IN THE EMPLOYMENT COURT
AUCKLAND

[2017] NZEmpC 41
ARC 55/13
ARC 79/13
ARC 25/14
ARC 48/14

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER	of proceedings removed
AND IN THE MATTER	of applications for leave to raise personal grievances out of time and pursuant to s 4(7) Limitation Act 1950 to bring proceedings
BETWEEN	KATHLEEN CRONIN-LAMPE First Plaintiff
AND	RONALD CRONIN-LAMPE Second Plaintiff
AND	THE BOARD OF TRUSTEES OF MELVILLE HIGH SCHOOL Defendant

Hearing:	30 August 2016, further evidence and submissions of counsel filed 30 November 2016 and 14 December 2016 (Heard at Hamilton)
Appearances:	T Braun and R Karalus, counsel for Mr and Mrs Cronin-Lampe P N White, counsel for The Board of Trustees of Melville High School
Judgment:	26 April 2017

INTERLOCUTORY JUDGMENT OF JUDGE M E PERKINS DEALING WITH APPLICATIONS FOR LEAVE TO RAISE PERSONAL GRIEVANCES OUT OF TIME AND TO BRING PROCEEDINGS

Introduction

[1] The plaintiffs, Kathleen and Ronald Cronin-Lampe, were employed as guidance counsellors by the defendant, the Board of Trustees of Melville High School (the BoT) from 1996 until a date in 2012. Neither of them returned to school at the commencement of the school term in 2012. However, both were then granted special paid leave until 24 February 2012. Following the expiry of that special leave, they then each used up sick leave entitlements. Once the sick leave entitlements had been used up, both plaintiffs ceased employment with the BoT on the grounds of medical retirement. The exact dates when the plaintiffs individually ceased employment is difficult to ascertain from the documents filed so far, but it will be a matter of record and capable of being proven when the trial of these matters proceeds. Personal grievances alleging they had suffered unjustifiable disadvantage in employment with the BoT were raised by Mr and Mrs Cronin-Lampe on 26 January 2012. Unsuccessful proceedings commenced in the Employment Relations Authority (the Authority) by Mr and Mrs Cronin-Lampe have led to a challenge being filed with the Employment Court.

[2] Two interlocutory applications have been filed by the plaintiffs. The first is an application pursuant to s 114(3) of the Employment Relations Act 2000 (the Act) seeking leave to raise further personal grievances out of time. The second is an application pursuant to s 4(7) of the Limitation Act 1950 seeking leave to bring proceedings out of time. The proceedings to which these applications relate are summarised as follows:

(a) ARC 55/13: This is a de novo challenge by Mr and Mrs Cronin-Lampe to a determination of the Authority dated 12 June 2013.[1] That determination dealt with the personal grievances that Mr and Mrs Cronin-Lampe commenced against the BoT and which they had formally raised on 26 January 2012. The grievances were not settled at mediation. The determination followed a four-day investigation meeting conducted by the Authority. The claims were dismissed in

1 *Cronin-Lampe v Board of Trustees of Melville High School* [2013] NZERA Auckland 249.

their entirety. A statement of claim commencing the challenge was dated and filed 10 July 2013. It was accompanied by the determination, the subject of the challenge. The plaintiffs have since lodged an amended statement of claim with the Court in respect of the challenge. This has not yet been formally accepted for filing and awaits the outcome of the applications to be considered in this judgment. The challenge is against all matters by way of grievances dealt with in the determination and is against the Authority's determination declining to consider other grievances on the basis they were not raised within the 90-day period allowed for raising a grievance, and the Authority therefore considered it lacked jurisdiction to deal with them.[2] It is now the subject of the first of the applications seeking leave to raise further grievances out of time. The challenge seeks a hearing de novo. The application for leave to raise personal grievances out of time is clearly filed as an alternative to the challenge and out of an abundance of caution in case the Court upholds that part of the determination declining to consider the matters found to have been belatedly raised.

(b) ARC 25/14: This is a matter where statements of problem filed by Mr and Mrs Cronin-Lampe in the Authority on 4 April 2014 have been removed to the Court. The removal was made pursuant to a determination of the Authority dated 14 April 2014.[3] The proceedings involve a common law action for damages and related remedies arising from alleged bodily injury caused by breach of contract, tort and breach of statutory duties and are the subject of the second interlocutory application also the subject of this judgment. Issues of limitation have been raised. As stated earlier, an application for leave pursuant to s 4(7) of the Limitation Act 1950 has been filed. Affidavits in support, in answer and reply have been filed by the parties.

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2 Employment Relations Act 2000, s 114(1).

3 *Cronin-Lampe v Board of Trustees of Melville High School* [2014] NZERA Auckland 146.

