COMPENSATION FOR NON-MONETARY LOSS – FICKLE OR FLEXIBLE?

In Search of a Principled Framework for Pursuing, Defending and Deciding Claims under s 123(1)(c)

Her Hon Judge Christina Inglis
Employment Court
Auckland

Liz Coats
Bell Gully
Auckland

Part I: The framing and the principles

Judge Christina Inglis[588]

Introduction

Emotional harm has received a decidedly frosty reception from the common law over the years.[589] However, s 123(1)(c)(i) of the Employment Relations Act 2000 provides a statutory mechanism for compensating for humiliation, loss of dignity and injury to feelings.[590] The stated purpose is simple. Its application is not.

It is probably fair to say that considerably more adversarial and adjudicative effort is put into establishing whether a substantive employment claim has been made out than on an assessment of relief. This is particularly marked in claims of non-pecuniary loss, which are often fleetingly touched on in evidence, dealt with in a couple of paragraphs in written submissions and despatched in relatively short-shrift in the resulting judgment. It may be said that this has had some knock-on consequences, including in terms of quantum and consistency.

Part I of the paper examines the basis and scope of compensatory relief under s 123(1)(c)(i) and suggests a framework for approaching such claims. It also considers the case for harmonising awards across jurisdictions.

Part II explores the relatively uncharted boundaries of potential claims under s 123(1)(c)(ii), some strategies for bringing and responding to a claim under either limb of s 123(1)(c), and the potential benefits (and pitfalls) of pursuing relief in the Human Rights Review Tribunal.

---

588 The views expressed in this paper are the author's own personal views. They do not reflect the views of the Employment Court or its individual Judges. The author would like to thank Geoffrey Beinart-Smollan, Judges' clerk, particularly for his patience in dealing with the plethora of footnotes.

589 See the discussion in *Watts v Morrow* [1991] 1 WLR 1421 (CA) at 1445; *Addis v Gramophone Co Ltd* [1909] AC 488 (traditionally interpreted as meaning that damages for reputational and other non-monetary loss are not available at common law, although this has been questioned: *Johnson v Unisys Ltd* [2003] 1 AC 518 (HL); Law Commission *Aspects of Damages: Employment Contracts and the Rule in Addis v Gramophone Co* NZLC R18, 1991).

590 For earlier iterations of the provision see s 40(c) of the Employment Contracts Act 1991; s 227(c) of the Labour Relations Act 1987. Section 123 is annexed for ease of reference (Appendix 1).

Why Bother With a Framework?

Transparency, consistency of approach and predictability are guiding principles of judicial decision-making across all areas of the law. The need for an articulated framework for the assessment of harm, and the quantification of damage, is amplified in cases involving non-pecuniary loss. Compensatory awards which appear to be plucked out of thin air feed concerns about subjectivity and arbitrariness which do little to enhance public perceptions of the justice system.[591]

As has been observed:[592]

> In all national courts and international tribunals, *the most striking feature of awards for non-pecuniary loss is the absence of developed principles for injury to dignitary interests.* Things like pain and suffering, fright, nervousness, grief, anxiety, and indignities are said to constitute 'elements' of damages, but very little articulation is given to assessment of the quantum of damages. Of course such things are particularly personal, and therefore immensely difficult to measure. Yet common experience suggests that the reality of physical and emotional suffering is the very thing which has most concerned victims. *The law fails claimants if it cannot do better in articulating the basis on which these harms are to be considered.*

Section 123(1)(c) confers a broad discretion on the Court. Some have suggested that the discretion is unfettered. That is a misstatement. All statutory discretions are fettered. The discretion under s 123(1)(c)(i) must be exercised judicially and in accordance with principle, consistent with the underlying objectives of the empowering legislation. This, in turn, reinforces the need for a principled framework to be identified, and applied, in assessing claims for non-pecuniary losses, while accepting that an unduly rigid approach is to be avoided.[593]

A framework for analysis requires an understanding of what it is designed to achieve. It also requires clarity as to the nature of harm that must be established and how any resulting loss is to be quantified.

What is the Purpose of the Award?

An analysis of the cases suggests that there is no common view as to what compensatory awards for non-pecuniary loss under s 123(1)(c)(i) are directed at. Some appear to be more focussed on consolation or vindication for the employee. In others there are discernible hints of deterrence and/or punishment for the employer. A restorative approach, seeking to return the employee to their pre-breach position, is evident elsewhere.[594]

There is perhaps room for a different approach, aimed at ensuring that the wronged employee receives fair redress for the loss or damage suffered, with due regard being given to the importance of the rights that have been breached and the dynamic of the employment

---

591 *Wright v British Railways Board* [1983] 2 AC 773 (HL) at 784.

592 Grant Hammond "Beyond Dignity?" (paper presented to the Second International Symposium on the Law of Remedies, Auckland, 16 November 2007) at 10 (emphasis added). See too Harvey McGregor *McGregor on Damages* (18th ed, Thomson Reuters, London, 2009) at 3-011.

593 See, for example, the useful discussion in Nelson Enonchong "Breach of Contract and Damages for Mental Distress" (1996) 16(4) Oxford J of Legal Studies 617. "[T]he assessment of damages is a question of fact and should not be trammelled by rigid rules" per Tipping J in *NZ Land Development Co Ltd v Porter* [1992] 2 NZLR 462 (HC) at 466; "[T]here is no such thing as a rule, as to the legal measure of damages, applicable to all cases…" per Cooke P in *McElroy Milne v Commercial Electronics Ltd* [1993] 1 NZLR 39 (CA) at 41.

594 See, for example, *Trotter v Telecom Corp of New Zealand Ltd* [1993] 2 ERNZ 659 (EmpC) at 692.

relationship.[595] This might be said to fit more comfortably with the objectives underlying the Act and the Court's jurisdiction to determine matters before it consistently with equity and good conscience.[596]

Identifying the Basis for the Relief Claimed

Identifying the precise basis on which a legal claim is advanced is always a good idea. A claim for relief under s 123(1)(c) is no exception.

Section 123(1)(c) has been dealt with in around 2000 cases. The vast bulk of these claims are based on s 123(1)(c)(i). Its poor cousin, s 123(1)(c)(ii), plainly lacks popularity. It features less than seven per cent of the time. That is perhaps surprising as s 123(1)(c)(ii) is broadly worded and includes the loss of *any* benefit (a phrase which is not defined), whether of a monetary kind or not.

It may be arguable that the second limb of s 123(1)(c) has been under-utilised by practitioners, the Employment Relations Authority and the Court.[597] There is also scope for argument about the availability of broader compensatory relief outside the parameters of ss 123(1)(c)(i) and (ii) given the inclusive rather than exclusive introductory wording of the subsection ("the payment to the employee of compensation by the employee's employer, *including* compensation for ..."). The largely untapped potential of s 123(1)(c)(ii) is examined in Part II of the paper.

A random sampling of the 2000 cases reinforces the impression gleaned from experience that claimants tend to do one of two things. They either amorphously plead "humiliation, loss of dignity and injury to feelings" without attempting to distinguish between the three different heads or they advance a claim for relief on the basis that the employee has suffered "hurt and humiliation". While the latter phrase has achieved colloquial status within employment circles, "hurt" is not a separately recognised basis for relief under s 123(1)(c)(i) and nor is it particularly helpful short-hand for the two concepts, loss of dignity and injury to feelings.

It is very rare for a pleading to omit a prayer for relief under s 123(1)(c)(i). However, although such claims represent very familiar territory for practitioners and the employment institutions, it is difficult, if not impossible, to find a working definition of each of the three terms in the employment caselaw.[598] It may be that this reflects an assumption that they are so obvious their meaning goes without saying. If that is so, it does not appear to be consistent with the experience of other jurisdictions with similar tests, most notably in the

595 *Johnson v Unisys Ltd* [2001] UKHL 13, [2001] 2 All ER 801 per Lord Steyn at [20]: "It is no longer right to equate a contract of employment with commercial contracts. One possible way of describing a contract of employment in modern terms is as a relational contract." For a critique of the relational contract approach see Melvin A Eisenbert "Relational Contracts" in Jack Beatson and Daniel Friedman (eds) *Good Faith and Fault in Contract Law* (Clarendon Press, Oxford, 1997) at 291–304. For a discussion of corrective justice based compensation as redress see Margaret J Radin "Compensation and Commensability" (1993) 43 Duke LJ 56 at 61, cited in Penelope Watson "Redressing Dignitary Interests and Non Economic Loss in Novel Torts" in J Berryman and R Bigwood (eds) *The Law of Remedies: New Directions in the Common Law* (Irwin Law, Toronto, 2012) at 211.

596 Employment Relations Act 2000, s 189(1).

597 It appears that a more adventurous approach may have been adopted elsewhere. For example, the loss of competitive advantage through wrongful demotion, causing an employee to be viewed differently and paid less by a prospective employer, has been acknowledged in Canada. See RL Colson and AJ Milburn "Ancillary Claims for Damages in Employment Law" in Law Society of Upper Canada *Special Lectures 2007: Employment Law* (Irwin Law, Toronto, 2007) 427.

598 *Lim v Meadow Mushrooms* [2015] NZEmpC 192 discusses the term "humiliation" by reference to the analysis in *Director of Proceedings v O'Neil* [2001] NZAR 59 (HC). None of the terms are statutorily defined.

Human Rights arena. Nor is it consistent with the organic nature of concepts such as dignity (and its associated loss), which are complex, develop over time and which have spawned a considerable amount of academic interest and debate.[599]

Humiliation can be said to result when a person feels degraded, ridiculed, demeaned, put down or exposed, diminishing or damaging their status and/or self worth.[600]

Loss of dignity may best be summarised as an injury to a person's self-worth or self-esteem.[601] As the Supreme Court of Canada has observed in *Law v Canada (Minister of Employment and Immigration)*:[602]

> Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits... Human dignity is harmed when individuals and groups are marginalised, ignored, or devalued...

Injury to feelings may be experienced in a number of ways, including sadness, depression, anger, anxiety, stress and guilt.[603] In *Director of Proceedings v O'Neil* the point was made that:[604]

> [29] The feelings of human beings are not intangible things. They are real and felt, but often not identified until the person stands back and looks inwards. They can encompass pleasant feelings (such as contentment, happiness, peacefulness and tranquillity) or be unpleasant (such as fear, anger and anxiety). However a feeling can be described, it is clear that some feelings such as fear, grief, sense of loss, anxiety, anger, despair, alarm and so on can be categorised as injured feelings. They are feelings of a negative kind arising out of some outward event. To that extent they are injured feelings.

Conjunctive or disjunctive harm?

While s 123(1)(c)(i) refers conjunctively to compensation for "humiliation, loss of dignity, *and* injury to feelings" it is clear that a claimant need only establish one rather than all three. This has been confirmed by the High Court in *Winter v Jans*, in the context of substantially the same phrase contained within s 66(1)(b)(iii) of the Privacy Act 1993.[605]

---

599 See, for example, Hammond, above n 592; Doron Shultziner and Itai Rabinovici "Human Dignity, Self-Worth and Humiliation: A Comparative Legal-Psychological Approach" (2012) 18(1) Psychology, Public Policy, and Law 105 at 106.

600 See Donald Klein "The Humiliation Dynamic: An Overview" (1991) 12(2) Journal of Primary Prevention 93 at 117; Catherine L Fisk "Humiliation at Work" (2001) 8 Wm & Mary J Women & L 73 at 77; Saulo Fernández, Tamar Saguy and Eran Halperin "The Paradox of Humiliation: The Acceptance of an Unjust Devaluation of the Self" (2015) 41(7) Personality and Social Psychology Bulletin 976; Walter J Torres and Raymond M Bergner "Humiliation: Its Nature and Consequences" (2012) 38(2) Journal of the American Academy of Psychiatry and the Law 195 at 201; Shultziner and Rabinovici, above n 599, at 111.

601 Shultziner and Rabinovici, above n 599, at 107. See too Randy Hodson "Dignity at Work" (Cambridge University Press, Cambridge, 2001) at 3.

602 *Law v Canada (Minister of Employment and Immigration)* [1999] 1 SCR 497 at 53, cited in *Hammond v Credit Union Baywide* [2015] NZHRRT 6 at [152].

603 See, for example, Laura N May and Warren H Jones "Does hurt linger? Exploring the nature of hurt feelings over time" (2007) 25(4) 245 at 253.

604 *Director of Proceedings v O'Neil*, above n 598.

605 *Winter v Jans* HC Hamilton CIV-2005-419-854, 6 April 2004 at [36]. Note s 66(1)(b)(iii) of the Privacy Act 1993 refers to "*significant* humiliation, *significant* loss of dignity, or *significant* injury to the feelings of that individual" (emphasis added). See too *Geary v Accident Compensation Corporation* [2013] NZHRRT 34 at [148].

How is Compensation to be Quantified?

Quantifying non-pecuniary loss "presents special problems for the judicial process, which aims to produce results objectively justified by evidence, reason and precedent."[606] That is because, unlike lost remuneration, subjective feelings of humiliation, loss of dignity and injury to feelings are incapable of measurement in monetary terms. However, the losses are real and difficulty in assessment is no excuse for denying compensation or for adopting an arbitrary approach to quantification. As has been said:[607]

> The court ... is enjoined to assess compensation in an amount which is just and equitable in all the circumstances, and there is neither justice nor equity in a failure to act in accordance with principle.

The following framework might usefully be applied.

Objective approach

While the subjective effect on the employee will be the focus of the inquiry, along with causation, the loss is to be objectively assessed and quantified.[608]

Burden

The employee must prove, on the balance of probabilities (1) that they suffered loss, (2) that the employer's breach was a material factor in the loss they sustained, and (3) quantification of loss.[609]

Evidence of loss

It is a well established legal principle that loss must be established for compensation to flow.

As McGechan J has pointed out: "damages are compensatory, not punitive, and must bear a clear relationship to evidence. *They are not simply a vote of sympathy, or a fine.*"[610]

There may be circumstances in which loss can be established inferentially in the absence of direct evidence,[611] but such an approach carries risk, including of making unwarranted assumptions about emotional harm which, because of its subjective nature, are inherently fraught. And even if loss can be inferred from the circumstances, it is clear that the prospect of achieving an award of any significance is improved commensurate with the existence and quality of the evidence put before the Court.

---

606 *Vento v Chief Constable of West Yorkshire Police* [2002] EWCA Civ 1871 at [50].

607 *Norton Tool Co Ltd v Tewson* [1973] 1 All ER 183 per Sir John Donaldson P, cited with approval in *Air New Zealand Ltd v Johnston* [1992] 1 ERNZ 700 (CA) at 708-709 per Cooke P.

608 *Telecom New Zealand Ltd v Nutter* [2004] 1 ERNZ 315 (CA), endorsing Chief Judge Goddard's approach in *Ballylaw Holdings Ltd v Henderson* [2003] 1 ERNZ 313 (EmpC) at [80]–[81] and the need to address the "actual consequences for the employee of the [employer's breach]."

