that Mrs Uzan-Greer had read the letter of 4 September 2000. Mr King said that Mrs Uzan-Greer gave "no indication that she did not receive [the letter]."

Mrs Birdsall said, that given Mrs Uzan-Greer's intentions, the committee wrote another letter, dated 7 September 2000. The letter was addressed to Mrs Uzan-Greer's Auckland address. The letter requested that Mrs Uzan-Greer attend a meeting of the committee to discuss the possibility of the termination of her employment. The grounds for such action were noted as incompatibility with other Syndicate members. The letter concluded:

"Please arrange a time and place to meet. Since you do not appear to be at home during the day, I am inferring that there is no illness-related reason why you could not meet with us at the school. I propose a time during the school day so that you will not be inconvenienced."

Mrs Uzan-Greer was absent from New Zealand from 6 August 2000 until 23 October 2000. She had made comprehensive arrangements for the care of her son and for the redirection of mail to Ms Abreu's address in Christchurch. Mrs Uzan-Greer made a point to contact Ms Abreu on a fortnightly basis. She was in contact with her son regularly. The respondent submitted that in the circumstances it could not be held responsible if Mrs Uzan-Greer did not receive mail posted to her Auckland address. I will deal with that submission shortly, suffice to say that Mrs Uzan-Greer did not receive the letters of 4 and 7 September or was notified of their content until her return to New Zealand on 23 October 2000. That obviously explains Mrs Birdsall's explanation saying, "we did not hear from her". The Board formed the conclusion that Mrs Uzan-Greer was avoiding the issue.

The Board waited approximately a month before writing to Mrs Uzan-Greer again. According to Mrs Birdsall, the Board desired to determine the issue before the Gazette advertising begun. She said that apart from actual threat of resignations, disaffected staff might commit themselves to fresh positions. On 10 October 2000 the Board wrote:

"It is particularly urgent that we hear from you because we have scheduled a meeting to be held tomorrow, Wednesday 11 October in the principal's office at 3.30pm. The meeting will take place whether or not you are present. You may wish to bring a representative to support you, or make use of telephone conference facilities if necessary".

Courier sent the letter. In addition, a Board member, Mr Maskell telephoned Mrs Uzan-Greer's Auckland residence on 10 August to press home the urgency for her to contact him. Mr Maskell spoke to a friend of Mrs Uzan-Greer's son. He read the letter out to that person and was told that Mrs Uzan-Greer "was overseas and would be back in two weeks". Mrs Uzan-Greer was not informed of this letter until her return from overseas.

The Employment Committee of the Board met on 11 October 2000 as planned to decide Mrs Uzan-Greer's employment. In her absence or any contact from her, the committee proceeded with the meeting and agreed "unanimously" to dismiss her. In a letter dated 12 October 2000 the committee provided the following reason for the dismissal:

"We had reached the point where the three [other] teachers in your syndicate were going to leave if you returned and we had to choose between you and those teachers. In fact the situation was made worse when the associate principal advised the principal on the day of the scheduled meeting, that if you were returning as planned, she would be leaving at the end of the year".

A process server delivered the letter to Mrs Uzan-Greer's Auckland address. The delivery was confirmed but that the respondent was advised that Mrs Uzan-Greer was on holiday in the South

Island. On 16 October, Mr Maskell rang Mrs Uzan-Greer's residence. Mr Maskell spoke to Mrs Uzan-Greer's son. He indicated to him urgency for his mother to contact Board. Mrs Uzan-Greer's son contacted his mother who informed her of the dismissal. Mrs Uzan-Greer contacted Mr Maskell shortly after that.

The Board advised the Teachers Registration Board of the dismissal.

Evaluation

The factual evidence is largely not in issue. Although Mrs Uzan-Greer may have had issue regarding the initial disciplinary investigation, it was not an issue before me. The employment problem arises because there were issues regarding Mrs Uzan-Greer's interpersonal relationships with members of her syndicate that the Board had investigated and resolved. The problem was addressed in the sense that the Board after a full investigation was satisfied that all that was required to do was to issue Mrs Uzan-Greer an appropriately worded letter of warning requiring that she modify her behaviour as directed or face dismissal. The Board then instructed the Acting Principal at the time, to offer Mrs Uzan-Greer "every reasonable assistance to enable her to meet the [Board's] requirements". Regular meetings were to take place to monitor the situation. Mediation involving those affected was suggested by the Board as a constructive "start to mending bridges" with affected staff.