[3] The application for leave to raise personal grievances out of time was originally lodged with the Authority on 14 May 2014 but was then removed to the Court. Such removal was made pursuant to a determination of the Authority dated 9 June 2014.[4] If the application for leave was to be granted, the particular claims which will then be raised would usually need to be referred back to mediation pursuant to s 114(5) of the Act. In view of what has already transpired in these proceedings, and in view of the decision reached in respect of this application as set out hereafter, further mediation is dispensed with by the Court exercising its powers under s 188(2) of the Act. As an aside, the factual matters upon which the alleged grievances are based are in most cases the same as or similar to the factual allegations upon which the common law action is based.

The present position with the pleadings

(a) Mr and Mrs Cronin-Lampe's challenge to the determination

[4] As indicated, the amended statement of claim dated 31 March 2014, has been lodged with the Court but not yet accepted for filing. The reason for this is that while the challenge to the findings in the determination (and contained in the first statement of claim filed) is covered by the amended statement of claim, the plaintiffs have added in further particulars and claims relating to the alleged grievances which the Authority Member found were not raised within time or alternatively may be in addition to those alleged grievances. These are all the subject of the opposed application for leave to raise grievances out of time.

[5] Unfortunately, the proposed amended statement of claim appears to contain drafting errors giving rise to some confusion in the matter. Matters which appear to relate to Mrs Cronin-Lampe's personal grievances claims have been itemised as if they were particulars of or conflated within Mr Cronin-Lampe's claims. In addition, under paragraphs dealing with Mr Cronin-Lampe's claims, he is referred to as "she" or "her". This drafting confusion appears to have arisen as a result of some of the pleadings contained in the statement of claim presently filed to commence the challenge being carried through to the proposed amended pleadings and being placed

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4 *Cronin-Lampe v Board of Trustees of Melville High School* [2014] NZERA Auckland 223.

under wrong headings applying as between the two plaintiffs. In view of the decision I have reached in respect of the application for leave to raise grievances out of time, the proposed amended statement of claim should now be accepted for filing. However, it will need to be further reviewed and amended. The BoT will then be in a position to plead to it by way of a further statement of defence, which will no doubt raise the limitation issues deferred for determination at the hearing of this challenge.

[6] For the purposes of this judgment, the application for leave to raise grievances out of time has been considered by concentrating on the particulars contained within the application for leave itself and making logical sense of the proposed pleadings.

(b) The common law proceedings

[7] The pleadings presently relating to the common law action are contained in an amended statement of claim dated 4 December 2015, a statement of defence and counterclaim to the amended statement of claim dated 7 January 2016, and a reply to affirmative defences and statement of defence to counter-claim dated 12 February 2016. The pleadings contained in the amended statement of claim dated 4 December 2015 were filed following an interlocutory judgment of 6 August 2015 requiring the plaintiffs to file further particulars.[5] Proposed further particulars have also been notified to the defendants in a confidential memorandum. This has enabled the parties to argue the application made pursuant to s 4(7) of the Limitation Act. Under this application the plaintiffs seek an order granting leave, should such leave be necessary, to enable them to bring the proceedings, notwithstanding that two years or more have (or may have) elapsed from the date when the alleged causes of action accrued in their favour.

[8] The causes of action rely upon alleged unusual, exceptional and aggravating stressors and trauma dating from 1996 until 2011. There are five causes of action as follows:

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5 *Cronin-Lampe v Board of Trustees of Melville High School* [2015] NZEmpC 136.

(a) That the actions and failure of the BoT towards Mr and Mrs Cronin-Lampe were breaches of the terms of their employment agreements implied by common law. Such actions are described in the amended statement of claim as failures of the BoT to:

- Protect Mr and Mrs Cronin-Lampe from the traumatic incidents.
- Ensure appropriate support be provided to Mr and Mrs Cronin-Lampe to address the foreseeable trauma Mr and Mrs Cronin-Lampe suffered in the provision of the services.
- Provide a safe system of work to ensure Mr and Mrs Cronin-Lampe's mental and emotional health and wellbeing.
- Identify and manage the hazards or harm in the workplace and to ensure Mr and Mrs Cronin-Lampe did not suffer the harm or be exposed to the hazards in the workplace.
- Monitor and manage Mr and Mrs Cronin-Lampe's case load and ensure it was within manageable levels, and was not causing the plaintiffs physical or mental harm caused by work-related stress.
- Provide Mr and Mrs Cronin-Lampe with adequate supervision, support, case load management and counselling.
- Provide adequate resourcing of the department in which Mr and Mrs Cronin-Lampe worked.
- Provide adequate professional development.
- Address workplace bullying of Mrs Cronin-Lampe by another staff member.
- Provide training in trauma and suicide.
- Manage and monitor Mr and Mrs Cronin-Lampe's stress levels.
- Ensure Mr and Mrs Cronin-Lampe had regular time off from the demands of on call work and provide the cover to enable this to happen.