609 *Attorney-General v Gilbert* [2002] 2 NZLR 342 (CA) at [64] and [96].

610 *Undrill v Senior* HC Blenheim CP9/94, 20 August 1997 at 24 (emphasis added).

611 See, for example, *Winter v Jans*, above n 605, at [33] (in relation to assessment of loss for humiliation etc under the Human Rights Act 1993).

The Court of Appeal's caution, that it would "plainly" not be a proper practice to automatically award compensation for non-pecuniary loss whenever a personal grievance has been established,[612] must be heeded.

Trifling losses not sufficient

The law does not trouble itself with trifles. Accordingly it can probably safely be assumed (although it appears not to have been articulated in any decided case under s 123(1)(c)(i)) that *de minimis* principles apply, requiring a degree of loss or damage which is sufficiently serious to warrant an award of compensation.

It follows that not every established experience of humiliation, loss of dignity or injury to feelings will give rise to a compensatory award.

Sufficient causal connection

The loss to be compensated for must be *causally connected to the breach.*[613] It does not need to be the sole cause.[614] It is the employee who must establish a sufficient causal connection. Whether such a connection can be made out is a question of fact.

It is not always easy to differentiate the root causes of loss, particularly where there are multiple things going on in an employee's life at the relevant time. The different strands must be unravelled. Adjustment will be required where, for example, an established injury to feelings stems from a relationship breakup rather than the employer's unjustified action.[615] Where the breach has accelerated or exacerbated a pre-existing or progressive condition, the employer is responsible for that effect, and not the underlying condition.[616]

Principles of reasonable foreseeability may arise[617] and may, along with other liability-limiting principles (discussed below), provide fertile ground for further exploration, particularly by those acting for employers.

Not to punish

The purpose of an award under s 123(1)(c)(i) must remain central to any analysis. Such awards are designed to *compensate, not to punish.*[618] There is accordingly a need to hive off concerns about the employer's aggravating conduct, except in so far as that conduct

612 *Department of Survey & Land Information v NZ Public Service Assoc* [1992] 1 ERNZ 851 (CA) at 857 and 861. See too *Herron v Spiers Group* (2008) 8 HRNZ 668 (HC) at [46] per Andrews J; *Scarborough v Micron Security Products Ltd* [2015] NZEmpC 39 at [42].

613 A point emphasised by the Court of Appeal in *Transmissions & Diesels v Matheson* [2002] 1 ERNZ 22 (CA) at [20] in reducing the compensatory award of $50,000 to $25,000. In that case a number of other factors had been at play contributing to the distress and humiliation the employee had suffered, which were not taken into appropriate account by the Employment Court.

614 *Attorney-General v Gilbert*, above n 609, at [64].

615 See, for example, *Booth v Big Kahuna Ltd* [2014] NZEmpC 134 at [84], declining the amount of compensation sought on the basis that a significant proportion of the emotional harm suffered by the plaintiff stemmed from his recent relationship breakup, not the employer's unjustified actions. See too *Tawhiwirangi v Attorney-General* [1994] 1 ERNZ 459 (EmpC) at 479.

616 *Attorney-General v Gilbert*, above n 609, at [108].

617 *Mahmud v Bank of Credit and Commerce International SA (in liq)* [1998] AC 20 (HL) at 37, cited with approval in *Attorney-General v Gilbert*, above n 609, at [96].

618 *Lavery* v *Wellington Area Health Board* [1993] 2 ERNZ 31 (CA) at 55; *Paykel Ltd v Ahlfeld* [1993] 1 ERNZ 334 (EmpC) at 342; *Air New Zealand Ltd v Johnston*, above n 607, at 707.

increased the harm actually suffered by the employee.[619] So where, for example, an employer has acted vindictively, those actions may be found to have had a direct correlation with the negative effect on the employee. The position was summarised by the High Court in *Winter v Jans* as follows:[620]

> Behaviour is a factor which can obviously be taken into account in assessing the seriousness of the humiliation, loss of dignity and injury to the feelings suffered by the aggrieved individual, *if the Tribunal is satisfied that that behaviour increased the seriousness of the impact upon the complaint.*

It follows that subsequently discovered vindictiveness, not known to the employee at the relevant time but occurring during the course of the employment relationship, will likely be irrelevant to the quantification process.

No collateral purpose

An award under s 123(1)(c)(i) should not be used for *collateral purposes*.

While some employment practitioners and commentators have advocated for an increase in the quantum of compensatory awards having regard to the burdensome costs of pursuing a claim, the basis for this appears dubious. Such an approach runs the risk of the courts compensating not for the loss but for the cost of pursuing redress for the loss, or to "top up" perceived deficiencies in the costs regime applying in the Authority and the Court.

Concerns that the cost and expense of litigation has effectively rendered the right to compensation for humiliation, loss of dignity and injured feelings an "empty right"[621] may have strength but might best be addressed by other means (such as changes to the costs' regime or, potentially, damages for money lost as a result of the grievance under s 123(1)(c)(ii). Both are beyond the scope of this paper).

No double recovery

Issues of remedial overlap or potential double recovery may arise.[622] The facts will be pivotal in determining what, if any, adjustment is required. The impact of the Accident Compensation scheme and Court ordered reparation provide two examples.

As to the first, the Accident Compensation Act 2001 bars an employee who has suffered a personal injury from receiving damages for the injury's effects, such as loss of earnings, distress, embarrassment and humiliation. That is because such consequences are exclusively compensatible under the accident compensation legislation.[623]

As to the second, the Court has recently declined to have regard to a reparation award made by the District Court in assessing an appropriate level of compensation under s 123(1)(c)(i), although both arose out of the same facts.[624]

619 *Wellington & Taranaki Shop Employees, etc IUOW v Pacemaker Transport Wellington Ltd* [1989] 2 NZILR 762 (LC) at 10.

620 *Winter v Jans*, above n 605, at [54] (emphasis added).

621 See, for example, the minority judgment in *New Zealand Stainless Ltd v Thwaites* [2000] 2 NZLR 565 (CA) at [57], where Thomas J would have awarded substantially more than the $10,000 awarded by the majority.

622 See, for example, *Attorney-General v Gilbert*, above n 609, at [112].

623 See the discussion in *Brittain v Telecom Corporation of New Zealand Ltd* [2002] 2 NZLR 201, [2001] ERNZ 647 (CA) at [15]–[23] in relation to earlier provisions in the Accident Rehabilitation and Compensation Insurance Act 1992, cited in *Robinson v Pacific Seals New Zealand* [2014] NZEmpC 99, [2014] ERNZ 813.

624 *Fredericks v VIP Frames and Trusses Ltd* [2015] NZEmpC 203 at [44]. The Court held that the s 123(1)(c)(i)

It may be that some assistance can be drawn from cases involving the split jurisdiction between the High Court and the Employment Court and how concerns about double recovery are resolved in that context. As Barker J pointed out in *Anderson v Northland Health Ltd*, "The claim for humiliation ... as filed in the Tribunal would certainly play a part in the assessment of any award of exemplary damages in this Court."[625] A similar point was made by Judge Palmer in a claim relating to damage to reputation brought in the Employment Court and parallel High Court proceedings in defamation. Judge Palmer observed that "Appropriate judicial oversight of damages questions ... will ensure that doubled-up damages from the same contended non-pecuniary loss is wholly avoided."[626] On appeal the Court of Appeal acknowledged the potential for double recovery in relation to the injury sustained and said that such issues could be dealt with as and if they arose.[627]

It is notable that the Sentencing Act 2002 specifically provides that an order of reparation does not effect any right to bring a civil proceeding in relation to any harm, loss or damage "*in excess* of the amount recovered under the sentence of reparation."[628]

Drawing the threads together, there is an objection to double recovery. Where an employee receives compensation for losses arising out of the same facts in different jurisdictions, concerns about double recovery will likely be engaged and, if so, may well be relevant to an assessment of appropriate compensation under s 123(1)(c)(i).

Not to compensate for the loss suffered by others

Previous attempts to inflate the level of compensation in recognition of the distress suffered by third parties have not been endorsed.[629] This no doubt reflects the fact that it is the loss suffered by the employee, rather than strangers to the employment relationship, which is relevant.

The point was succinctly made in relation to a wife's evidence as to the impact of her husband's unjustified dismissal on her:[630]

> We are pleased to hear that Mrs Dahn is receiving competent clinical advice and that her condition is being properly investigated at consultant level. We wish her a speedy recovery. But beyond that we have no power to do anything.

Relevance of impact on employer?

The Court of Appeal has made it clear that any award of compensation should be "fair and just" to both parties.[631] This appears to have been taken to mean that, in determining the

compensation was to take account of the employee's humiliation, loss of dignity and injury to feelings resulting from his personal grievance arising under his employment relationship and "not anything arising as a result of his being a victim of VIP's criminal offending".

625 *Anderson v Northland Health Ltd* HC Whangarei CP2/96, 13 October 1997 at 6.

626 *Kelly v Accident Rehabilitation and Compensation Insurance Corporation* (1997) ERNZ 173 (EmpC) at 192.

627 *Accident Rehabilitation and Compensation Insurance Corporation v Kelly* [1997] ERNZ 193 (CA) at 196. See *Beattie v Premier Events Group Ltd* [2014] NZCA 184, (2014) 11 NZELR 755 for a reminder that the courts should be attuned to the possibility of double recovery and to take that into consideration at the remedy stage, at [50]-[56]. See too *Attorney-General v B* [2002] NZAR 809 (CA) at [11]-[14].

628 See Sentencing Act 2002, s 38(2) (emphasis added).

629 *Air New Zealand Ltd v Johnston*, above n 607, at 710.

630 *New Zealand Labourers IUOW v Manawatu Ward of the South West Pest Destruction Board* [1989] INZILR 626 (LC) at 640.

631 See, for example, *Telecom South v Post Office Union* [1992] 1 ERNZ 711 (CA) at 724 per Richardson J.

quantum of an award under s 123(1)(c), regard ought to be had to the employer's ability to pay.

In *Cain v H L Parker Trusts*, for example, Chief Judge Goddard referred to ability to pay as a relevant factor in assessing the overall fairness of awards against an employer.[632] And in *Waugh v Commissioner of Police* he again observed that in assessing the amount of compensation awarded regard is to be had to fairness to the employer, including its ability to pay.[633] Neither case gave rise to an application of the stated principle on the facts and it is fair to say that the point has received scant air time in subsequent cases. This stands in stark contrast to the consideration given to an employee's financial circumstances at the rear end of litigation, when it comes to allocating costs. Ability to pay is, however, likely to have particular significance for small and/or financially struggling employers.

It is perhaps notable that the cases involving higher compensatory sums over the last 25 years appear to have generally involved ostensibly well-resourced employers, particularly public sector employers and large companies.[634] None of the judgments refer to the employer's fiscal position as being a factor in determining the fairness and justice of the ultimate compensatory sum awarded. A question might arise as to whether the assumed financial position of the employer is an underlying factor impacting on quantum, although not expressly referred to.

There are two points in relation to the statutory scheme which may be of particular relevance in respect of the impact or otherwise of an employer's ability to pay in assessing compensation under s 123(1)(c)(i). First, there is no express provision requiring the Court to have regard to the financial circumstances of the employer. This can be contrasted with, for example, s 12 of the Sentencing Act which provides that the Court must impose a sentence of reparation for emotional harm (amongst other things) unless satisfied that it would cause hardship for the offender or the offender's dependants. Section 123(1)(c)(i) is squarely focussed on the grievant's right of redress.

Second, the Employment Relations Act *does* specifically recognise the potential detrimental impact of a compensatory award on an employer and makes provision for its amelioration by providing that an order for instalment payments may be made where the employer's financial circumstances require.[635] Interestingly no reference was made to this power by the Court in *Waugh*. Indeed the power under s 123(2) to order instalment

---

632 *Cain v H L Parker Trusts* [1992] 3 ERNZ 777 (EmpC) at 791. See too *Air New Zealand Ltd v Johnston*, above n 607, at 708 and *Telecom South*, above n 631, per Cooke P at 718: "plainly enough, what is to be aimed at is an award that is fair and reasonable between the parties as a matter of good industrial practice in the current economic climate." And per Richardson J at 722: "a just and reasonable award must reflect the circumstances and the legitimate interests of both parties".

633 *Waugh v Commissioner of Police* [2004] 1 ERNZ 450 (EmpC) at [136], indicating too that "[proportionality] to the circumstances of the case and of like cases, taking a broad view as to similarity" was appropriate.

634 See, for example, *Alton-Lee v Victoria University of Wellington* [2000] 2 ERNZ 152 $25,000 compensation for stress, plus $40,000 in respect of the employer's failure to publish an apology as agreed; *N v Attorney-General* [2000] 1 ERNZ 717 (EmpC) $40,000, reduced to $25,000 on appeal: *Attorney-General v N* [2002] 1 NZLR 651, [2001] ERNZ 629 (CA); *Binnie v Pacific Health Ltd* [2002] 1 ERNZ 438 (CA) $35,000 upheld, though described as "modest"; *Chief Executive of the Dept of Corrections v Dodds* EmpC Christchurch CC6/03, 4 March 2003 $25,000; *Telecom New Zealand Ltd v Nutter* [2004] 1 ERNZ 315 (CA), award of $10,000 described as "meagre"; *Commissioner of Police v Hawkins* [2009] NZCA 209, [2009] 3 NZLR 381 (CA) $35,000 upheld; *New Zealand Public Service Assoc v Land Corp Ltd* [1991] 1 ERNZ 741 (LC) $30,000; *Bailey v Minister of Education* [1993] 2 ERNZ 321 (CA) $25,000; *Trotter v Telecom Corp of New Zealand Ltd* [1993] 2 ERNZ 659 (EmpC) $40,000; *Ogilvy & Mather (New Zealand) v Turner* [1996] 1 NZLR 641 (CA) $50,000; *Carter Holt Harvey v Pirie* [1997] ERNZ 648 (CA) $30,000; *Gilbert v Attorney-General* [2000] 1 ERNZ 332 (EmpC) $75,000; *Brickell v Attorney-General* [2000] 2 ERNZ 529 (HC) $75,000; *Waugh v Commissioner of Police* [2004] 1 ERNZ 450 (EmpC) $50,000; *Woud v Department of Corrections* [2005] ERNZ 314 (EmpC) $35,000 would have been awarded but for the order of reinstatement (so $10,000).

635 See Employment Relations Act 2000, s 123(2).

payments to address an employer's financial capacity appears to have only been exercised once by the Employment Court.[636]

If it is correct that the current levels of compensatory awards are at least in part driven by a concern about affordability for employers, might that underlying concern more appropriately be addressed by an application of the powers in s 123(2)? Such an approach might be said to be consistent with the statutory scheme.

It is certainly arguable that before exercising any broader discretionary power to reduce an award which would otherwise be made, either because of perceived hardship, potential flow-on effect to other employees, or concerns about overall remedial quantum, consideration ought to be given to instalment payments. That would have the dual benefit of awarding fair compensation to the employee without reduction and addressing legitimate fiscal concerns about how a lump sum award would be satisfied.