Significantly, the Board granted Mrs Uzan-Greer extended leave on 19 July 2000 for medical reasons as from 21 July 2000 until 30 October 2000. Whatever doubts the Board might have had regarding the legitimacy for the need to take such time off work are irrelevant. The plain fact is that the Board granted Mrs Uzan-Greer's her request for leave. I have mentioned that for the reason that Mrs Birdsall in her evidence admitted that she was "struggling" with the concept that someone can plan to be sick as indicated. I should note, that the Board granted Mrs Uzan-Greer leave on the basis that she provide monthly medical certificates to support the need for leave until the end of October. A medical certificate was produced. That certificate indicated that Mrs Uzan-Greer should be fit to start work on 30 October 2000. The certificate was not challenged.

The Board it appears was determined that Mrs Uzan-Greer start her leave earlier than which she anticipated. Consequently, Mrs Uzan-Greer made a request and a reasonable one in my opinion, to the Acting Principal to attend school "occasionally" in the first week of the third term in order to finalise matters with her syndicate. That request was denied. As it happened, Mrs Uzan-Greer was in effect issued immediate notice to commence leave at the end of the school day on 21 July 2000. As a result, Mrs Uzan-Greer came under considerable pressure to complete her work. The Board was significantly guided at the time by the advice of the Acting Principal. I have no doubt after considering the evidence, the Acting Principal was in my opinion unnecessarily obstructive and indeed provocative in her response to Mrs Uzan-Greer's request. It certainly ran counter to the spirit of the Board's instruction to offer Mrs Uzan-Greer "every reasonable assistance" to meet the Board's requirements that they set for her. There is nothing in the evidence that suggests to me that Mrs Uzan-Greer's behaviour was in any way responsible for the tensions that occurred on 21 July.

In granting leave, the Board was mindful of the impact such leave would have on the programme it set for Mrs Uzan-Greer in the 22 June letter. The Board specifically advised Mrs Uzan-Greer that:

"The programme set out in our letter to you June 22nd, including fortnightly meetings with the Principal etc. will resume on your return to work".

There is no doubt that the Board agreed to defer the programme it set for Mrs Uzan-Greer until her return to work on 31 October 2000. In the letter of 7 September 2000, the Board expressed the view

that “if all had gone well” then good relations would have been restored by that time. That is affirmation that the Board was confident that the programme it set for Mrs Uzan-Greer was the practical solution to problem. No blame can be pointed at Mrs Uzan-Greer for any frustration the Board might have experienced caused by delay in implementing the programme. I do note that approximately four weeks passed from the disciplinary letter of 22 June to her taking leave on 21 July 2000. The investigation did not reveal any employment concerns regarding Mrs Uzan-Greer in that period.

The next significant event was in August 2000, when the Board appointed a new Principal. The Board clearly anticipated that Mr King would continue with the programme that it had set for Mrs Uzan-Greer. According to Mr King, sometime before the 4 September 2000, the Personnel Committee of the Board invited him to a meeting in order to brief him on the circumstances affecting Mrs Uzan-Greer. It was at that initial meeting that Mr King said “he shared his findings” to the committee regarding adverse teacher comment should Mrs Uzan-Greer return. The Board at that stage apparently sought legal advice. On legal advice, the committee instructed Mr King to interview the three concerned teachers again and to ask each of them “bluntly” whether the school could rely on them to return next year if Mrs Uzan-Greer returned to school. It is claimed that each teacher said they would not contemplate leaving if assured that Mrs Uzan-Greer would not return. I note in a written statement admitted by consent, one teacher (Garden) was less decisive. The Board of course acted on the information relayed back to it by Mr King. The Board in my opinion had no reason to doubt that Mrs Uzan-Greer would not return. In reality, the Board felt in the circumstances that dismissal was the only practical option open to it.

Had Mrs Uzan-Greer met with the committee as intended, I am unable to think what she might have contributed further other than reassure the committee that it had investigated the problem and that a practical resolution was put in place pending to be implemented on her return to school. The Board had confidence that the resolution would work. No new issues had emerged that would reasonably put doubt in the minds of the committee members that the programme would not work. The only issue as I see it, was that Mrs Uzan-Greer had yet to prove to the Board that the resolution put to her would work. At that point, pending her return, there was nothing further that Mrs Uzan-Greer could do assist her situation. The Board however owed Mrs Uzan-Greer reciprocal obligations of fair treatment. It ought to have in the circumstances in my opinion provided each of the affected teachers reassurance that it was constructively dealing with the issues regarding Mrs Uzan-Greer.