(b) That the actions and the failure of the BoT towards Mr and Mrs Cronin-Lampe amounted to breach of implied contractual terms derived from duties pursuant to the Health and Safety in Employment Act 1992. The statement of claim then itemises the sections of that Act from which the implied terms are to be derived. The same breaches are then pleaded.

(c) That the actions and failures of the BoT towards Mr and Mrs Cronin-Lampe amounted to breach of implied contractual terms derived from the Secondary School Teachers Collective Employment Agreement (SSTCA). The amended statement of claim itemises three requirements from the collective agreement and then specifies the same particulars in which it is alleged the BoT failed.

(d) That the actions of the BoT towards Mr and Mrs Cronin-Lampe amounted to breaches of statutory duties pursuant to the Health and Safety in Employment Act 1992 and the State Sector Act 1988. The same provisions from the Health and Safety in Employment Act as in the previous cause of action are relied upon to support the duties. Insofar as the State Sector Act is concerned, s 72A of that Act is pleaded as requiring the BoT to be a good employer and to ensure the fair and proper treatment of Mr and Mrs Cronin-Lampe regarding good and safe working conditions. The same particulars of breach are then pleaded.

(e) That the BoT owed a duty of care to Mr and Mrs Cronin-Lampe to avoid and not cause bodily injury and that the BoT was negligent in breaching the duties of care, the particulars of which are the same as previously pleaded in the other causes of action.

[9] It is difficult to ascertain how causes (d) and (e) are within the jurisdiction of this Court.[6] However, no application has yet been made to have them struck out.

[10] Insofar as remedies are concerned, Mr and Mrs Cronin-Lampe seek:

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6 See *Hally Labels Ltd v Powell* [2015] NZEmpC 92 at [130]-[134].

A. Compensatory damages for distress in an amount to be quantified prior to trial.

B. Damages for loss of career, employment, mental state and employability in an amount to be quantified prior to trial.

C. Compensation for loss of income from the date the employment relationship ended to the date of retirement in an amount to be quantified prior to trial.

D. Reimbursement of medical costs and expenses.

E. Compensatory damages for loss of any benefit, namely the Board of Trustees' contribution towards the teacher's superannuation scheme in an amount to be quantified prior to trial.

F. Exemplary damages.[7]

G. Interest.

H. Costs.

Relevant factual background

[11] Mrs Cronin-Lampe commenced employment at Melville High School in 1996. Her employment was covered by an individual employment agreement. Her job description was as a long-term relieving guidance counsellor. Her individual employment agreement incorporated the terms and conditions of the SSTCA. Her position became permanent on 8 August 1997 and the BoT appointed her on that date as the head of the guidance counselling department at the high school.

[12] Mr Cronin-Lampe commenced employment at Melville High School in 1996 as a part-time guidance counsellor working one day per week. This was in the form of a job-sharing arrangement with his wife to cover for her during periods she was away to complete her master's degree. Mr Cronin-Lampe's employment at that time was covered by a memorandum of understanding. On 18 November 1997, Mr Cronin-Lampe's employment was converted to a permanent part-time (0.6 full time equivalent) position as a part-time guidance counsellor. His terms and conditions of employment were covered by an individual employment agreement incorporating, as appropriate, terms of the SSTCA. In March 1998 Mr Cronin-

[7] Exemplary damages for breach of contract are not available at the Employment Court: see *Paper Reclaim Ltd v Aotearoa International Ltd* [2006] 3 NZLR 188 (CA) at [162]-[183]; *Prins v Tirohanga Group Ltd* [2006] ERNZ 321 (EmpC) at [80].

Lampe was appointed to a full-time position as a guidance counsellor. There were subsequent variations to Mr Cronin-Lampe's employment agreement which do not need to be set out in this summary.

[13] Between the commencement of their employment in 1996 and the time their employment came to an end in 2012, Mr and Mrs Cronin-Lampe alleged they came under unreasonable stress as a result of traumatic incidents and stressors placed upon them in their roles as guidance counsellors. These incidents and stressors consisted of 22 suicides by students and former students over the 16-year period, and death by other causes of students, former students, teaching staff and close family members of students and staff. One student was murdered. Mr and Mrs Cronin-Lampe say it was left to them, without proper oversight and support by the Principal of Melville High School and the BoT, to provide guidance, counselling, pastoral care and assistance to the students, staff and their close families when such incidents occurred. In particular, Mr and Mrs Cronin-Lampe allege that they were expected to be on call 24 hours a day, seven days a week. They allege they were required to deal with at risk students without proper support and facilities, and in addition were required to assist the staff of the school with any personal issues they might have.