A special approach for certain categories of claim and claimant?

Some commentators have suggested that redundancy and sexual harassment may give rise to a special approach to compensation under s 123(1)(c)(i).[637] It is doubtful that this can be correct. That is because it is the nature and extent of the loss, not the characterisation of the grievance, which is the focus under s 123(1)(c)(i).

Somewhat surprisingly a review of recent cases across both the Authority and the Court suggests a tendency for redundancy dismissal compensatory awards to be slightly higher than for "fault based" dismissals, such as serious misconduct and poor performance. It is unclear why this is so, particularly given the Court of Appeal has made it plain that where a redundancy dismissal is substantively justified any compensation is strictly limited to the distress caused by the procedural unfairness, not the dismissal itself.[638] It might be assumed that this would generally lead to somewhat lower, not higher, average awards in such cases.

A lean towards higher compensatory awards for more senior employees may be discerned in the older cases,[639] reflected in some of the language used. In *Ogilvy & Mather*, for example, the Court of Appeal described a compensatory award of $50,000 as "a very large sum of damages arising from a dismissal *even of a chief executive*."[640] In *Telecom South* reference was made to previous awards of $50,000 having been made, while noting that: "... apparently there has been *no other case of an employee in a senior management position comparable to that of Mr Devlin, and it is not surprising* in the particular circumstances of this case *that there should be a considerably higher award for him*."[641]

A review of more recent cases does not support a strong trend towards higher awards based on status or earning potential, although there are certainly instances of low income employees receiving substantially lower awards. Such cases may, however, be explicable on their own facts.

636 See *New Zealand Language Centres Ltd v Page* [2013] NZEmpC 100, [2013] ERNZ 226 at [137].
637 See, for example, *Personal Grievances* (online looseleaf ed, LexisNexis) at [11.24] regarding redundancy and *Mazengarb's Employment Law* (online looseleaf ed, LexisNexis) at ERA 108.7 regarding sexual harassment.
638 See, for example, *Coutts Cars v Baguley* [2002] 2 NZLR 533 (CA) at [46]-[47]; *Aoraki Corp Ltd v McGavin* [1998] 1 ERNZ 601 (CA) at 620; *Rongotai College Board of Trustees v Castle* [1998] 2 ERNZ 430 (CA) at 437–438.
639 See the cases referred to, above n 634, by way of illustration.
640 *Ogilvy & Mather (New Zealand) Ltd v Turner* [1996] 1 NZLR 641 (CA) at 654 (emphasis added).
641 *Telecom South v Post Office Union*, above n 631, at 717 per Cooke P (emphasis added).

There is no empirical research to support the notion that the higher you fly the harder you fall in terms of humiliation, loss of dignity or injury to feelings. And nor is there any logical reason to assume that, for example, a doctor, police officer or a teacher might suffer a greater degree of injury to his/her feelings than a cleaner who has been unjustifiably dismissed.[642]

Dangerous assumptions about the impact of loss of perceived status ought to be avoided. After all, the loss of a job to someone on the minimum wage with a number of dependents is likely to be keenly felt, including in terms of standing and reputation within their community. It might be expected that an experienced senior manager will be imbued with a degree of resilience and a well developed ability to robustly withstand challenging situations arising in the workplace. All of this serves to emphasise the importance of putting any preconceived notions to one side.

The reality is that different people respond to difficult situations differently. For some an adverse event is water off a duck's back. For others it is not. The personality of the individual employee, and their response, will accordingly be relevant.[643]

Mitigation – "duty" to mitigate? Application to claims of non-pecuniary loss?

It is routinely said that an employee is under a duty to mitigate their loss and that a failure to prove that they have taken adequate steps to do so may lead to a reduced, or no, award.[644] The basis for the so-called duty, or the way it has historically been applied by the employment institutions, remains unclear.[645] What is clear is that to date it has been almost exclusively confined to claims of lost remuneration.

Two issues arise:

- First, whether an employee does have a "duty" to mitigate their loss; and
- Second, whether mitigation principles might not equally apply to non-pecuniary loss.

In ordinary breach of contract cases it is generally accepted that a plaintiff is under no duty to mitigate their losses.[646] A plaintiff may, however, only recover the loss s/he would have suffered had s/he taken reasonable steps to mitigate the damage. The important point is that a reverse burden applies. That means that the plaintiff must prove that the loss resulted from the defendant's breach; the defendant must then prove that the plaintiff failed to take reasonable steps to mitigate their loss.[647]

---

642 See the discussion in *Thwaites*, above n 621, per Thomas J at [44].

643 See, for example, *Wellington & Taranaki Shop Employees*, above n 619, at 769: "In some cases the extent of the grievance will be greater than in others depending, not only on the conduct of the employer, but also on the personality of the grievant. The respondent must take the grievant as it finds him or her." See too the discussion in May and Jones, above n 603, at 253-254, warning against ascribing uniform feelings of hurt to heterogeneous populations.

644 See, for example, *Allen v Transpacific Industries Group Ltd* (t/a "Medismart Ltd") (2009) 6 NZELR 530 (EmpC) holding that dismissed employees are not only under an obligation to mitigate loss but to establish this in evidence if called upon. And, at [79], that "The onus in these circumstances is on the former employee and if it is not fulfilled, will result in a former employer submitting…that either a lesser or no award should be made as a result of failure to prove loss." See too the extended discussion in *Hamer v Transport Commercial (Auckland) Ltd* [1998] 1 ERNZ 509 (EmpC) at 519–521.

645 Some cases have suggested that the 'duty' arises under s 124 although that does not emerge clearly from the wording of the provision or the interplay between it and s 123. Chief Judge Goddard has said that it arises out of the Court's jurisdiction in equity and good conscience: *Trotter v Telecom,* above n 594, at 693.

646 *McGregor on Damages*, above n 592, at 7-017.

647 John Burrows, Jeremy Finn and Stephen Todd *The Law of Contract in New Zealand* (5th ed, LexisNexis, Wellington 2016) at 21.2.4.

An application of the conventional approach in breach of contract cases would place the burden squarely on the employer to show that the employee, as a reasonable person, ought to have taken steps to mitigate their loss. The burden has been described as a difficult one to discharge.[648] However, a review of employment cases suggests that it is not uncommon for a claim for reimbursement of lost wages to be dismissed on the basis that an employee failed to prove that they took reasonable steps to mitigate their loss. Such an approach might be said to put the wronged party (the employee) on the back foot.

Further, while arguments about the extent to which an employee has sought to mitigate their loss are invariably focussed on pecuniary loss (attempts, for example, to find alternative work), there appears to be no reason why principles relating to mitigation should not also apply to a claim of non-pecuniary loss. If that is so, the focus of inquiry may be on steps that the particular employee might reasonably have been expected to take to reduce the impact of any emotional harm, or an explanation as to why such steps were not taken in the particular circumstances.

Failure to adopt mitigation principles in respect of claimed non-pecuniary losses arguably gives rise to perverse incentives which are best avoided from a policy perspective, and having regard to the mutual obligations of good faith in employment relationships.

Plainly if a loss is mitigated, the only remaining entitlement is to the actual (residual) loss.

Contribution

Section 124 of the Act provides that where the Court determines that an employee has a personal grievance, it must, in deciding both the nature and the extent of the remedies to be provided, consider whether the actions of the employee contributed towards the situation that gave rise to the personal grievance and, if those actions so require, reduce the remedies that would otherwise be awarded accordingly.

It follows from the mandatory wording of s 124 that contribution will be relevant to an assessment of whether compensation will be awarded under s 123(1)(c)(i) and, if so, how much.[649]

In undertaking this exercise, two factors are of particular relevance: causation and proportionality. If there is no causal connection between the alleged contributing conduct and the situation giving rise to the grievance, the conduct is immaterial. Where there is a causal connection, the reduction must be proportionate to the conduct.[650]

Relevance of post-termination conduct by employee

In *Salt v Fell* the Court of Appeal indicated that a compensatory award under s 123(1)(c) may and sometimes should be effected having regard to later discovered misconduct by the employee.[651]

648 See Peter Blanchard (ed) *Civil Remedies in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2001) at 84-85.

649 *Knapp v Locktite Aluminium Specialities Ltd* [2015] NZEmpC 71 at [34]. Compare *Harris v The Warehouse Ltd* [2014] NZEmpC 188, [2014] ERNZ 480. At the time of print a full Court judgment on the issue of whether an award can be reduced to nil for contribution is pending.

650 *Macadam v Port Nelson Ltd (No 2)* [1993] 1 ERNZ 300 at 304 (EC); *Nutter*, above n 608, at [79]. *Ballylaw Holdings*, above n 608, at [74].

651 *Salt v Fell* [2008] ERNZ 155 (CA) at [104].

Relevance of post-termination conduct by employer?

The Employment Court (in *Nelson v Katavich*) has recently taken egregious post-termination behaviour into account in awarding compensation for humiliation, loss of dignity and injury to feelings.[652] After the employment relationship had come to an end, and in seeming response to the filing of a personal grievance, the ex-employer embarked on a course of conduct which included pursuit of a private prosecution in the District Court and complaints to the Law Society about the conduct of the ex-employee's legal adviser. The Court awarded $30,000 compensation under s 123(1)(c)(i), including having regard to such activity.

The extent to which post-termination conduct can be taken into account in inflating an award of compensation under s 123(1)(c)(i) is not without doubt. In *Northern Distribution Union v Sherildee* the Court observed that "the consequences of the [employer's] unjustified action must cease, so far as they make the company liable for compensation [including for humiliation, loss of dignity and injury to feelings], at the conclusion of the employment contract..."[653]

And in *Cross v Onerahi Hotel* it was observed that:[654]

> While there are references in both the Court and the Authority to post-termination conduct being an aggravating factor in the hurt and humiliation suffered by the employee it remains unclear what the basis for such a potentially broad brush approach is. The remedies provided for under s 123 appear to be clearly linked to the personal grievance itself and (in relation to s 123(1)(c)(i)) the hurt and humiliation caused by the grievance.
>
> While in some cases the hurt and humiliation actually caused by the grievance may be ongoing, and accordingly be relevant to the assessment of quantum, in the present case it is difficult to see why distinct actions of the employer (the posting of a newspaper article about the outcome of the Authority's determination) taking place long after the departure of the employee and the alleged grievance (the unjustified dismissal) are relevant to an assessment of compensation under the Act.

While *Katavich* will no doubt serve as a salutary warning against vindictive action following termination of an employment relationship, issues relating to ongoing liability may arise. Limiting principles such as causation, foreseeability, remoteness and proportionality will likely be key considerations in any attempt to draw such conduct in to an assessment of compensation under s 123(1)(c)(i).

Modesty?

The Court of Appeal has previously made it clear that the courts must exercise "firm restraint" and a "sense of proportion" in making awards,[655] and that *compensatory awards should be modest.*[656] A review of awards made in the Authority and the Court over the last

---

652 *Nelson v Katavich* [2016] NZEmpC 48 at [116]; See too *Hoff v The Wood Lifecare (2007) Ltd* [2015] NZEmpC 58 at [79]; *Strachan v Moodie (aka "Miss Alice"), (T/A Moodie & Co)* [2012] NZEmpC 95, (2012) 10 NZELR 216 at [129]; *Trotter v Telecom*, above n 594, at 701-702.

653 *Northern Distribution Union v Sherildee Holdings Ltd* [1991] 2 ERNZ 675 (EmpC) at 681.

654 *Cross v Onerahi Hotel Ltd* [2014] NZEmpC 26, (2014) 1 NZELR 467 at [40]–[41].

655 *Carter Holt Harvey Ltd v Pirie* [1997] ERNZ 648 (CA) at 652; *Health Waikato Ltd v Van der Sluis* [1997] ERNZ 236 (CA) at 243.

656 See, for example, *Nutter*, above n 608, at [79], setting out the policy considerations as to why moderation in awards is appropriate. See too *Air New Zealand Ltd v Johnston*, above n 607, per Cooke P at 708: "... when exercising a jurisdiction which the New Zealand legislature has left very much to the Courts, [the Court should] not ... pitch awards unrealistically high, especially in times of economic stringency for employers as well as employees."

three years (June 2013 – June 2016) suggests that these calls have been answered. The figures across both the Authority and the Court for this period reveal the following median awards:[657]

Unjustified suspension:	$2,500
Unjustified warning:	$2,000
Dismissal (poor performance):	$5,000
Dismissal (serious misconduct):	$6,000
Dismissal (redundancy):	$6,500

Insofar as the need for "modesty" has been equated with a need for low awards, it may, with respect, be worthy of further consideration. The policy concerns identified by the Court of Appeal in *Nutter*, a case which is routinely cited by counsel in support of an asserted need for moderation in s 123(1)(c)(i) awards, are generally focussed on pecuniary loss, most notably lost remuneration, and issues relating to the potential perils of "full" compensation in that context.

It is undoubtedly true that excessive awards may undermine public respect for the judicial process. They have previously been characterised as an inappropriate path to "untaxed riches"[658] and have generated concerns about affordability, floodgates, development of a "blame and claim" culture and an undesirable proliferation of "Santa Claus" judges.[659] However, the expressed need for "modest" awards does not equate, linguistically at least, with a "low" award. Rather it is, as the dictionary definition of "modest" makes clear, an award that is not "extreme or excessive".[660]

Further, it may be argued that the asserted need to retain a sense of proportion in making compensatory awards must itself be kept in proportion, as it begs the question – in proportion to what? If it is proportionality to the monetary sum at issue that will often not be reflective of the true interests at stake in employment litigation, as more recent case law in relation to the impact of Calderbank offers which do not address important non-pecuniary concerns (such as restoration of reputation) reflects.[661]

Surely the pivotal point is what award will adequately compensate for the harm that has been caused? A focus on concerns such as an adverse effect on an employer's business (and, tangentially, the position of other employees) might be relevant but needs to be balanced against what is presumably the most important interest, namely addressing the loss suffered by the wronged employee.

It is arguable that low compensatory awards effectively diminish the value placed on an employee's rights, including the right not to be treated unfairly by their employer; undermine the mutuality of the obligations owed by parties to an employment relationship; act as little incentive to avoid unjustified action causing humiliation, loss of dignity and injury to feelings; and generally do little to redress the imbalance of power recognised in the Act.

---

[657] Refer Appendix 2.

[658] Cited in *Vento*, above n 606, at [53].

[659] See the discussion in Penelope Watson "Redressing Dignitary Injuries and Non-economic Loss in Novel Torts: Challenges for the Law of Remedies" in Jeffrey Berryman and Rick Bigwood (eds) *The Law of Remedies: New Directions in the Common Law* (Irwin Law, Toronto, 2010) 209.

[660] *Collins English Dictionary* (2006) www.collinsdictionary.com.