This now leads me to the teachers threats should Mrs Uzan-Greer return to school. I am satisfied that the teachers concerned were not aware of the details of the action plan contained in the 22 June 2000 letter. Mrs Birdsall testified that only the Principal was notified. There is nothing to suggest that the previous Acting Principal or Mr King advised the teachers concerned or reassured them that the matter was under control. It appears that the teachers expressed their concerns in total ignorance of the committee’s actions in addressing the situation. By all accounts the basis of the teachers threats arise from the same concerns that gave rise to the complaints against Mrs Uzan-Greer in the first instance but unknown to them that the Board had taken steps to resolve their concerns. Their responses are consistent with that impression. The teachers should have at least been informed that positive steps are taken to remedy their concerns. It is not open to speculation as to what the teachers reactions might have been if they were informed. The Board should have in the circumstances as part of the requirement to act fairly, to have attempted to resolve the situation with the affected teachers: *Canterbury Clothing Union v Caroline Goodman Fashions Ltd [1982] ACJ 121*. It did not do so. Obviously, the teachers need not be informed of the details of action taken against her The Board ought to have as a minimum requirement advised the teachers of the situation and promoted the result advantageously. Had it done so, the committee would have at least received informed responses. Whatever those responses might be, given the action against Mrs Uzan-Greer and the severe consequences of any further breach, the Board had an obligation to reassure the

teachers against any enduring anxiety over its decision. Given those circumstances, I am not satisfied on the balance of probability that it could be claimed that the alleged incompatibility was so severe as to leave no option but to dismiss Mrs Uzan-Greer.

Finally, I wish to address Mr Andrew's submission that the issues were such, originating from junior teachers, that management and not the Board should have dealt with the problem. It was submitted that in effect the staff had a veto on Mrs Uzan-Greer's employment. It appears from the evidence that Mr King initially obtained the teachers responses without knowing of the disciplinary action taken against Mrs Uzan-Greer. He then was directed by the committee to confirm those responses knowing of the disciplinary action but without disclosing to the teachers that action was underway to address their concerns. Mr King ought to have made disclosure for the reasons noted but ultimately the Board must assume responsibility in failure to do so.

That disposes of the substantive reasoning for the dismissal. Mrs Uzan-Greer raised a number of procedural defects. First was that she was never informed or put on notice of the issues that arose affecting her return to school. Second, it is claimed that she was never properly notified of the meetings resulting in her dismissal.

Commencing with the first alleged defect, Mrs Uzan-Greer claims that Mr King would have known of the concerns affecting her return to school when they spoke and that he never disclosed those concerns to her. With regard to the claim that Mr King withheld important information, I agree. The fact that he never disclosed the concerns is admitted. I found it significant that Mr King never covered this aspect of the facts in his written brief. In cross examination however he said he felt no obligation in the circumstances to inform Mrs Uzan-Greer of the issues affecting her before the Board. When asked why, he said that he assumed that she had received the letter of 4 September. That is not a sufficient explanation given the importance attached to the matter and likely ramifications affecting Mrs Uzan-Greer's employment. Not to disclose such information in the circumstances when the opportunity clearly warranted disclosure was in my opinion a serious error of judgement. That is especially the case, given the opening remarks in the Board's letter of 4 September. The Board in effect was apologetic of having to raise this "important issue" by letter in the first instance, but justified in doing so due to failure by Mr King to contact her by phone. By mere implication, the Board's remarks confirm or that it was led to believe that Mr King did try to contact Mrs Uzan-Greer with the intention to raise with her the issues affecting her return to school. When the opportunity availed itself to make disclosure, the failure to do so significantly, in my opinion contributed to the Board's perception that Mrs Uzan-Greer was deliberately avoiding the issue. The error is not for any esoteric legal reason, but simply as a matter of plain common sense and the maintenance of good faith employment relations.

The second alleged procedural shortcoming is that Mrs Uzan-Greer claims she was never notified of the disciplinary meetings against her. She was absent from New Zealand from 6 August 2000 until 23 October 2000. The respondent denies that it knew that she was overseas. Mrs Uzan-Greer said that she advised the respondent (Mrs Birdsall) as well as the school that she would be spending time out of Auckland. She says that Mr King was advised of her whereabouts on the 4 September 2000 or very shortly thereafter although Mr King denies that. It is evident that the respondent was aware that Mrs Uzan-Greer would be spending time away from her Auckland home. The process server also confirmed that on 13 October 2000. On the documentary evidence before me, the earliest that the respondent was aware that Mrs Uzan-Greer was overseas was 10 October 2000 (Paul Maskell note). The respondent therefore was on notice that she was not in the country when it made the decision to dismiss her.