[14] As well as these incidents and stressors, Mr and Mrs Cronin-Lampe allege that between 1996 until 2011 they were required to provide guidance, counselling, pastoral care and assistance to students and teachers in respect of issues relating to sexual orientation, sexual and psychological abuse, eating and psychological disorders, issues relating to self-harm, issues relating to addictions and mental health issues including depression and anxiety.

[15] Of relevance to the limitation issues now arising from the present applications is the fact that there were breaks in the traumatic events between 2006 and further alleged causative factors and incidents in 2009, 2010 and 2011. In December 2009, December 2010 and January 2011, there was one death of a student by electrocution and two further student suicides. In March 2011, one of the teaching staff died.

[16] In 2011 difficulties arose between Mr and Mrs Cronin-Lampe and the BoT including the Principal. These difficulties, alleged as stressors by Mr and Mrs Cronin-Lampe, include reneging on terms and conditions of employment, declining paid leave requests, insisting on their constant availability to deal with traumatic incidents and other issues, failure to deal adequately with disputes with other staff members including an allegation of bullying, unsubstantiated accusations that they were not complying with their obligations as counsellors and taking time away from work without approval. These allegations were part of the disadvantage grievances raised with the BoT and subsequently dealt with in the statement of problem submitted to the Authority. Those matters which were raised and considered by the Authority are contained in the determination which is now the subject of the challenge.

[17] In 2012 Mr and Mrs Cronin-Lampe were examined by a clinical psychologist and subsequently a registered psychiatrist. Following the examinations the clinical psychologist diagnosed both Mr and Mrs Cronin-Lampe as suffering from chronic Post Traumatic Stress Disorder (PTSD). The psychiatrist who subsequently examined them diagnosed them both as suffering from anxiety disorder. Both the clinical psychologist and the psychiatrist identified the causative factors of these disorders as being the trauma and stressors they had undergone during the course of their employment with the BoT. Uncontested evidence from both the clinical psychologist and the psychiatrist has been presented in affidavit evidence in support of the applications which are the subject of this judgment. The clinical psychologist has also opined that as a result of their disorders Mr and Mrs Cronin-Lampe's ability to properly and comprehensively understand the nature and content of their grievances and claims has been affected.

[18] From time to time since the commencement of these proceedings in the Court, affidavits have been sworn and filed by Mr and Mrs Cronin-Lampe, Clive Hamill, the Principal of Melville High School and David McNulty, the Deputy Principal. These affidavits have been helpful in setting out the background and respective perspectives of the parties.

Consideration of legal principles applying

[19] Having grappled with these applications for some time now, I have reached the conclusion that it may not have been the most appropriate course to deal with the applications on a preliminary basis prior to the eventual trial of this matter. Certainly in respect of the application for leave to raise grievances out of time, for reasons which will be discussed later in this judgment, I have decided not to deal with that application as a preliminary matter in view of the way in which the challenge has been pleaded. It is deferred for consideration at the trial.

[20] As a result of the extent of the allegations and the historical nature of most of them, it has been particularly difficult in this case to determine the dates on which the various cause or causes of action accrued. The position is considerably nuanced. An added complication is that if leave needs to be granted to Mr and Mrs Cronin-Lampe to raise the personal grievances out of time (in the event that the challenge to the Authority's determination on jurisdiction is not upheld), then, as counsel for the BoT, Mr White, has submitted on its behalf, s 4(7) of the Limitation Act 1950 applies to those parts of the personal grievances which are also actions for remedies for bodily injury. If leave is granted under the Act, time to commence the personal grievance proceedings would only run from the time when the leave to raise the grievances was allowed. Under the Act the limitation period for commencement of such proceedings is three years from the date of raising of the grievance, although this can be extended.[8] However, if s 4(7) of the Limitation Act also applies to the grievances, then it would be additionally necessary to ascertain when the grievances covering bodily injury accrued. If further leave to commence the grievances is then required in the same way that is necessary in respect of the common law action, it raises very complicated issues which may only be capable of proper resolution following completion of evidence at trial.

[21] In dealing with the application pursuant to s 4(7) of the Limitation Act 1950, which presently only relates to the common law action, I first set out the provisions of that section as follows:

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[8] Employment Relations Act 2000, s 114(6).

> (7) An action in respect of the bodily injury to any person shall not be brought after the expiration of 2 years from the date on which the cause of action accrued unless the action is brought with the consent of the intended defendant before the expiration of 6 years from that date:
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> Provided that if the intended defendant does not consent, application may be made to the Court, after notice to the intended defendant, for leave to bring such an action at any time within 6 years from the date on which the cause of action accrued; and the Court may, if it thinks it is just to do so, grant leave accordingly, subject to such conditions (if any) as it thinks it is just to impose, where it considers that the delay in bringing the action was occasioned by mistake of fact or mistake of any matter of law other than the provisions of this subsection or by any other reasonable cause or that the intended defendant was not materially prejudiced in his defence or otherwise by the delay.