[661] See, for example, the recognition given to the importance of reputational interests in *George v Auckland Council* [2014] NZEmpC 100, [2014] ERNZ 681 at [26] and [63]–[73]; *Bluestar Print Group (NZ) Ltd v Mitchell* [2010] NZCA 385, [2010] ERNZ 446 at [20].

Such concerns reinforce the need for awards to *remain socially relevant*.

Justice Thomas put it this way in *Thwaites*:[662]

> Of course, a sense of proportion must be maintained. But to consistently strike compensation for non-monetary injury at a level which is inadequate to truly compensate the employee for the humiliation, loss of dignity and injured feelings which he or she has suffered, and which *renders the remedy provided in the statute largely ineffective*, fails to achieve that objective. The so-called need to maintain a sense of proportion becomes the catch-cry by which compensation is maintained at a disproportionately low level.

Many might agree with one academic's observation that:[663]

> ... as the Court indicated in *Nutter*, the crucial issue is the loss suffered by the actual employee, and moderation should, where appropriate, always be secondary to the factual context in which the assessment of individual loss is determined. ... It is also important that a policy of moderation, even if it is justified, should not be exercised to render the remedy in question ineffective or to set remedies at a level that fails to properly meet the statutory objective of providing proper compensation to unjustifiably dismissed employees.

Keeping up with the times

Awards should not only keep up with the times socially but also remain *current in economic terms*. This point has been emphasised in a number of recent cases, including *Hall v Dionex* where it was said that while there is a need for consistency of awards there was a danger of keeping awards at an artificially low level.[664] That is why there is much to be said for viewing previous cases through an economically realistic lens.

It follows that two questions might usefully be asked when considering issues of consistency with earlier cases:

- What is the monetary value of the sum awarded having regard to its current purchasing power?
- What is a fair award in the current social context? (rather than solely proceeding on an assumption that historic awards are fair and should simply be inflation adjusted).[665]

Globalisation

There are a number of cases in which a global compensatory award has been made. There will be circumstances in which one form of personal grievance bleeds into another, taking with it the non-pecuniary losses sustained by the employee. In such circumstances there are particular difficulties with assessing appropriate compensatory amounts to allocate to each individual breach.[666] The problem is likely to be less pronounced in cases involving discrete

---

662 *Thwaites*, above n 621, at [43] (emphasis added).

663 Gordon Anderson, "Reimbursement and Compensation for Unjustified Dismissal" (2006) 12 NZBLQ 230 at 247.

664 *Hall v Dionex Pty Ltd* [2015] NZEmpC 29 at [88]. See too *Rodkiss v Carter Holt Harvey* [2015] NZEmpC 34 at [133]-[134].

665 See, for example, the approach adopted by the full Court of the Federal Court of Australia in *Richardson v Oracle Corporation Australia Pty Ltd* (2014) 312 ALR 285 at [96] observing that community standards now accord a higher value to compensation for pain and suffering and loss of enjoyment of life than before. The Court noted at [87] that academic commentary reflects that a conservative approach to assessing damages in discrimination cases had impeded the "deep social reform" that anti-discrimination legislation had been designed to implement.

666 *Gini v Literacy Training Ltd* [2013] NZEmpC 1, (2013) 10 NZELR 551 at [36].

claims (such as suspension and subsequent dismissal). Ultimately there is a need to articulate the reasons for both quantum and apportionment with a sufficient degree of clarity. Global awards run the risk of obfuscating the way in which the ultimate sum has been arrived at, and how it sits with other awards.

Overall assessment of relief?

There is authority for the proposition that the Court should stand back and assess relief overall, and adjust the different components (including the quantum of compensation under s 123(1)(c)(i)) "if appropriate."[667] Indeed in one case compensation for non-pecuniary loss was declined on the basis that the amount of reimbursement was high.[668] In another, reinstatement was ordered but compensation was denied, even though the employee was found to have suffered "considerable distress."[669]

It is clear that the introductory wording of s 123(1) confers a degree of remedial flexibility on the Court.[670] This, combined with the powers in s 189 (equity and good conscience), arguably enables the Court to juggle the heads of relief as it sees fit, in the quest to achieve an overall 'just' result.

However, such an approach is not without difficulty, given that each head of relief relates to a separately identifiable and quantifiable loss. As the UK Law Commission pointed out in its report "*Damages for Personal Injury: Non-Pecuniary Loss*":[671]

> To reduce damages for non-pecuniary loss because of the level of damages for pecuniary loss *must cause under-compensation.*

Stuck with the pleadings as to quantum?

Any attempt to seek or award more by way of compensation for non-pecuniary loss than a party has identified in their pleadings is likely to be problematic. In *McCulloch* the Court of Appeal upheld an appeal against a judgment awarding $27,500 compensation for humiliation, loss of dignity and injury to feelings, in part on the basis that the Employment Court had exceeded its jurisdiction (only $15,000 having been sought in the plaintiff's statement of claim).[672] On referral back, Chief Judge Goddard granted leave to amend the statement of claim to the figure originally awarded in the plaintiff's favour.

Notably the High Court has subsequently sought to distinguish *McCulloch* in a claim for non-pecuniary loss under materially identical s 92M(1)(c) of the Human Rights Act. While

---

667 See, for example, *Telecom South v Post Office Union,* above n 631, per Richardson, explained by Chief Judge Goddard in *Cain*, above n 632, at 791, "Richardson J should be taken as having pointed out that the global impact or overall effect of the two awards should be taken into account and the total amount moderated if appropriate. This suggestion sits easily with the practice established in the Labour Court which, in proper cases, had regard to an employer's ability to pay and reduced awards to meet it or, where the amount of reimbursement was already high, sometimes declined to add it to any amount for compensation: see, for example, *STAMS v The Pad & Paper Co Ltd* [1990] 3 NZILR 1030." In *Cain* Chief Judge Goddard would have ordered more by way of compensation if he had not upgraded the lost remuneration part of the relief package. And in *Woud v Department of Corrections* [2005] ERNZ 314 (EmpC) at [101] the Court ordered $15,000 compensation but said that $35,000 would have been awarded if reinstatement had not been ordered.

668 *STAMS* above n 667, at 1045.

669 *De Bruin v Canterbury District Health Board* [2012] NZEmpC 110, [2012] ERNZ 431 at [85]-[86]. Judge Couch declined to order any compensation under s 123(1)(c)(i) to an unjustifiably dismissed employee. Although the employee was found to have suffered "considerable distress" reinstatement was considered solely appropriate.

670 "[The Court] *may*, in settling the grievance, *provide for any 1 or more of the following remedies...*" (emphasis added).

671 Law Commission *Damages for Personal Injury: Non-Pecuniary Loss* (UKLC, 1995) at 3.17 (emphasis added).

672 *McCulloch & Partners v Smith* CA133/03, 3 December 2003 at [3]–[5] (emphasis added).

accepting the general common law principle that a plaintiff cannot get more than they have sought, Fogarty J held that the Tribunal had the power to award a greater amount having regard to special features of the legislation (a number of which have synergies with the employment legislation).[673]

Interest?

The weight of authority is against interest being awarded on orders for compensation for non-pecuniary loss, having regard to the wording of sch 3, cl 14 (the Court may award interest in any proceedings "for the recovery of any money").[674]

While such an interpretation may follow a strict reading of the provision, the exclusion of interest in cases involving non-pecuniary loss is controversial and has not been universally endorsed.[675]

It appears that the Court of Appeal has not yet dealt expressly with the scope of cl 14, although it declined to interfere with the award of interest on all compensatory sums, including for non-pecuniary loss, in *Gilbert v Attorney-General*.[676]

Harmonisation

While the assessment of compensation must be individualised to the circumstances of the particular case,[677] awards should be *broadly consistent*.[678] Because an award for non-pecuniary loss is in the nature of a conventional sum, comparability is said to be particularly important.[679]

It may be argued that the historic approach to quantifying compensatory awards has led to a degree of inconsistency. While there are obvious limitations in seeking to analyse awards across cases, a review of decisions reflects a range of awards with no clearly discernible pattern. Tables of awards made by the Court and the Authority under s 123(1)(c)(i) are annexed and illustrate the point.[680]

While consistency is a desirable end, it raises a question – consistency with what?

- Consistency between Authority and Employment Court awards made under s 123(1)(c)(i)?

---

673 *Chief Executive of the Ministry of Social Development v Holmes* [2013] NZHC 672, (2013) 9 HRNZ 541 at [103]-[108]. See too *Singh v Singh* [2015] NZHRRT 8 at [64].

674 See, for example, *Salt v Fell*, above n 651, at [133]-[134]; *Reynolds v Burgess* EmpC Christchurch CC5/07, 2 March 2007 at [114]. Compare *Nutter*, above n 608, where the Court of Appeal ordered interest on the total compensatory sum, including in respect of the award under s 123(1)(c)(i). However, note that the point does not appear to have been raised and was not expressly addressed.

675 *Pickett v British Engineering Ltd* [1980] AC 136 at 151 per Lord Wilberforce; *Wright v British Railways Board*, above n 591, per Lord Diplock in respect of interest for pain, suffering and loss of amenity in personal injury cases. Compare *McGregor on Damages*, above n 592 at 15-053, where it is said that interest can have no relevance where monetary damages are being awarded not as replacement for other money but as representing the best the law can do in the face on incommensurable loss which is not truly calculable in money.

676 *Gilbert v Attorney-General* [2010] NZCA 421, (2010) 8 NZELR 72 at [97] referring to the first remedies judgment: *Gilbert v Attorney-General* EmpC Auckland AC 63/03, 4 December 2003 at [93]-[94].

677 *Nutter*, above n 608, at [80].

678 See, for example, *Minister of Education v Bailey* [1993] 2 ERNZ 321 (CA) at 323 per Cooke P: "The Court had to achieve reasonable conformity with the results of other personal grievance cases and to act with judicial consistency."

679 *Poh Choo v Camden and Islington Area Health Board* [1980] AC 174 per Lord Scarman at 187.

680 Refer Appendix 2.

- Consistency between awards made under s 123(1)(c)(i) and for humiliation, loss of dignity and injury to feelings for breach of contract at common law?
- Consistency between such awards and awards of other institutions exercising a comparable remedial jurisdiction, notably the Human Rights Review Tribunal and the High Court on appeal?
- Consistency across jurisdictions for awards for non-pecuniary loss?

As to the first, there is no logical reason for inconsistency in awards in like cases between the Authority and the Court.[681] If it were otherwise the rationale for de novo challenges would be undermined.

Nor does there appear to be any logical reason why comparable claims for relief at common law would give rise to different awards, although a review of the cases suggests that higher awards for non-pecuniary loss have been achieved in such cases.[682]

As to the third, it is evident that the Human Rights Review Tribunal has embraced the opportunity to award more by way of compensation for humiliation, loss of dignity and injury to feelings than the employment institutions have been willing to do, despite the fact that there is a jurisdictional limit of $200,000 in the Tribunal and no monetary limit applies under the Employment Relations Act.

The recent case of *Hammond* (in which the plaintiff was awarded $98,000 for humiliation, loss of dignity and injury to feelings for actions taken by the defendant employer) provides a well publicised example.[683] This compares to the highest compensatory award in an employment case under s 123(1)(c)(i) (or its predecessors) of $50,000.[684]

A perusal of the decisions across the two jurisdictions reflects that neither is looking to the other for guidance in quantifying losses sustained under materially identical statutory provisions. This is perhaps surprising given the heads of relief are the same; employment often provides the factual context for claims arising in the Tribunal; and it is not uncommon that a claimant can elect to proceed down one or the other route. This latter point raises a particularly acute issue of parity. Should forum make a difference to the quantum of compensation for precisely the same loss? Many would see a conceptual difficulty with such a result.[685]

It is true that the legislative schemes differ. The Privacy Act, for example, contains a threshold requirement of "significant" harm before a complaint can progress.[686] That may have some effect in terms of the quantum of awards in that jurisdiction in comparison to the employment jurisdiction, which has no such initial threshold.

Further, it could be said that the rights underlying a compensatory award by the Tribunal (for example, breach of privacy) are sufficiently serious to justify higher average awards than those which are generally available in this jurisdiction. However, because

[681] A review of recent cases suggests that higher awards in the Court generally reflect "better" evidence in that forum on a de novo challenge.

[682] See, for example, *Ogilvy & Mather*, above n 640, ($50,000 in 1998); *Gilbert*, above n 634, ($75,000 in 2000); *Matheson v Transmissions and Diesels Ltd* [2002] 1 ERNZ 22, at [21]-[23] ($25,000, taking into account a $10,000 payment made to the plaintiff's widow); *Brickell v Attorney-General* [2000] 2 ERNZ 529 (HC) ($75,000); *Whelan v Waitaki Meats Ltd* [1991] 2 NZLR 74 (HC) ($50,000).

[683] Hammond, above n 602, at [189.5]. It is unclear whether the defendant was in an employment relationship at the relevant time. No appeal was advanced against the Tribunal's decision.

[684] *Waugh v Commissioner of Police*, above n 633, at [140]-[141].

[685] See *Laursen v Proceedings Commissioner* (1998) 5 HRNZ 18 at 29, per Gallen ACJ.

[686] Privacy Act 1993, s 66(1)(b)(iii).

compensation is directed at the actual loss or damage suffered rather than the nature of the breach itself, that may not provide a principled basis for differentiation.

In any event it is questionable whether a breach of privacy is inherently worth more by way of compensation, or likely to be more acutely felt, than breach of an employer's fundamental obligations to act fairly and reasonably to an employee. After all, employment is generally a particularly important aspect of an individual's life from which a considerable amount of self worth is derived.

The other point of difference is that there is no equivalent to s 124 (remedy must be reduced if contributing behaviour by employee) in, for example, the Privacy Act.

Further, appeals from quantum awards made by the Employment Court are dealt with by the Court of Appeal, rather than the High Court. It may be that the two appeal routes have impacted on the "going rate" for compensatory awards in each jurisdiction. There does not appear to be any reported case in which an appeal has advanced from the High Court to the Court of Appeal in terms of an award of compensation for humiliation, loss of dignity and injury to feelings by the Tribunal.

What of a broader approach to consistency? The legal right to redress for non-pecuniary loss is not limited to the employment field. Defamation, false imprisonment and malicious prosecution all provide a springboard for compensation for mental distress, anxiety or injured feelings. As a matter of basic principle one might assume that there would be a degree of consistency across the spectrum, given the nature of the wrong being compensated for. That appears not to be the case. Rather, a siloed approach appears to have been favoured.

The quest for harmonisation in relation to compensatory awards for non-pecuniary loss is not new.[687] The policy rationale for a broader inquiry was touched on in *Vento v Chief of West Yorkshire Police* where it was said that:[688]

> Compensation of the magnitude of £125,000 for non-pecuniary damage creates concern as to whether such recent tribunal awards in discrimination cases are in line with general levels of compensation recovered in other cases of non-pecuniary loss, such as general damages for personal injuries, malicious prosecution and defamation. In the interests of justice (social and individual), and of predictability of outcome and consistency of treatment of like cases (an important ingredient of justice) this Court should indicate to Employment Tribunals and practitioners general guidance on the proper level of award for injury to feelings and other forms of non-pecuniary damage.