The other aspect of this claim is that Mrs Uzan-Greer asserts that the respondent had instruction of the delivery address of all communications regarding her employment. In the letter of 17 July 2000, the Chairperson of the Board noted:

“ The letter of reply to your correspondence of 29 June, requesting leave without pay, was forwarded to you on the 6 July via your employment advocate Lee Goffin. The delivery address being in response to Lee Goffin’s request: that all future correspondence be sent via her..”

That instruction was never revoked either by Mrs Uzan-Greer or Ms Goffin. Without the benefit of hindsight, it is not credible for the respondent to say that it believed that Ms Goffin was not acting for Ms Uzan-Greer at the material time. In cross examination, Mrs Birdsall conceded that Mrs Uzan-Greer would have expected the Board to have sent all communications to Ms Goffin.

Overall, the circumstances of serving communications on the applicant were less than acceptable. However, Mrs Uzan-Greer must accept some responsibility for not leaving explicit and fresh instructions to the respondent where to send mail or means of contact in case of urgency.

The determination of the Authority

The onus was on the respondent to justify procedurally and substantively the dismissal of Mrs Uzan-Greer. That onus has not been discharged. Mrs Uzan-Greer was unjustifiably dismissed. Mrs Uzan-Greer has a personal grievance.

Remedies

Lost remuneration

Mrs Uzan-Greer seeks to recover actual loss of salary. A structured process of reasoning is required to determine an award under this head. I will adopt the approach in *Trotter v Telecom Corp [1993] 2 ERNZ 659:694*, with regard also to the template adopted by my colleague, Wm Hodge, in *Judd v Waikato District Council AT39A/01 26 July 2001 Unreported*, in the calculation of loss wages. The process is as follows:

1. Establish proven loss wages, that is the gross sum that the applicant would have earned during the term of employment with the respondent up until the date of hearing.
2. Determine whether there are any factors, which suggest that the discretion to extend the period beyond the statutory three months should be exercised.
3. Determine the applicant’s gross taxable earnings, which were attained by her during the relevant time period as mitigation.
4. Determine whether contributory fault is warranted and if so, reduce that gross figure by the amount to such extent as is just and equitable.

The resulting “bottom line” is gross and will be subject to taxation at source.

I have assessed Mrs Uzan-Greer’s gross wage at the time of dismissal to be \$51,350.00 (\$48,600.00 gross per annum including management unit allowance of \$2,750.00 per annum). Therefore, the gross proven loss as a result of the personal grievance by the applicant from the date of dismissal on 12 October 2000 until the date of hearing is \$81,304.16 gross.

Having determined the gross proven loss, I must now determine whether there are any factors that would preclude me from awarding the applicant more than the statutory minimum of three months remuneration. Mrs Uzan-Greer is a fully qualified, New Zealand trained, Primary School Teacher.

At the time of her dismissal, she was a Senior Teacher. In the period of 19 months Mrs Uzan-Greer has not found permanent employment. The reason or obstacle preventing her attaining secure employment is not having a written reference from the respondent or apparent failure by the respondent to act as a referee. This matter was discussed at the investigation and the respondent did agree to provide the applicant a suitably worded reference. There are also issues of “recency” and missing opportunities of career development over the 19 months period. The law is quite principled that unless there are good reasons to award the statutory minimum of three month’s wages, proven loss of wages should be ordered: *Pascoe v Covic Motors Ltd [1994] 2 ERNZ 152*. In the circumstances, I find no good reason why the applicant should not be awarded the full amount of her claim for lost wages.

Having decided that the applicant is entitled to be awarded the full amount of loss remuneration, I must now consider the extent to which the applicant has sought to mitigate her loss. This is a positive obligation on an employee and must be decided on the relevant merits of the case. In this instance, Mrs Uzan-Greer was paid the sum total of \$10612.85 following her dismissal. A portion of that amount was in settlement of a back pay claim. The balance included 6 weeks termination pay and holiday pay. Since her dismissal, Mrs Uzan-Greer has been employed for approximately 29 weeks. Mrs Uzan-Greer very helpfully provided the Authority her income details. I need not set those details out in full, suffice to note that the gross income earned since dismissal comes to \$43,781.21 (including \$5,592.31 termination pay subsequently received). Since the time of dismissal, Mrs Uzan-Greer has not found permanent employment. The problem in part is not having a current reference. The jobs taken up are irregular, and entail in the main casual relieving positions at a much lower income. I am satisfied that Mrs Uzan –Greer has done much within her power to mitigate her loss.