[22] One of the issues which has been raised by counsel for Mr and Mrs Cronin-Lampe in submissions is the question of whether reasonable discoverability applies so that the causes of action would only accrue when all of their constituents had crystallised. In this case that may be the time when Mr and Mrs Cronin-Lampe were finally diagnosed with the psychological illnesses they now suffer from. If those diagnoses were in fact the time when the causes of action accrued, then in this particular case, Mr and Mrs Cronin-Lampe do not need any extension as the common law action was commenced within two years of those diagnoses. A consequence of the causes of action accruing at that time might also be that Mr and Mrs Cronin-Lampe would be entitled to rely upon the events and stressors going right back to the commencement of their employment. The causes of action would arise at the time when they were able to make the connection between those stressors and causative factors and their illnesses: that time most likely being the diagnosis of their psychological illnesses.

[23] In this case the application under s 4(7) of the Limitation Act is made out of an abundance of caution in the event that it is held that those causes of action relating to bodily injury were not commenced within two years of the accrual of the causes of action. In this event, the Mr and Mrs Cronin-Lampe rely upon those alleged causative and stressor factors which occurred within the operative six-year period leading to the commencement of the action as specified in the section. That

particularly relates to the incidents referred to in their evidence as occurring between 2009 and leading into 2012.

[24] The BoT filed a notice of opposition to leave to extend the limitation period under s 4(7), on the grounds that:

a. There was no mistake of fact or law that caused the delay in filing the claim and seeking leave;

b. No reasonable cause for the delay in filing the claim or applying for leave exists;

c. The respondent (the BoT) has been and will be materially prejudiced in its defence by the plaintiffs' delay;

d. It would be unjust to grant leave;

e. The application for leave has not been filed within six years of any of the causes of action accruing; and

f. Upon the further grounds set out in the affidavit of David Joseph McNulty filed with [the notice of opposition].

[25] The factors which the Court needs to take into account in considering the application under s 4(7) are discrete alternatives rather than having to be established in combination before the Court may grant the extension. The onus rests upon Mr and Mrs Cronin-Lampe to prove that one or more of those factors exist.

[26] There was considerable dispute between the submissions of counsel in respect of the issue of the time of accrual of these causes of action, and whether they even constitute causes at all. Mr Braun, counsel for Mr and Mrs Cronin-Lampe, clearly relied upon the principle of reasonable discoverability in respect of the bodily injury claims and relied upon the Court of Appeal decisions of *S v G*[9] (a case

[9] *S v G* [1995] 3 NZLR 681 (CA).

involving historical abuse of a child in foster care) and *G D Searle & Co v Gunn,*[10] (which concerned a faulty contraceptive device and subsequent health problems not initially known to be caused by the fault). On the other hand, Mr White submitted that the reasonable discoverability principles enunciated in the Court of Appeal decisions can no longer be relied upon as a result of the Supreme Court's discussion of *S v G* and *Searle* in *Trustees Executors Ltd v Murray* (wrongly cited in NZLR as *Murray v Morel & Co Ltd).*[11] This was not a case involving personal injury. It concerned whether a cheque which was presented but not used for payment qualified to validate allotments made under s 37(2) of the Securities Act 1978; and whether s 28 of the Limitation Act 1950 postponed the commencement of the limitation period otherwise applicable to the plaintiffs' claims. The Supreme Court in *Murray* determined that there was no generally applicable rule of reasonable discoverability, but that if Parliament intended there to be so, it would need to amend the legislation. The discussion on s 4(7) was ancillary to the primary argument.

[27] In two decisions of this Court dealing with similar applications to the present, the Court in the employment context relied upon *Searle* to hold that the doctrine of reasonable discoverability applies not only to cases in tort, but also to those in contract where the claim relates to bodily injury. In *Bacon v NZ Post Ltd* Judge Colgan stated as follows:[12]

> **When do causes of action accrue?**
> [92] The statute does not define this point. It leaves it to Courts to do so. In *G D Searle & Co v Gunn* the Court of Appeal concluded:
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> > We would therefore hold that for the purposes of s4(7) of the Limitation Act 1950, a cause of action accrues when bodily injury of the kind complained of was discovered or was reasonably discoverable as having been caused by the acts or omissions of the defendant.
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> [93] In general, a cause of action accrues when every fact exists which it would be necessary for the plaintiff to prove in order to support the plaintiff's right to a judgment. This definition was formulated as long ago as 1897 in *Coburn v Colledge* [1897] 1 QB 702 as followed by the Court of Appeal in New Zealand in *Williams v A-G* [1990] 1 NZLR 646 (CA) at p 678 and *Williams v A-G* [1999] 2 NZLR 709; (1999) 13 PRNZ 420 (CA), at p 738; p 449. It was applied by this Court in *Leask v Air NZ Ltd* unreported,

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10 *G D Searle & Co v Gunn* [1996] 2 NZLR 129 (CA).