And that:[689]

> The totality of the award [for discrimination] for non-pecuniary loss is seriously out of line with the majority of those made and approved on appeal in reported Employment Appeal Tribunal cases. It is also seriously out of line with the guidelines compiled for the Judicial Studies Board and with the cases reported in the personal injury field where general damages have been awarded for pain, suffering, disability and loss of amenity. *The total award of £74,000 for non-pecuniary loss is*, for example, *in excess of the JSB Guidelines for the award of general damages for moderate brain damage, involving epilepsy, for severe post-traumatic stress disorder having permanent effects and badly affecting all aspects of the life of the injured person, for loss of sight in one eye, with*

687 See, for example, Sirko Harder *Measuring Damages in the Law of Obligations: The Search for Harmonised Principles* (Hart Publishing, Oxford, 2010) at 7.
688 *Vento*, above n 606, at [47].
689 At [61] (emphasis added).

> *reduced vision in the remaining eye, and for total deafness and loss of speech. No reasonable person would think that that excess was a sensible result.*

Comparisons with non-pecuniary losses for personal injury in New Zealand reveal that amputation of a leg below the knee resulting in 28% impairment may lead to a one-off lump sum payment of $12,617; tetraplegia resulting in 80+% impairment to a lump sum payment of $131,785.95.[690]

Living in a leaky home, with its associated stress, anxiety and loss of amenity may give rise to general damages of around $25,000.[691] Being detained by a Customs officer, including without access to sanitary products and with delays in providing an opportunity to shower, change clothes and eat, has attracted a compensatory award of $4,000.[692]

Reparation for emotional harm arising out of the kidnapping and assault on an employee who wished to go and work for another employer was set at $5,000 by the Court of Appeal in *Chahil v R*.[693]

An emotional harm award of $1,300 was described as a "significant sum" in *Prowse v Police* by French J in circumstances where the victim's "significant emotional harm and distress" arose out of serious physical injuries caused by the appellant in a motor vehicle accident.[694]

An award of $20,000 for emotional harm under the Health and Safety in Employment Act 1992, arising out of the loss of fingers caught in an inadequately guarded machine, was said to be consistent with other similar awards in *Big Tuff Pallets Ltd v Department of Labour*.[695]

A prisoner subjected to an unlawful behavioural management scheme, which included solitary confinement and humiliating strip searches, was awarded $35,000 compensation.[696] He had a psychiatric condition which made him particularly unsuitable for the programme. A Police assault with batons and pepper-spray on a person while in custody has resulted in an award of $30,000.[697]

A wrongful conviction and detention attracts an ex gratia compensatory payment for non-pecuniary losses (including emotional harm) of $100,000 per annum.[698] Damages for non-pecuniary loss arising out of a defamatory publication may reach $825,000.[699]

Hammond J has, extra-judicially, cautioned against a "pick-a-figure" approach. Rather, he suggests looking around the legal system to see what is done in other areas of the law for comparative yardsticks "which will at least operate as a constraint on personal judicial

---

690 Together with an ongoing quarterly independence allowance of $431.34 and $1,131.52 respectively. See ACC "Lump Sum Payments and Independence Allowances" (March 2015) www.acc.co.nz.

691 See, for example, *O'Hagan v Body Corporate 189855* [2010] NZCA 65, [2010] 3 NZLR 486 at [153] [*Byron Avenue*] where the Court of Appeal gave general guidance that an appropriate level of compensation for non-economic loss in leaky home cases should be $25,000 per unit for occupiers.

692 *Attorney-General v Udompun* [2005] 3 NZLR 204 (CA). Justice Hammond, dissenting in part, would have awarded $10,000. And see the discussion in *Toll New Zealand Consolidated v Rowe* [2007] ERNZ 840 (EmpC) at [105].

693 *Chahil v R* [2010] NZCA 244 at [57]. The Court observed that reparation impacted on the length of the sentence of imprisonment.

694 *Prowse v Police* [2012] NZHC 1931 at [8].

695 *Big Tuff Pallets Ltd v Department of Labour* HC Auckland CRI 2008-404-000322, February 2009 at [21]. Note the absence of evidence of extreme or psychiatric disability.

696 *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429 at [21], [118].

697 *Falwasser v Attorney-General* [2010] NZAR 445 (HC) at [129].

698 See Cabinet Guidelines *Compensation and Ex Gratia Payments for Persons Wrongly Convicted and Imprisoned in Criminal Cases* (Pol Min (01) 34/5, 12 December 2001).

699 *Siemer v Stiassny* [2011] NZCA 106, [2011] 2 NZLR 361 at [80].

idiosyncrasy, and which may give some guidance, whilst not under-valuing the importance of the dignitary interest."[700]

The point was perhaps most eloquently expressed by Lord Diplock in 1964, where he referred to the "scale of values", observing that:[701]

> ... *I am convinced that it is not just* (and I do not think that it is the law, as Mr Eastham [counsel for the plaintiff] has contended) *that, in equating incommensurables when a man's reputation has been injured, the scale of values to be applied bears no relation whatever to the scale of values to be applied when equating those other incommensurables*, money and physical injuries. *I do not believe that the law today is more jealous of a man's reputation than of his life or limb. That is the scale of values of the duel. Of course, the injuries in these two kinds of cases are very different, but each has as its main consequences pain or grief, annoyance or unhappiness, to the plaintiff.* In this court last week we refused by a majority to disturb a verdict of a jury awarding £2,000 to a woman thirty years of age who had, after considerable suffering for many months and two operations in hospital, had a leg amputated below the knee, and her knee permanently immobilised. In that case, it was the view of the Court of Appeal that a proper measure of damages, had the award been made by a judge, would have been in the neighbourhood of £4,000 to £6,000, a figure which is in scale with the amount of damages which are commonly awarded (and have been approved by this court) in serious physical injury cases. *If £2,000 is not inappropriate, or if £4,000 to £6,000 is appropriate, compensation for a life-long injury of this character, which has its physical effect every day of the plaintiff's future life, and £9,000 is the appropriate award for the injury done to the plaintiff in this case, then I can only say that the scale of values is wrong, and, if that is the law, so much the worse for the law.*

Predictability

Awards should be *predictable*. This is closely related to the need for broad consistency. While the Court of Appeal has expressed the view that guidelines might be useful for compensatory awards in the employment jurisdiction,[702] that observation was made over a decade ago, and the Court of Appeal has not yet taken steps to provide such guidelines.

Concerns about consistency and predictability have been addressed in a number of areas of the law by way of introduction of a *banding or tariff approach*. This has not been limited to assessing compensatory awards, although it is utilised for such purposes in some areas, including in the Human Rights Review Tribunal and Accident Compensation cases. It also features in areas of the criminal law, such as for sentencing purposes. The underlying policy rationale is to provide an aid, not a straightjacket, for decision-making in like cases.

Adopting a banding or tariff approach may be particularly useful at an early stage of the employment process, allowing individuals to make more informed decisions about potential outcome and risk and providing representatives with a surer footing for offering advice. This objective has particular force in this jurisdiction, where the early resolution of grievances is actively encouraged (for obvious reasons).[703]

---

700 Hammond, above n 592, at 20.
701 *McCarey v Associated Newspapers Ltd (No 2)* [1965] 2 QB 86 (HL) at 109 (emphasis added).
702 *Nutter*, above n 608, at [85].
703 See Employment Relations Act 2000, ss 101 and 143.

A Banding Approach?

The twin objectives of broad consistency and predictability might usefully be achieved by adoption of a banding approach. Such a system is notably absent from the employment jurisdiction,[704] although something of an informal banding system can perhaps be detected from the annually published table of awards made in the Authority. And while it is relatively common to see reference to awards in other cases in judgments of the Court, that tends to be limited in scope and appears to be engaged for loose comparative purposes.

A banding approach based on seriousness may have much to recommend it. On this approach there might be three bands:

- Band 1 – cases involving low level loss/damage;
- Band 2 – cases involving mid-range loss/damage;
- Band 3 – cases involving high level loss/damage.

In allocating a band, and where within a band a particular case sits, the facts of the individual case will be pivotal. Comparisons to other cases may be helpful but often they are of limited utility. The following sort of factors would likely be of particular relevance:

- In assessing seriousness *the focus is on the loss and/or damage sustained by the employee.* It is not directly on the employer's actions. That is because compensatory damages are distinct from aggravated and exemplary damages and are not designed to punish the transgressor. Rather it is to compensate the aggrieved party for the loss or damage they have sustained, insofar as it is sufficiently causally linked to the breach.
- What was the *nature of the loss and/or damage suffered by the employee*, and *which of the three heads* applies? It may be that the evidence establishes loss and/or damage under all three, but it may not.
- What was the *extent of the loss and/or damage* suffered by the employee?

Interestingly harmonisation with the Human Rights Review Tribunal would lead to adoption of the following bands:

- Band 1 – nil to $10,000
- Band 2 – $10,000 to $50,000
- Band 3 – $50,000 and over

Whether direct harmonisation would be appropriate is open to question, including having regard to the fact that the threshold requirement for "significant" humiliation, loss of dignity and injury to feelings does not find statutory expression in the Employment Relations Act.

In *Carter Holt Harvey Ltd v Pirie*[705] the Court of Appeal described the award of $50,000 in *Ogilvy & Mather*[706] as the "high water mark" for cases of its kind.[707] Whether the

[704] In *Simpsons Farms Ltd v Aberhart* [2006] ERNZ 825 (EmpC) at [75] Chief Judge Colgan indicated that it would not be appropriate to set a range within which awards should fall, given that Parliament had not stipulated a cap. These observations were subsequently endorsed by the Court of Appeal in *Commissioner of Police v Hawkins* [2009] NZCA 209, [2009] 3 NZLR 381 at [69]. The comments appear to be directed at recognising that Parliament has set no ceiling for awards, rather than a more general concern about the utility of ranges, the top one having no upper limit.

[705] *Carter Holt Harvey Ltd v Pirie* [1997] ERNZ 648 (CA) at 652.

[706] *Ogilvy & Mather*, above n 640, at 654.

[707] It was followed eight years later in the Employment Court by an award of $50,000 in *Waugh v Commissioner of*

statement was intended to be applied as an impenetrable ceiling for awards is questionable. And even if it was, it was imposed over 19 years ago and may not reflect the approach that the Court would adopt in 2016.

In any event adjusting the "high-water mark" figure identified by the Court of Appeal to account for inflation would lead to a significantly higher "high water mark" of around $75,000 in 2016. That would place it $25,000 above the bottom of Band 3 if the above bands were adopted.

While there may be some advantages in harmonising compensatory awards in the employment institutions and the Human Rights Review Tribunal, the Court of Appeal has not yet had the opportunity to consider the matter. Accordingly it remains speculative as to what, if anything, it would do. What can be said with a degree of confidence is that a review of the cases across the two jurisdictions reflects that different results may flow from the same factual context depending on forum choice. It is, of course, the employee not the employer who selects forum.

Ability to Adopt a Different Approach?

Both the Authority and the Court have a broad statutory discretion to award remedies. Neither is bound by its own decisions. As the Court of Appeal has emphasised, in evolving its approach to the exercise of its remedial discretionary powers, the Employment Court must act judicially and on the basis of principle. Reasonable consistency is required and established patterns should not be departed from without good and enunciated reasons.[708]

Notably the High Court has recently affirmed the Human Rights Review Tribunal's ability to adopt a different approach to costs to that previously endorsed by it, having regard to the Tribunal's special jurisdiction and working knowledge of the cases coming before it.[709] A similar point was made in *Wright v British Railways Board* where the House of Lords accepted that the Court of Appeal, with its hands-on experience of the cases, was best qualified to set the guidelines for compensation for non-economic loss.[710] Lord Diplock went on to observe that:[711]

> A guideline as to quantum ... is not a rule of law nor is it a rule of practice. It sets no binding precedent; it can be varied as circumstances change or experience shows that it does not assist in the achievement of even-handed justice or that it makes trials more lengthy or expensive or settlements more difficult to reach.

In this jurisdiction the Court of Appeal has noted that the Employment Court is:[712]

Police, above n 633, the quantum of which was not appealed.

708 *Telecom South*, above n 631, per Cooke P at 716; *Air New Zealand v Johnston*, above n 607, at 710.

709 *Central Clerical IUOW v Victoria University Students' Association* (1990) ERNZ Sel Cas 767 (LC) at 775, cited in *Commissioner of Police v Andrews* [2015] NZHC 745, where Mallon J stated at [61]: "I consider the Tribunal is right to express caution about applying the conventional civil costs regime to its jurisdiction. Statutory tribunals exist in order to provide simpler, speedier, cheaper, and more accessible justice than do the ordinary courts." A similar approach was adopted by the Human Rights Review Tribunal in adopting revised bands for compensatory awards for humiliation, loss of dignity and injury to feelings in *Hammond*, above n 602, at [170.9]: "There is no reason why the Tribunal, at first instance, cannot come to the conclusion that the time has come for a recalibration of the level of awards against which there should be some consistency. That view would be informed by the much larger number of cases coming before the Tribunal. It can then [be] taken on appeal to the High Court."

710 *Wright v British Railways Board*, above n 591, at 785.

711 At 785.

712 *Commissioner of Police v Hawkins*, above n 634, at [76].

> ... well placed to know what is happening in industrial relations in New Zealand society, including, for example, the pattern in relation to extra-judicial settlements. That is a real advantage which points against the desirability of frequent incursions by this Court as to the appropriate level of awards.

It is well known anecdotally that litigants are generally likely to achieve higher compensatory payments for non-pecuniary loss under agreed terms of settlement than via litigation in the Authority and the Courts. This was noted some time ago by Chief Judge Colgan in *Simpsons Farms*,[713] and the position appears to have remained the same despite the passage of time.

An Alternative Option?

If the proposed quantification process seems too complex, it may be as simple as pressing a few buttons on your calculator – as an advertisement by a UK firm of solicitors suggests:

> **How much could you be entitled to?**
>
> Choose one of the dismissal or discrimination calculator options below to see how much you may be entitled to, or call [0800...] to speak to our friendly employment team who will help you calculate your likely compensation award.

[713] *Simpsons Farms*, above n 704, at [78].

Part II: Practical considerations

Liz Coats, Bell Gully[714]

The Second Limb

In the context of the employment relationship, where the nature of the parties' exchange is financial, personal and relational, the types of "injury" that an employee may suffer from a wrong committed by their employer are potentially vast and multi-faceted. As suggested in Part I, the strict contract law analysis may not be appropriate when quantifying compensation, given the importance and nature of these rights and the framework of the employment relationship.