Under s 124 of the Act, it is a mandatory requirement that the Authority consider the extent to which the actions of the employee contributed to the situation that gave rise to the personal grievance. The Authority is also obliged (in a remedy setting) to reduce the remedies that would otherwise have been awarded “if those actions so require”. The contributory conduct must be clearly proved rather than asserted. Following the general guideline set out in *Paykel Ltd v Ahlfed [1993] 1 ERNZ 334:337*, I am not required to consider whether in this case the applicant’s relationship with staff contributed to her actual dismissal but whether it contributed to the situation that gave rise to the claim of unjustifiable dismissal. I find that Mrs Uzan-Greer must in the circumstances accept some responsibility for the situation that gave rise to her claim particular that aspect of the grievance concerning procedural shortcomings. The respondent in the circumstances for the reasons given cannot entirely be responsible for the procedural defects. Some contribution must be given for the difficulties that arose but the amount is not significant. I put it at 15%. That is, in my opinion a just and equitable reduction.

Given that assessment of the applicant’s claim for lost remuneration, the starting point for an award under s 128 is \$81,304.16. The applicant was obliged to take steps to mitigate that loss. I found that she has. Subtracting \$43,781.21, which is the combined gross earnings, leaves a total of \$37,522.95. Reducing that sum by 15% (or \$5,628.44) leaves a total of \$31,894.51.

In terms of section 123 (b) of the Employment Relations Act 2000, the Kohimarama School Board of Trustees shall pay to Mrs Uzan-Greer \$31,894.51 (gross) as lost remuneration.

Interest

In her statement of problem Mrs Uzan-Greer has sought interest. The power to award interest appears at section 11 of the second schedule to the Act. The rate of interest shall be such rate not exceeding the 90 day bill rate plus 2%. My knowledge of the 90-day bill rate is a little under 6%.

The calculation of interest in arrears claims is straightforward. This is not an arrears claim but a claim where interest is sought in a personal grievance/lost remuneration setting. I intend to adopt an alternative approach occasionally applied by the Court under the prior legislation. I will meet the claim in the overall award in terms of s 123(c)(i) of the Act.

Compensation

Mrs Uzan-Greer claims \$30,000 compensation for humiliation, loss of dignity and injury to feelings as a result of the respondents actions. I heard evidence from Mrs Uzan-Greer as to the hardship she and her son have had to endure as a consequence of her dismissal. I accept that she has suffered hardship both emotionally and financially as a result of the dismissal. The real uncertainty that she will have her career restored unblemished has added to her emotional vulnerability. Mrs Uzan-Greer talked of "despair" and I can say after observing her and considering the evidence that is self evident. I must say that right up until the time of the investigation hearing, Mrs Uzan-Greer suffered considerable stress over the prospect of losing her registration to teach. The hearing took place on 20 May. Her Teacher Practising Certificate was due to expire on 31 May 2002. The delay reinforced Mrs Uzan-Greer's suspicions that the Board was not going to support her with the renewal and therefore effectively put an end to her teaching career. The problem as the respondent conveyed it to me was that the former Acting Principal was required to fill out a section of the renewal certificate. Of course and I must stress, there are no issues regarding Mrs Uzan-Greer's competency as a teacher or issues of safety that would affect a renewal. Through the Authorities intervention to have this aspect of the problem rectified whilst the parties were all present, the respondent undertook to have the relevant portion of the document signed and sent to the Teacher Registration Board in time. The delay undoubtedly resulted in stress and in my opinion avoidable.

I consider that Mrs Uzan-Greer in the circumstances is entitled to compensation. I will take into account the interest issue dealt with above. I will arrive at a global figure. An appropriate award of compensation is set at \$10,000. The Authority is required under this head, as it did for lost remuneration, to make an assessment as whether the applicant's actions contributed towards the situation that gave rise to the personal grievance. I see no reason to alter the percentage identified as the applicant's culpable contribution to her dismissal. Therefore the award of \$10,000 is reduced by 15% (\$1,500) to \$8,500.

In terms of section 123(c) of the Employment Relations Act 2000, The Kohimarama School Board of Trustees is ordered to pay Mrs Uzan-Greer, \$8500 without deduction, as compensation for humiliation, loss of dignity etc suffered as a result of her unjustified dismissal.

Costs

In the first instance I ask Mr Andrew to discuss this with Mr Parmenter. Hopefully they can resolve this matter as between the parties. Should that prove to be unsuccessful, then I will of course determine the matter of costs for them in the usual manner.

Tom Woods
Member of Employment Relations Authority