11 *Trustees Executors Ltd v Murray* [2007] NZSC 27 (cited as *Murray v Morel & Co Ltd*), [2007] 3 NZLR 721 at [57].

12 *Bacon v NZ Post Ltd* [2003] 2 ERNZ 570 (EmpC).

> Colgan J, 3 October 2000, AC25A/00. This Court in *Leask* also relied upon the following passage from 28 *Halsbury's Laws of England*, Limitation of Actions, at para 622:
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> > a cause of action normally accrues where there is in existence a person who can sue and another who can be sued, and when there are present all the facts which are material to be proved to entitle the plaintiff to succeed.
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> [94] The last point at which the causes of action arose was when each intending plaintiff became aware, or ought reasonably to have been aware, of her injuries attributable to the intended defendant's acts or omissions.

[28] Similarly in *Davis v Portage Licensing Trust* Judge Colgan stated as follows:[13]

> **When did the causes of action accrue?**
> [43] Causes of action in contract generally have been said traditionally to accrue upon breach. Where proceedings have been brought for compensation for personal injury and generally in tort, accrual of a cause of action has been held to occur not simply at the time of the breach of the duty of care or other act or omission relied upon, but also when the intending plaintiff's injury was discovered or ought reasonably to have been discovered: *G D Searle & Co v Gunn* [1996] 2 NZLR 129. This is what is known as the actual or reasonable discovery test. The Court of Appeal in *Searle* expressed this as follows:
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> > We would therefore hold that for the purposes of s 4(7) of the Limitation Act 1950, a cause of action accrues when bodily injury of the kind complained of was discovered or was reasonably discoverable as having been caused by the acts or omissions of the defendant.
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> [44] As the Court of Appeal noted, actual or presumed reasonable discovery of the bodily injury must also include actual or reasonable discoverability of its causation by the acts or omissions of the intended defendant but it is unnecessary for there to be discovery or presumed reasonable discovery that such acts or omissions were unlawful. That position has been adopted recently in this Court in *Bacon v NZ Post Ltd*, unreported, Colgan J, 26 August 2003, CC23/03.

[29] While Mr White has submitted that the Supreme Court's discussion in *Murray* means that the Employment Court's decisions on this point can no longer be relied upon, nor for that matter the findings in *S v G* and *Searle*, I do not necessarily accept that the decisions have been discredited in the way that he submitted. The authors of *Law of Contract in New Zealand*, state as follows regarding this conflict:[14]

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13 *Davis v Portage Licencing Trust* [2003] 1 ERNZ 627 (EmpC).

14 John Burrows, Jeremy Finn and Stephen Todd *Law of Contract in New Zealand* (5th ed, LexisNexis, Wellington, 2016) at 884.

> In recent cases in tort there has been debate as to whether the general rule that time runs from the date of damage should be replaced by a rule that says that time runs from the date that the damage was reasonably discoverable. A discoverability rule has been held to apply in three kinds of cases – those involving latent defects in buildings, personal injury, and sexual assault – and there is something to be said for applying it generally to all causes of action including claims in contract. However, in *Murray v Morel & Co Ltd* the Supreme Court declined to extend the law any further. And possible limitation problems in contract actions caused by lack of knowledge of relevant matters are now addressed in the Limitation Act 2010.

[30] The authors clearly do not regard the rule in personal injury cases, whether based on tort or breach of contract, as being necessarily abrogated by *Murray*. In the present case, the conflict has wider ramifications than just those parts of the potential causes of action covered by the s 4(7) application. For this reason it is preferable to defer a final consideration of those wider limitation issues until all matters have been canvassed at the substantive hearing of all proceedings.

[31] In respect of the present application, all that is being sought is an extension of the two-year limitation period under s 4(7) to encompass incidents and stressors alleged to accrue as causes of action within the six-year period preceding the commencement of the actions. With the complicated nature of the facts in this matter, while it is necessary to consider the present application, I prefer to leave a final determination of accrual and limitation issues until all of the evidence in this matter has been heard. The present application does not involve whether there should be a striking out or barring from pursuing causes of action, but simply whether the discretion under s 4(7) should be exercised. In that context it is helpful to consider that while the purpose of the limitation is to protect the potential defendant against being held to account for an ancient obligation, to prevent litigation being determined on stale evidence and to require due diligence of the plaintiff in pursuing a cause of action, the legislation should not deprive a potential litigant of the right to bring an action unless there are strong grounds to do so.[15] To deprive a potential litigant of that right will not be lightly decided.