The broad introductory wording of s 123(1)(c) provides a discretion in relation to compensating an employee. Under s 123(1)(c), the Authority or Court may, in settling a grievance, provide for "the payment to the employee of compensation by the employee's employer, *including* compensation for (i) humiliation, loss of dignity, and injury to the feelings of the employee; and (ii) loss of any benefit, *whether or not of a monetary kind*, which the employee might reasonably have been expected to obtain if the personal grievance had not arisen" (emphasis added).

While the vast majority of claims for relief under s 123(1)(c) focus on the employee's "humiliation", "loss of dignity", and "injury to feelings" under the first limb, the broad wording of both the introduction to the subsection and the second limb provide scope for a more expansive, creative approach. Part II of this paper raises some ideas which may be able to be advanced in an appropriate case.

As His Honour Judge Corkill put it in a recent case, s 123(1)(c)(ii) is not to be interpreted narrowly.[715] In *McKendry v Jansen*,[716] the full Court considered whether s 123(1)(c)(ii) allows the Authority and Court to award compensation for lost benefits that were not provided for under the relevant employment agreement. In reaching its view that the Authority *was* permitted to order payment of compensation for the loss of an entitlement to the Government paid parental leave scheme, the Court noted that s 123(1)(c) did not contain any express limitation or restriction of benefits, and nor could it be implied from s 123(1)(c)(ii) that compensation is limited to loss arising under the employment agreement only. Whilst generally the word "benefits" is understood to refer to perquisites additional to monetary remuneration (such as the provision of a vehicle or mobile phone), the Court noted that "the legislation has not, in its text, so restricted the benefits able to be compensated for."[717]

Yet a survey of recent cases involving claims under s 123(1)(c)(ii) suggest that there is a strong focus on claims for loss of monetary benefits only. Recent cases in the Authority and Court have included claims for:

- Non-payment of a contractual bonus;[718]

714 The author gratefully acknowledges the assistance and contribution of Rebecca Compson, law clerk, Bell Gully, in the preparation of this paper.
715 *Wills v Goodman Fielder New Zealand Ltd* [2014] NZEmpC 233 at [129].
716 [2010] ERNZ 453.
717 Above at [67].
718 *Singh v Ora HQ Ltd* [2016] NZERA Auckland 115 at [36-37].

- Non-payment of a commission that the employee was likely to have received had the employer engaged with them in good faith about the commission scheme to apply and implemented such a scheme;[719]
- Superannuation contributions associated with an award of lost wages;[720]
- Employer contributions to KiwiSaver associated with an award of lost wages;[721]
- Holiday pay associated with an award of lost wages;[722]
- Redundancy compensation that the employee would otherwise have received had they not been constructively dismissed;[723]
- Training costs incurred by the employee that would otherwise have been borne by the employer;[724] and
- Payment in respect of long service leave.[725]

Notwithstanding the Court's endorsement of an expansive interpretation of s 123(1)(c)(ii), there have been comparatively few claims under s 123(1)(c)(ii) seeking compensation for *non-monetary benefits* which fall outside of *"humiliation, loss of dignity, and injury to the feelings of the employee"* under s 123(1)(c)(i) or the employee's lost financial benefits.

The Possibilities – claims for non-pecuniary loss under s 123(1)(c)(ii)

In *Waugh v Commissioner of Police*,[726] the Court held that compensation under s 123(1)(c)(ii) could include compensation for having incurred a detriment that would not otherwise have been suffered but for the personal grievance.[727] There, the Court awarded the employee $200,000 for legal costs incurred by the employee in relation to a judicial inquiry into the employee's application for a free pardon.

While *Waugh* dealt with *pecuniary* detriment that the employee had suffered, the same principles would apply in relation to *non-pecuniary* detriment suffered by the employee that they would not otherwise have suffered "but for" the grievance.

What non-pecuniary claims, then, *could* be brought under s 123(1)(c)(ii)? Set out below are some possibilities which could be available as heads of compensation in an appropriate case. It is important to emphasise that these are all conceptual *possibilities* – whether such a claim succeeds will of course depend on how clearly the claim articulates what is being sought and why (ie the evidence), and how each head of claimed relief is different and distinct to the others. However, it is suggested that seeking relief under the second limb may offer employee plaintiffs a broader range of remedies than a focus on claims for relief under the first limb above.

---

[719] *French v SGS New Zealand Ltd* [2014] NZERA Auckland 102.
[720] *Davis v Commissioner of Police* [2016] NZERA Christchurch 34 at [118-119].
[721] *Nagel v Nelson Underground Services Ltd* [2016] NZERA Wellington 36; *McCormack v Niu* [2015] NZERA Christchurch 146.
[722] *Porter v Complete Siteworks Company Ltd* [2015] NZERA Christchurch 201 at [2]; *Gunning v Bankrupt Vehicle Sales and Finance Ltd* [2013] NZEmpC 212.
[723] *Wills v Goodman Fielder New Zealand Ltd* [2014] NZEmpC 233.
[724] *Hughes v Board of Trustees of Rotorua Girls High School* [2014] NZERA Auckland 330; *Gyenge v Clifford Lamar Ltd* [2011] NZEmpC 1.
[725] *New Zealand Language Centres Limited v Page* [2013] ERNZ 226.
[726] [2004] 1 ERNZ 450.
[727] At [146], consistent with what the Court of Appeal made clear in *Air New Zealand Ltd v Johnston* [1992] 1 NZLR 159.

Eg: Loss of benefit of stable, permanent employment and anticipated future income

In *Ballylaw Holdings Ltd v Henderson,*[728] His Honour Chief Judge Goddard noted that compensation under s 40(1)(c) of the Employment Contracts Act 1991 (ECA) (the ECA equivalent to s 123(1)(c)) could include compensation "for the value of the job lost"). He continued:[729]

> Usually that value will be equivalent to the loss of income that the employment would have yielded if it had not been unjustifiably terminated *but there may be other attributes or benefits of an intangible kind but nevertheless capable of estimation in money such as the reputation that a position may carry or opportunities for travel or education.* (emphasis added)

More recently, in *Hall v Dionex Pty Ltd,*[730] the plaintiff employee sought $167,000 under s 123(1)(c)(ii) for loss of benefit of stable permanent employment and anticipated future income. In the circumstances of that case, the Court did not need to consider the claim due to factual findings reached.[731] However, there was no suggestion that such a claim was impossible (as a matter of principle) if the circumstances and evidence had supported it.

Eg: Loss of status/career

Whether or not there is a basis to claim compensation for loss of career, loss of status or damage to family relationships remains uncertain, but the broad wording of s 123(1)(c)(ii) together with the principles in *Waugh* arguably provide scope for such a claim in an appropriate case.

In *Johnson v Gore Wood & Co,*[732] Lord Cooke recognised (albeit not in an employment context) "both a changed way of life because of poverty and damaged family relationships can be grievous forms of non-pecuniary harm." In that case, the plaintiff brought proceedings against the defendant firm of solicitors for negligence, and as part of that claim, sought general damages for mental distress and anxiety. The plaintiff alleged that he had suffered extreme financial embarrassment (going from some prosperity to being reduced to subsistence on a social security benefit), as well as deterioration in family relationships with his wife and son.

In a decision on a strike out application, a majority of their Lordships held the claim fell afoul of the principle that damages for such loss were not generally recoverable in respect of a breach of contract. However, Lord Cooke dissented and stated that he would let such a claim go to trial. His Lordship commented that "the common law would be defective and stray too far from reality, humanity and justice if it remorselessly shut out even a restrained award under these heads" (subject to the disclaimer that damages "could not be awarded merely for injured feelings" as that is excluded from the statutory scheme in the UK).[733]

In *Horsburgh v NZ Meat Processors Industrial Union of Workers,*[734] the Court of Appeal accepted that damages may be available to compensate for "loss of status or standing and interference with the right to work." The facts involved a claim by an employee against his union arising from his unlawful expulsion from that union. The Court accepted that the

[728] [2003] 1 ERNZ 313 at [73].
[729] Ibid.
[730] *Hall v Dionex Pty Ltd* [2015] NZEmpC 29.
[731] Ibid. See para [91].
[732] [2001] 1 All ER 481 at 517.
[733] [2001] 1 All ER 481 at 516.
[734] [1988] 1 NZLR 698 (CA).

employee's union status carried certain employment opportunities with it, and, in a time of high unemployment, it was highly probable that the union's deliberate refusal to offer the employee union member status would cause significant loss of status. The employee was awarded $7,500 damages, and the Court was careful to note that it was not "essaying any general propositions about when damages for distress can be recovered under various causes of action." Rather, it was "simply holding that, if the facts warrant it, distress is a kind of damage to be taken into account in assessing damages for loss of status and interference with the right to work in a case of the present kind."

Although a claim for loss of status and/or career is theoretically available in principle under s 123(1)(c)(ii), it may run into the difficulties associated with double recovery. In *Attorney-General v Gilbert*,[735] the Court of Appeal found that the Court's decision to award $50,000 damages for "loss of career, lost employment status, employability and future marketability" was in error. It noted that the Court's decision to award compensation for earnings for the balance of the plaintiff's working life was sufficient to cover any loss of career – and any additional associated embarrassment was covered by the award of damages for distress and injured feelings.

Eg: Damage to family relationships

Awards for compensation under s 123(1)(c)(i) are of course designed to compensate the employee for humiliation, loss of dignity, and injury to feelings that the employee has themselves suffered, and not for any such similar injury that might have been caused to the employee's spouse or family by association.

In *Edwards v Board of Trustees of Bay of Islands College*, His Honour Chief Judge Colgan noted that the employee's wife could not be compensated for any embarrassment or humiliation that she suffered arising from her husband's dismissal, but "the plaintiff's distress and humiliation arising from his experiencing the impact of his dismissal on his wife, in particular, is a foreseeable and compensable consequence of his dismissal from an esteemed position in his small community for reasons of dishonesty."[736] This was then taken into account in setting the amount of an award of compensation under s 123(1)(c)(i). In other words, although the employee's wife could not herself receive any compensation, the employee's injury to feelings arising from seeing the impact on his wife could be taken into account in assessing his compensation under the first limb.

Applying the "but for" analysis from *Waugh*, it could also be argued that damage to the wronged employee's relationships with his or her family is a detriment that the employee can be compensated for under s 123(1)(c)(ii), provided that that damage can be causally linked to the employer's action. (This would be compensation for harm suffered by the employee themselves, and not for the harm suffered by the employee's family).

Eg: Psychiatric/mental injury

Although it is not uncommon for medical evidence to be provided to support a claim for compensation under s 123(1)(c)(i), there is nothing in the wording of that limb which requires evidence of any medically recognised condition or injury as a precondition for

[735] [2002] 2 NZLR 342 at [112].
[736] [2015] NZEmpC 6 at [304].

relief. It is therefore respectfully suggested that there is no reason for medical evidence to be required before compensation is awarded under the first limb.

A claim for more serious, medically diagnosed stress, anxiety or psychiatric injury could also be brought within the second limb of s 123(1)(c), but may face an uphill battle in being proved.

In *Johnson v Unisys Ltd,*[737] the employee brought a claim against his former employer for breach of contract and negligence, seeking damages of £400,000 for loss of earnings allegedly arising from the fact and manner of his dismissal which, he claimed, caused him to suffer a nervous breakdown and made it impossible for him to find work. The House of Lords held that such a claim was contrary to the unfair dismissal regime applicable under the Employment Rights Act 1996 (because that Act does not allow for compensation for humiliation and injury to feelings).

In his dissenting judgment, Lord Steyn noted that "there are formidable evidential difficulties in the way of the employee."[738] In relation to causation, he noted that the employee would need to prove that his psychiatric condition was caused by the *manner* of his dismissal rather than the *fact* of his dismissal; and in relation to remoteness, he noted the difficulty of proving it was reasonably foreseeable that this type of loss would be sustained by this particular employee. Lord Hoffman commented that expert evidence would be required to perform the task of distinguishing between the psychiatric consequences of the dismissal itself (for which no damages were recoverable) and the unfair circumstances in which the dismissal took place (for which damages could be recovered).

To similar effect, in *Hatton v Sutherland,*[739] the Court of Appeal noted that "the question is not whether psychiatric injury is foreseeable in a person of 'ordinary fortitude'. The employer's duty is owed to each individual employee, not to some as yet unidentified outsider...The employer knows who his employee is.[740] It may be that he knows...or ought to know, of a particular vulnerability, but he may not. Because of the very nature of psychiatric disorder, as a sufficiently serious departure from normal or average functioning to be labeled a disorder, it is bound to be harder to foresee than is physical injury..." Furthermore, the Court held that where there are several different possible causes for an employee's mental injury, as will often be the case, an employee may have difficulty proving that the employer's fault was one of them.

Closer to home, in *Gilbert,*[741] the Court of Appeal recognized that the onus of proving causation (in a claim for damages for mental injury arising from an employer's breach of contract), on the balance of probabilities, is on the employee. It said at [67] that "very often that burden will prove insurmountable for a plaintiff."

In that case, the Court of Appeal noted the extensive expert evidence from three medical specialists, the international literature referred to by them, as well as the direct evidence of the workplace conditions that was provided in support of the employee's claim (and which it considered provided ample evidence upon which the Court could find that he had

[737] [2001] 2 All ER 801.
[738] [2001] 2 All ER 801 at 814.
[739] [2002] EWCA Civ 76 at [23].
[740] But see the Court of Appeal's comments in *Gilbert* at [92], where the Court held that "it does not follow that in all cases the risk [of vulnerability to a particular type of mental injury] will need to be matched to the particular employee. If the risk is one which applies generally, then knowledge of specific vulnerability may be irrelevant."
[741] Above at [21].

discharged the burden of proof). This indicates that even where it may be possible for a plaintiff employee to discharge the burden of proof, it is likely to be an expensive and time consuming exercise to ensure that the relevant evidence is before the Court.

Eg: Loss of opportunity eg for professional training, travel

In *Ballylaw*, His Honour Chief Judge Goddard noted that compensation may be awarded for the loss of "other attributes or benefits of an intangible kind [which are] nevertheless capable of estimation in money such as the reputation that a position may carry or opportunities for travel or education."[742]

More recently, in *Maori Hill and Balmacewen Pharmacy Ltd v O'Sullivan*,[743] the employee claimed compensation in relation to the loss of an opportunity to attend an approved training course and the loss of a year of study and career advancement as a result of an unjustified constructive dismissal. On the facts, the Court found that there was no causal connection between the constructive dismissal and the loss pleaded and therefore compensation was not awarded. However, in a case where there *was* a causal connection, such a benefit could well be claimed.

Eg: Loss of reputation

And what about loss of reputation?

In *Trotter v Telecom Corporation of New Zealand Ltd*,[744] the employee sought $150,000 as compensation for loss of reputation. He had been recommended for a position as a consultant to the World Bank in Indonesia, which was revoked as soon as it became known that he had been dismissed by Telecom (for poor performance). As a result, the damage to his reputation arising from dismissal was described as being "swift", within the company and externally.