[32] On the basis of the way that Mr and Mrs Cronin-Lampe have pleaded the action, there are alleged causes of action based on contractual liability for bodily

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[15] *G D Searle and Co v Gunn*, above n 10, at 131; and *Wilson v Nightingale Trading Ltd* HC Wellington, CP88/99, 4 August 1999 at 6 and 9.

injury accruing within the period of six years leading up to the commencement of the action. In the event that other alleged accrual of causes are not upheld, the plaintiffs will wish to remain entitled to pursue those causes which are the subject of the present application along with the other causes of action (and grievances) arising from the alleged breaches of the employment agreements which are not subject to the same limitation rules and which the Authority decided it had jurisdiction to deal with, although it did not uphold them.

[33] Insofar as the criteria under s 4(7) are concerned, the applicants submit that if they are out of time in commencing the causes accruing within the six-year period prior to the commencement of the proceedings, then such delay arose from their mistake of law.

[34] The mistake upon which Mr and Mrs Cronin-Lampe rely is that they were not aware and nor had they been advised that there were other causes of action available to them in addition to their personal grievance claims. The earlier affidavits of Mr and Mrs Cronin-Lampe depose that they had been legally represented since around November or December 2011, and that prior to 4 April 2014 when the claims were filed and served, they were not so aware. These assertions have been modified by the further affidavit of Mr Cronin-Lampe sworn on 30 November 2016. This was filed following realisation by him and Mrs Cronin-Lampe that legal advice as to the availability of other causes of action must have been given to them several months before the commencement of the actions. However, it is also clear from the determination of the Authority which dismissed the personal grievance claims, that Mr and Mrs Cronin-Lampe and their legal advisers would have become aware from that source of the potential to commence an action for breach of contract.

[35] Mr Braun relied upon *Ellison v L* to submit that ignorance of the law in the circumstances which existed in this case provides a basis for establishing the first criterion under s 4(7).[16] In *Ellison*, which was also a case involving an application under s 4(7) of the Limitation Act 1950, Elias J stated:[17]

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16 *Ellison v L* [1996] 10 PRNZ 531(HC).
17 At 534.

> There are statements ... which suggest that ignorance of the law as to the right to claim is not a mistake upon which an intending plaintiff can rely. I am, however, unable to read s 4(7) as excluding such mistake. Provided that the mistake of law is not one as to the provisions of s 4(7) itself (which is expressly excluded by the words of the subsection) I do not consider that the subsection imposes any qualification at all. The language used is ample. I agree with the view expressed by Tompkins J in *White* v *Arthur Nicol Ltd* [1966] NZLR 645, 647 that "ignorance of the law" is capable of constituting a mistake of law for the purposes of s 4(7). Although some caution is, as Tompkins J suggests, sensible where the proposed plaintiff contends that he or she did not know of the right to claim damages, here I accept that the possibility of claiming exemplary damages would not have been known to the applicant until she obtained legal advice.

[36] There has been some conflict in the authorities relating to the findings in *Ellison*. However, on appeal to the Court of Appeal, no criticism was levelled at the earlier findings in the lower Court.

[37] While Mr Braun has submitted that the claims were raised as soon as Mr and Mrs Cronin-Lampe became aware they were available to them, there was nevertheless some further delay before the commencement of the action in April 2014. If Mr and Mrs Cronin-Lampe should be taken to have become aware of their entitlements as a result of the statement by Member Crichton in the Authority's determination, then that delay was substantial. Even, as appears to be the case, they became aware of their entitlement through advice from their lawyer later in 2013 or early in 2014, there were still some months of delay in commencing the action.

[38] Insofar as the second criterion under s 4(7) is concerned, Mr and Mrs Cronin-Lampe rely upon the trauma from which they were suffering resulting in anxiety, stress and humiliation, as other reasonable cause occasioning the delay in commencing the action. In this regard they particularly rely upon the evidence of the clinical psychologist and the psychiatrist to claim that it was not possible for them to raise the claims earlier. While Mr White casts some aspersions on the reliability of the medical reports and in particular the similarity of language inferring collusion, I do not accept his submissions. Mr and Mrs Cronin-Lampe came under the same incidents and stressors while together carrying out virtually the same occupations and it is therefore logical that there would be similarity of language used by the medical advisors in discussing the onset of their respective illnesses. Whether or not Mr and Mrs Cronin-Lampe can eventually attribute liability to the defendant, there is

no doubt that they are ill and were so at the time when under normal circumstances they would be required to turn their mind to a particular method of advancing their causes of action. In the circumstances disclosed, it is perfectly feasible that their psychological states provided a reasonable cause for the delay in commencement of the action.

[39] The third criterion under s 4(7) relates to the issue of prejudice. It is clearly noted in *Ellison* that the evidential onus is upon the applicant to satisfy the Court that the respondent will not be materially prejudiced. In the present case, Mr White has submitted that there will be substantial prejudice occasioned to the BoT if leave is granted. This is upon the basis of the consequences of the length of delay and also on the fact that an alleged material witness has died in the meantime. Mr White has also pointed to the fact that in November 2016, Mr Cronin-Lampe swore and filed the further affidavit from which it was clear that his own and Mrs Cronin-Lampe's memory had been dimmed by the passage of time insofar as exactly when the legal advice they received occurred. Mr White submits that if they have difficulties remembering such events in 2012, then equally witnesses for the defendant will be similarly affected.