In considering his claim relating to reputational loss, the Court of Appeal noted that it was clearly a separate head to "injury to feelings", because it was concerned with the effect of the grievance on the minds of others rather than on the mind or feelings of employee themselves. The Court found that there was "no reason in principle to exclude" claims for damage to reputation from compensation claims under s 40(1)(c) of the ECA.

Despite its acceptance that, in principle, such a claim may be available as a type of "compensation" relief, the Court of Appeal declined to make any award. And, as noted in *George v Auckland Council*, there do not appear to be any cases since in which general damages or compensation has been awarded for damage to reputation arising from a personal grievance.[745]

Yet surely the scope for such claims to succeed is increasing, in a world where one's reputation is increasingly on-line as well as "IRL",[746] and where news or rumour about one's employment situation now spreads immediately.[747] A person's professional

[742] Above at [73].
[743] [2013] NZEmpC 28.
[744] [1993] 2 ERNZ 659 (CA).
[745] *George v Auckland Council* [2014] NZEmpC 100, [2014] ERNZ 681 at [130]; application for leave to appeal dismissed in [2014] ERNZ 72.
[746] In Real Life.
[747] Consider the news earlier this year relating to various staff arrivals and departures from MediaWorks, which attracted

reputation can be destroyed in an instant, on a global scale. Furthermore, there is increasing judicial recognition of the importance to individuals of the reputational consequences for them of actions taken by employers (for example, in the context of assessing the relevance of a *Calderbank* offer when determining costs).[748]

It is suggested that the below may go some way to explaining the paucity of cases in which compensation for damage to reputation has been sought:

1. A "vicious cycle" – no claims have succeeded, and therefore no claims are advanced;
2. The need to avoid double-counting of relief; and
3. Probably most importantly, these claims are inherently difficult to prove.

As to the risk of "double-counting", this was specifically noted in *Trotter* and more recently in *George*. In *George*, Her Honour Judge Inglis noted that the fact that there had been no cases in which damages for reputation from a personal grievance had been awarded may be a reflection that the compensatory awards under s 123(1)(c)(i) usually suffice to compensate any such damage.

If making a claim for damage to reputation, it will therefore be important to distinguish between the harm suffered to the employee's feelings as a result of the manner of the unjustified dismissal and any harm suffered (eg injured feelings or distress) as a result of damage to the employee's reputation arising from that dismissal. While this is easy to describe in principle, in reality it may be quite complex to draw this distinction.

As to the difficulties in proving these claims, damage to reputation is a type of loss that is similar in some respects to the loss claimed in *Waugh* referred to above, as it relates to a detriment that the employee would not have suffered but for the grievance. However, unlike the pecuniary detriment suffered in *Waugh*, reputation is a "benefit" which is non-monetary, and therefore inherently difficult to assess. It is not capable of "arithmetical calculation, exact valuation, or close reasoning" – it "really is a matter of impression."[749]

In order to succeed in such a claim, an employee needs to be able to prove that there was *actual* and not hypothetical past damage to their reputation, or that there *will* be such loss in the future.[750] In *BCCI v Ali*, the House of Lords stated that this might be established through an examination of an employee's job applications, their outcome and the reasons for that outcome. In relation to future job applications, the House of Lords held that the correct approach was to decide whether the damage to reputation would deprive the employees of a real opportunity of success on such applications. This would require consideration of the character of the employee, the job, the criteria of appointment, and the competition, and the person best equipped to provide such information would be the prospective employer.

In *Trotter*, the Court of Appeal suggested that an employee may be more likely to succeed in a claim for compensation relating to damage to reputation where the immediate losses (in terms of damage to the employee's own feelings and dignity) are comparatively small but downstream future losses (to the employee's general reputation) are great. In this situation, the risk of double-counting would be greatly reduced.

---

unprecedented media attention.

748 *Campbell v Commissioner of Salford School* [2015] NZEmpC 122 at [180] – [217]; application for leave to appeal dismissed in *Commissioner of Salford School v Campbell* [2016] NZCA 126.

749 *Trotter v Telecom Corporation of New Zealand Ltd* at 709.

750 *Bank of Credit and Commerce International SA (in liq) v Ali* (No 2) [1999] 4 All ER 83.

Factors that might be of assistance in building a case for compensation for damage to reputation:

- Evidence of changes in views of the employee in the minds of others in the community as a result of the grievance eg news spread over social media, news articles, evidence of recruitment agencies no longer providing the employee's CV to perspective employers.
- Comparatively little evidence of injury to feelings to the employee (eg because they have a robust personality). In other words, the injury to the employee's feelings is short-lived, but the impact on their professional reputation and career is likely to be prolonged and significant.
- Real (and not hypothetical) evidence of difficulty in obtaining further work that the employee would otherwise have been successful in applying for but for the grievance (eg prospective employers providing credible evidence that the reason the employee was not successful in obtaining a position was because of what they had heard about the circumstances of the employee's unjustified dismissal).[751]

A Few Comments on Claims for Certain Types of *Pecuniary* Loss under s 123(1)(c)(ii)

Although this paper is focused on claims for compensation for non-pecuniary loss, there are two potential heads of claim for pecuniary loss that may not yet have been explored to their full potential.

Costs incurred by an employee in engaging representation during an employment process (before proceedings initiated)

Where an employee has been subjected to a baseless investigation, it may be possible to seek compensation under the second limb of s 123(1)(c) in relation to the legal costs that the employee incurred in defending themselves during that process.

In *Binnie v Pacific Health Limited* (a common law claim for breach of contract), the Court of Appeal noted as a general proposition that special damages are recoverable in full (as opposed to party and party costs which are recoverable only to the extent of a reasonable contribution), but observed that "use of the special damages approach should be reserved for cases in which a proper line can be drawn…"[752] In that case, the Court suggested that legal expenses properly incurred in relation to "issues such as wrongful suspension of employees and investigations into their conduct" could be classified as special damages in this way.

Shortly thereafter, in *Harwood v Next Homes Limited* (a personal grievance claim), His Honour Judge Travis noted (obiter) that he was "not persuaded that in dealing with the resolution of an employment relationship problem as opposed to an action for damages…that it would be appropriate to classify costs incurred prior to the filing of the statement of problem to enable them to be recovered in full and not be subject to any

[751] For example, in *Stevenson v Chief Executive of the Auckland University of Technology* (AC68/01, 17 October 2001, Shaw J) (a wrongful dismissal claim in which damages were sought for loss of reputation as a result of the manner and circumstances of the employee's redundancy), the Court noted at [95] that evidence was provided by a potential employer as to their assumption that a person who had been selected for redundancy may have some professional or personal weakness and would therefore generally review that applicant less favourably. No award of damages was made on the facts of this case.

[752] [2002] 1 ERNZ 438 at [18].

restraint as party and party costs are in the Authority."[753] The Authority has subsequently relied on Judge Travis' comments in asserting that legal costs are not a compensable loss for the purposes of s 123(1).[754]

More recently, in *Hall*,[755] a claim for special damages was made arising from alleged breaches of contract associated with the process implemented by the employer prior to the dismissal. Her Honour Judge Inglis held that the employee's breach of contract claims could not be advanced (as they were essentially the same as the employee's personal grievance). Furthermore, although the defendant employer had committed some procedural breaches (in that there was no lawful basis to suspend or dismiss the employee), there were genuine concerns about his conduct which justified an inquiry and warranted a response from the employer. In these circumstances, Her Honour indicated that this would not be an appropriate case for special damages.

However, Her Honour accepted at [114] that there may be "limited circumstances" in which an employee can claim the costs associated with an employment investigation. For example, where the employee was subjected to a "baseless" investigation which required them to engage the services of a lawyer (as in *Binnie*, where the employee was suspended and subjected to an investigation in relation to suggestions of professional misconduct which were found to have been completely unfounded). The Court also noted that it may be possible to claim these costs as compensation under s 123(1)(c) – rather than as a claim for special damages as part of a breach of contract claim.[756]

There does not appear to be any case where compensation under s 123(1)(c)(ii) has been awarded for pre-litigation costs incurred by an employee. However, in light of the comments in *Hall*, there is certainly this possibility in an appropriate case where the employer's process was particularly unfounded *and* the legal costs incurred as part of that process can be distinguished from the costs arising from litigation.

Holiday pay eg for payments made after termination of employment

In relation to holiday pay, the recent *Zeetags* case[757] suggests that holiday pay ought to be considered payable on *all* awards of lost remuneration and any contractual benefits which the employee is found to have lost under s 123(1)(c)(ii).[758] This is regardless of the fact that the payment may be made some time after the employee's employment has ended.

The definition of "gross earnings" in s 14 of the Holidays Act 2003 – "all payments that the employer is required to pay to the employee under the employee's employment agreement, including…" – is very broad. Applying the approach in *Zeetags*, it is arguable that there should be holiday pay applied to payments of salary in lieu of notice as well as contractual redundancy compensation (as well as in relation to any relief awarded that arises from a contractual entitlement). However, a survey of the cases in which awards of these payments have been made suggests that the question of whether such entitlements attract holiday pay has not been definitively determined.[759]

753 [2003] 2 ERNZ 433 at [37].
754 For example, *Moxon v Pathways Health Ltd t/a Pathways* [2011] NZERA Christchurch 151 at [89] – [96].
755 [2015] NZEmpC 29.
756 Above at [114].
757 *Howell v MSG Investments Ltd (formerly known as Zee Tags Ltd)* [2014] NZEmpC 68.
758 The definition of "gross earnings" in s14 of the Holidays Act is very broad, encompassing "all payments that the employer is required to pay to the employee under the employee's employment agreement", with only certain limited exceptions.
759 The New Zealand Payroll Professionals Association is in dialogue with MBIE about what is/is not included in "gross

Better the Devil you Know? Where to Go if you have the Choice

The Human Rights Review Tribunal's (Tribunal) recent award of $98,000 compensation for humiliation, loss of dignity and injury to feelings in *Hammond v Credit Union Baywide*[760] was "attention-getting",[761] particularly given the stark contrast with comparatively low awards made by the Authority and Court. Some commentators have gone as far as to suggest that "the obvious consequential message for counsel [of the large award by the Tribunal in *Hammond*] is that, where there is a choice of pathways...pursuit of the privacy remedy would seem to be more promising, with a much greater possible 'upside'."[762]

This section of the paper explores the circumstances in which a claim in the Tribunal may be possible, and the pros and cons associated with that option.

Jurisdiction

The Tribunal may make awards of compensation to employees pursuant to its jurisdiction in relation to (a) harassment and discrimination under the Human Rights Act 1993 (HRA) and (b) interference with privacy under the Privacy Act 1993. Section 92Q of the HRA provides that the Tribunal cannot award any remedy in any proceedings that is greater than $200,000 (being the limit of the jurisdiction of the District Courts under the District Courts Act).

The wording of the relevant sections in the HRA and Privacy Act is almost identical to the wording in s 123(1)(c) of the ERA, with both limbs of s 123(1)(c) reflected in s 92M of the HRA and s 88 of the Privacy Act.

However, unlike the relatively static levels of awards in the employment jurisdiction (and particularly the Authority), the Tribunal has clearly reached a view that previous awards for compensation were inadequate, and has taken steps to address this by increasing the amounts awarded.

The Tribunal has in recent years noted the need for awards to keep up with inflation, and to be "calibrated appropriately with awards in other contexts but which are, essentially, for much the same kinds of harm."[763] It has reported, for example, that the owners of leaky buildings are routinely awarded sums in the vicinity of $25,000 as general damages for stress and anxiety (and $15,000 for non-occupying owners). In *Chief Executive of the Ministry of Social Development v Holmes*, the High Court endorsed the Tribunal as being entitled to, at first instance, come to the conclusion that the time has come for such a recalibration of the level of awards.[764] The Tribunal appears therefore to have taken a pro-active approach in raising the level of awards to reflect inflation over time.

Even just a high level review of the cases and the amounts awarded confirms that the general trend in the Tribunal is towards substantially higher awards of compensation than those being awarded in the employment jurisdiction (as discussed in Part I of this paper).[765]

earnings", and in particular whether contractual redundancy compensation should be included. See issue number 348 of "ePayroll", an email publication published by the NZPPA on its website - http://www.nzppa.co.nz.

760 [2015] NZHRRT 6 ("*Hammond*").

761 Stephen Penk and Rosemary Tobin (eds) *Privacy Law in New Zealand* (2nd edn, Thomson Reuters, 2016) at 10.3.5.

762 Ibid.

763 *EN v KIC* [2010] NZHRRT 9, (2010) 7 NZELR 350 at [68].

764 [2013] NZAR 760.

765 See the Schedule included with the article by Peter Cullen and Calum Cartwright "The Human Rights Review

The Court is aware of this, and in recent judgments has shown sympathy for the view that awards of compensation have fallen "woefully behind."[766]

When can the Tribunal be accessed?

Of course, the potential award of compensation available will not be the only driver of which jurisdiction your employee client chooses to bring their claim. It is worth considering a number of factors – beyond just the currently accepted compensation ranges – before a decision is made on this complex issue.

The threshold issue is whether the Tribunal has jurisdiction to hear the claim at all. Employees only have the ability to bring a claim in the Tribunal in certain limited circumstances.

- *Discrimination/harassment:* The Tribunal has jurisdiction in relation to complaints under the HRA relating to unlawful discrimination and racial or sexual harassment in employment. However, as this issue can also amount to a personal grievance under the ERA, s 112 of the ERA and s 79A of the Tribunal provides that where the circumstances giving rise to a personal grievance are also such that the employee would be entitled to make a complaint under the HRA, the employee may choose to apply to the Authority to resolve the grievance *or* make a complaint to the Human Rights Commission under the HRA.
- *Privacy:* Where an employee believes that their employer may have interfered with their privacy, that claim will fall outside the jurisdiction of the Authority and Court and should be brought as a complaint to the Privacy Commissioner in the first instance.[767] Such a concern might arise, in relation to the way that the employer has collected information, refused an employee access to information, or disclosed that information to a third party.[768] However, it is quite possible that the same action could equally be reframed and described as a breach of contract, unjustified disadvantage or part of the sequence of events leading to an unjustified dismissal (for example, it is not uncommon for employees to seek access to information from their employer under both the Privacy Act and ERA). In this situation, the employee may be said to have a choice of whether to focus on the alleged privacy interference as a privacy complaint, or bring a claim within the employment jurisdiction.

Similarities between the jurisdictions

Without providing an exhaustive analysis of the Tribunal's jurisdiction, a review of the HRA and Privacy Act confirms that there are many similarities between the processes and constraints that the different institutions operate under.

- *Informal resolution between the parties preferred:* Under the ERA, HRA and Privacy Act, there is an emphasis on seeking to encourage the parties to resolve employment relationship problems or complaints by agreement rather than through a judicial process.

Tribunal" at https://www.lawsociety.org.nz/lawtalk/lawtalk-archives/issue-879/the-human-rights-review-tribunal,-employment-institutions-and-the-adequacy-of-remedies (3 December 2015).

[766] *Hall v Dionex Pty Ltd* at [87].