[40] Mr Braun has submitted, correctly in my view, that material factors in assessing this issue of prejudice are: the raising of the personal grievances in January 2012, the events immediately preceding that during 2011 and a lengthy investigation meeting in the Authority in December 2012, all of which could have alerted the defendant to the potential scope of the actions which might be taken. It is unfortunate that a witness has died. Nevertheless, I do not accept Mr White's submission that prejudice arises because the Authority investigation was run on a different basis from that being pursued in the Court and the witness who has died was not necessary at those proceedings so no attempt could be made to ascertain his views on the troubles that were brewing. The witness concerned was the school's adviser from the New Zealand Schools Trustees Assn during that time. I am also not satisfied that, in view of the different allegations now being made, the witness would have been able to give such relevant and probative evidence that his absence now means that the BoT is prejudiced to the extent asserted. No attempt has been made

to specify exactly the material way that that witness would have been able to assist now.

[41] Mr White also refers to the blurring of events by the passage of time and the lack of records. In a case such as the present where alleged breaches over many years are raised, there will inevitably be difficulties in recall of events and recovery and collating documentary evidence. If the prejudice arising is so substantial that a just hearing cannot result, then clearly that would be a substantially persuasive factor in determining whether leave should be granted or not. I do not perceive that to be the case here.

[42] Finally, under s 4(7), the Court must consider whether it is just to grant leave having regard to the whole of the material before it. While the delay in commencing the action and bringing the application for leave, particularly if Mr and Mrs Cronin-Lampe could no longer be labouring under a mistake of law from the time of the Authority's determination, is of concern, I am satisfied that the delay was occasioned by mistake of law on their part. In any event they have satisfied the criterion that the delay was occasioned by some other reasonable cause and that there has been no sufficient prejudice to the BoT. Accordingly, leave should be granted for Mr and Mrs Cronin-Lampe to bring their action in respect of alleged causes of action for bodily injury which accrued within the six-year period preceding 4 April 2014.

[43] Insofar as the application for leave to raise personal grievances out of time is concerned, as will be apparent I have decided this application should be deferred for consideration at the trial if it becomes necessary. The plaintiffs, Mr and Mrs Cronin-Lampe, are vehemently maintaining their de novo challenge to the entire findings in the Authority's determination. This includes that part of the determination in which the Authority decided that it had no jurisdiction to deal with those matters which are now the subject of the common law action and the application for leave to raise grievances out of time. The BoT is equally vehemently defending the challenge. In the common law action it has raised affirmative defences, including that s 317 of the Accident Compensation Act 2001 bars the claim relating to bodily injury. It has also raised counter-claims. It will no doubt raise the same defences in answer to the amended statement of claim on the challenge.

[44] It seems to me that there is a considerable danger that if the application for leave to raise grievances out of time is determined now, it will have the effect, one way or the other, of prejudicing the parties by predetermining a major part of the challenge and its defence before it has been argued. For instance a finding that the grievances were indeed raised out of time but that time would not be extended would preclude Mr and Mrs Cronin-Lampe from maintaining that part of the challenge against the determination declining jurisdiction. Equally, if the application for leave is granted, it would effectively preclude the defendant from the ability to defend that part of the challenge. Often applications such as this do come before the Court as a preliminary matter, as a means of curtailing the continuation of proceedings which might be precluded on purely legal grounds or be perceived as being without merit. That is not the case here and I do not consider it is appropriate on this occasion to consider the application in advance when it is a backup application in the event that the challenge on this part of the determination fails. In addition and in view of the overall nature of the sets of proceedings before the Court, any determination of the application at this point is not likely to shorten the trial by rendering evidence unnecessary.

Disposition

[45] In summary, the plaintiff's application pursuant to s 4(7) of the Limitation Act 1950 is granted to the extent that the two-year limitation period is extended in respect of those alleged causes of action accruing within the six-year period and for which the extension is necessary. The application for leave to raise personal grievances out of time is deferred for further consideration at the trial of this matter and at a time during the trial when it is considered the most appropriate to deal with that application. Except to the extent covered by the s 4(7) application, all arguments in respect of limitation relating to the alleged causes of action or grievances are preserved for further consideration at the trial of this matter.

[46] There may be further interlocutory applications pending in these proceedings. Whether or not that is the case, a further directions conference should now be convened so that the further progress of these proceedings may be made.

[47] Costs are reserved.

M E Perkins
Judge

Judgment signed at 12 noon on 26 April 2017