[767] *New Zealand Public Service Association Inc v Southern Regional Council* [2005] ERNZ 1008.

[768] Note that the complainant is required to establish both (1) an interference with their privacy and (2) one of the forms of actual or potential harm contemplated by s 66(1) of the Privacy Act.

In relation to complaints under the HRA, the first step is to file a complaint with the Human Rights Commission. If the Commission accepts the complaint, it has a number of flexible processes available to attempt to work with the parties to resolve the issues together (including providing information or mediation).

In relation to complaints under the Privacy Act, the Privacy Commission may investigate a complaint or decide to take no further action. If the Privacy Commission decides to investigate the complaint, it must inform the parties of the outcome of the investigation and any further steps it proposes to take. If the complaint is found to have substance, then the Privacy Commission is to endeavour to assist the parties to resolve a complaint without the need for recourse to the Tribunal, and it will adapt its approach to the particular circumstances of the matter.

In either situation, if the complaint is not resolved through those processes, then the aggrieved employee can take their complaint to the Tribunal.

- *Limited rights of appeal:* Under the ERA, a party who is dissatisfied with a judgment of the Court as being wrong in law may, with leave of the Court of Appeal, appeal to the Court of Appeal against the decision.[769] The Court of Appeal may only grant leave if it is satisfied that the question of law involved in the appeal is one that, by reason of its general or public importance or for any other reason, ought to be submitted to the Court of Appeal for decision.[770]

  Similarly, a party who is dissatisfied with a decision of the High Court under the HRA or Privacy Act may only appeal to the Court of Appeal on a question of law, with the leave of the High Court or special leave of the Court of Appeal.[771] Such leave will only be granted if the question of law meets the "general or public importance or for any other reason" standard.

Different opportunities in the Tribunal

Where an employee has the option to bring a claim in the Tribunal (or can only bring this claim in the Tribunal), this jurisdiction may be said to offer the following benefits or opportunities for a claimant that might not be available (or as easily available) in the employment jurisdiction:

- *Specialist assistance at an early stage:* If the primary issue relates to discrimination, harassment, or a breach of privacy, then it may be most useful to utilise the specialist knowledge of the Human Rights Commission and Privacy Commission (respectively) at an early stage (rather than relying on mediation provided by MBIE, which is largely driven by the parties themselves). The investigators assigned to complaints at each Commission have specific experience in relation to investigating human rights and privacy issues, and a broad range of tools available to them to assist the parties before proceedings are filed. The Commission deals with complaints with a process of investigation and conciliation.[772] The parties to an investigation will therefore benefit from specialist input at an early stage, which may help to identify key issues and claims and the likely outcome in the event of proceedings.
- *Representation by Director of the Office of Human Rights Proceedings:* If an employee's complaint is not resolved through the Commission process (whether the

[769] ERA s 214(1).
[770] ERA s 214(3).
[771] HRA s 124(1); Privacy Act 1993 s 89.
[772] Privacy Act, ss 69-71.

complaint arises under the HRA or Privacy Act), it may be possible for the employee to obtain free representation in the Tribunal from the Office of Human Rights Proceedings (OHRP).

The OHRP is part of the Human Rights Commission, but acts independently of it. The OHRP is headed by the Director of the OHRP. Upon receiving a complaint, the OHRP can: refer the complaint back to the Human Rights Commission; investigate the complaint further and try to help the complainant and other party reach a settlement; or decide to take the case for the complainant to the Tribunal.

The Director of the OHRP is required to consider a number of factors before deciding whether to provide legal representation to a complainant, including whether the complaint raises a significant question of law, whether the complaint would affect a large number of people, the level of harm, the likelihood of success, and whether or not it is in the public interest to provide representation.[773] Where a request for representation is granted, this will mean that the complainant avoids the costs associated with their own counsel, as well as any potential adverse costs award that they might otherwise be required to pay if the claim does not succeed.

- *Other relief available:* Beyond just compensation for injury to feelings (the focus of this paper), the Tribunal may grant several other remedies.

  In relation to breaches of the HRA, the Tribunal can order a party in breach to: pay damages for financial loss suffered and for the loss of any benefit, whether financial or non-financial, that the complainant might otherwise have had;[774] not continue or repeat the relevant breach;[775] do particular things to put right any loss or damage that has been suffered as a result of the breach;[776] undertake any specified training or any other programme, or implement any specified policy or programme, in order to assist or enable that party to comply with the HRA;[777] and any other relief that the Tribunal thinks fit.[778]

  In relation to any interference with the privacy of an individual under the Privacy Act, the Tribunal may order the party in breach to: pay damages for financial loss suffered and for the loss of any benefit, whether financial or non-financial, that the complainant might otherwise have had;[779] not continue or repeat the relevant breach;[780] do particular things to put right any loss or damage that has been suffered as a result of the breach;[781] and any other relief that the Tribunal thinks fit.[782]

  A claimant in the Tribunal can, as part of a claim for damages sought under s 92M(1)(a), obtain an award for legal advice taken in the period leading to any adverse action taken by their employer. In *Meulenbroek v Vision Antenna Systems Ltd*, the Tribunal awarded

773 HRA, s 92.
774 HRA, s 92M(1)(a) and (b).
775 HRA, s 92I(3)(b).
776 HRA, s 92I(3)(d). Under s 123(1)(d) of the ERA, where the Authority or Court finds that an employee has been racially or sexually harassed in their employment, the Authority or Court may make recommendations to an employer concerning: (i) action that the employer should take in respect of the person who made the request or was guilty of the harassing behaviour, which may include the transfer of that person, disciplinary action against that person, or rehabilitative action in respect of that person; and (ii) any other action that is necessary for the employer to take to prevent further harassment of the employee concerned or any other employee.
777 HRA, s 92I(3)(f). The ability to order a party in breach to undertake training or to implement a policy or programme is in contrast to the more limited ability of the Authority and Court to "make recommendations" to an employer, where the Authority or Court finds that any workplace conduct or practices are a significant factor in a personal grievance.
778 HRA, s 92I(3)(h).
779 Privacy Act, s 88(1)(a) and (b).
780 Privacy Act, s 85(1)(b).
781 Privacy Act, s 85(1)(d).
782 Privacy Act, s 85(1)(e).

just under $7,000 for legal advice in the period leading to the employee's dismissal.[783] (See discussion above regarding the possibility of claiming legal costs as special damages or compensation under s 123(1)(c)(ii) in the employment jurisdiction).

- *Approach to costs:* While the Authority's usual approach is that "costs follow the event", this is no longer the prevailing principle when it comes to awarding costs in the Tribunal.

  In *Andrews v Commissioner of Police*,[784] the Tribunal revisited the approach taken by the Tribunal and High Court under previous jurisprudence and advised of its view that "an assumption that costs follow the event must be approached with considerable caution, if not rejected altogether."[785] It noted that the Tribunal's jurisdiction in relation to costs is broad, and cannot be fettered by applying a presumption that costs are to be awarded to the successful party. Of particular relevance was the fact that the Tribunal hears issues of public and constitutional law, often between private individual and the State, and from complainants of limited means. On appeal, the High Court accepted that the Tribunal was the appropriate body to develop its own approach to costs and recognised its broad discretion to do so.[786]

  The upshot of this approach to costs is that employee claimants may be able to be less concerned about the adverse costs consequences of a failed claim in the Tribunal than they would otherwise be in the employment jurisdiction.

  Where a costs award is made against the unsuccessful party, there appears to be a recognised starting point for legal costs in the Tribunal of $3,750 per sitting day. This is less than the $4,500 daily tariff effective in the Authority from 1 August 2016.

Advantages of employment jurisdiction

Where an employee has the option to bring a claim in either the Tribunal or the employment jurisdiction, the employment jurisdiction may be said to offer the following advantages:

- *Remedies available:* If the employee wishes to be reinstated to their previous position (eg because of an allegedly unjustified demotion or dismissal), then only the Authority and Court are empowered to make such an order. Reinstatement is not a remedy that the Tribunal can order.

- *Tribunal jurisdiction limited:* Related to the comment above regarding the range of remedies, the Tribunal does not have jurisdiction to hear claims which fall within the exclusive jurisdiction of the Authority and Court. This means that if an employee has a number of separate concerns, and only some of those fall within the Tribunal's remit, it is likely to make more sense (in terms of avoiding possible duplication issues, keeping a lid on costs, reducing delay and simplicity) to frame all of those claims as employment claims which can be brought in the Authority.

  When advising an employee client, consider what is at the heart of their concern and be clear about what the client is trying to achieve – if the privacy breach is the primary issue or the alleged issues arise from harassment or discrimination, then the Tribunal may be preferred. However, if this is an employment relationship problem in relation to

---

[783] [2014] NZHRRT 51.
[784] [2014] NZHRRT 31.
[785] Above at [7].
[786] [2015] NZHC 745 at [57].

which a privacy or human rights breach is just one of several issues, then the employment jurisdiction is likely to be preferred.[787]

Of course, it is possible for an employee to bring claims in both the Authority *and* the Tribunal, provided that they are not attempting to litigate the same complaint in both jurisdictions. For example, in *Director of Human Rights Proceedings v Valli and Hughes*,[788] the Director brought proceedings on behalf of Mr Valli in relation to a failure by his previous employers (his sister and her partner) to provide him with personal information sought following his redundancy. The claim in the Tribunal related solely to the ex-employers' failure to provide Mr Valli with his personal information, and the consequences of that interference with his privacy – it did not deal with any issues relating to his redundancy.

- *Familiarity:* the number of cases heard by the Authority each year is significantly greater than the employment cases heard by the Tribunal (which also hears many cases which arise outside of an employment relationship). As a consequence, it is probably fair to say that most practitioners in this area are more familiar with the employment jurisdiction and therefore may (consciously or subconsciously) prefer to guide their clients through this process. The Tribunal may be said to be more of an "unknown quantity."
- *Delay:* in relation to both human rights and privacy matters, it is necessary for the employee's complaint to first be submitted to the Privacy Commission and Human Rights Commission (respectively), before any proceedings can be filed. This is because the Tribunal only has jurisdiction if the relevant Commission has investigated it first. An investigation is likely to take longer than a mediation (which can typically be secured within 4-6 weeks of the application for mediation assistance being lodged with MBIE).

"DOs" and "DON'Ts"

Several determinations and judgments bemoan the lack of attention given in both evidence and submissions to the relief sought for an employee's personal grievance. Below are some high level tips when presenting or defending these claims before the Authority or Court (taking into account some of the "thinking points" raised in this paper).

Acting for an employee

If you are acting for an employee:

DO clearly articulate the various forms of compensation that the employee is seeking.

Consider whether this is a personal grievance claim or a breach of contract claim, and seek remedies accordingly (ie under s 123 of the ERA for a personal grievance or as damages for a breach of contract claim). An expansive approach to the second limb of compensation available under s 123(1)(c) should mean that it is not necessary to claim *both* a personal grievance (likely to be an unjustified disadvantage) and a common law breach of contract.

[787] Research undertaken in 2011 indicated that the "vast majority" of litigation under the Privacy Act was not "pure privacy" but rather related in some way to other disputes between the parties: Gehan Gunasekara and Alida Van Klink "Out of the Blue? Is Litigation under the Privacy Act 1993 Addressed Only at Privacy Grievances?" (2011) 17 Canta LR 229.

[788] [2014] NZHRRT 58.

This is because the "damages" available under the common law are equally available under the two limbs of s 123(1)(c)(i). This is likely to simplify the way that the claim is pleaded and the scope of submissions it requires. Having said that, it will still be necessary to clear set out the various bases upon which compensation is sought.

If your client is seeking compensation under the second limb, consider whether they are also entitled to compensation for any employer contribution to KiwiSaver or holiday pay associated with any lost financial benefit that has been sought. The employer contribution to KiwiSaver must be paid on top of "gross salary or wages" (unless the parties have accounted for a total remuneration approach in the terms and conditions of employment). The current default rate is 3%. "Salary or wages" is broadly defined (with reference to the definition in s RD5 of the Income Tax Act 2007), and includes payments of salary, wages, or allowances, bonuses, gratuities, commissions, overtime, "or other pay of any kind."

DO provide evidence in support of each head of your claim for compensation.

If the employee is claiming compensation for humiliation, loss of dignity and injury to feelings under s 123(1)(c)(i), relevant evidence may include:

1. A description in any briefs of evidence as to the employee's feelings about how they were treated and physical manifestations of those feelings (eg loss of appetite, loss of sleep, anxiety);
2. Observations of the employee's feelings by those close to the employee such as a spouse or close friend/family member;[789] and
3. Medical evidence or proof in relation to points 1 and 2 (although this point is not without controversy).

The evidence required for a claim in support of compensation for some other benefit lost as a result of the grievance will depend on the nature of the benefit alleged to have been lost. As a matter of first principles, make sure that evidence is provided in support of each of the heads of compensation claimed in the statement of problem/statement of claim (a "proof matrix" might be helpful as a reference point when you are preparing briefs of evidence, particularly where there are a number of different "types" of compensation sought).[790] It is the author's view that medical evidence as to injury to feelings ought not to be a requirement,[791] but the employee should still be able to describe the particular injury to feelings that they perceive that they have suffered.

If the employee is claiming compensation for the loss of reputation, consider the evidence that can be provided to show the effect that the employer's actions had on the views of others towards the employee. This will be different to the evidence advanced in support of the claim for compensation under the first limb. For example, evidence from prospective employers, evidence of on-line articles or social media posts, or evidence from recruitment agents.

[789] *Lavery v Wellington Area Health Board* [1993] 2 ERNZ 31.
[790] See example matrix at Appendix 4.
[791] Endorsing the views of Kathryn Beck and Hamish Kynaston in "Remedies – we've been thinking..." (presented at the 2014 NZLS CLE Employment Law Conference), p459.

DO consider the appropriate quantum.

If nothing else, this paper confirms that accurately quantifying loss under s 123(1)(c) (or the equivalent provisions in the HRA and Privacy Act) is an incredibly difficult task. A banding approach to compensation would assist in addressing this task in relation to the first limb; and in relation to the second limb, the correct quantum will largely depend on the nature of the benefit alleged to have been lost.

In relation to the first limb, consider the information provided by both MBIE as well as the summary tables provided with this paper as a useful starting point for assessing the likely award that could be made if the employee's claim succeeds. The summary tables show that in several decisions a "global" award of compensation was made where several separate personal grievances were raised, rather than separately allocating amounts to each particular claim.

Of course, in a case where an employee has suffered acute injury to feelings, the time may be right for a courageous advocate to seek an award of compensation that is well above the current level of awards. Although it could be argued that it would be unreasonable (from a fairness and consistency perspective) for the Authority or Court to make an unexpectedly large award compared with the prevailing levels, there are a number of cases in other jurisdiction in recent years where a decision-making body has been prepared to make an award that is well outside the previously accepted range. Consider *Hammond* (which one commentator has described as an "outlier" and which was significantly higher than the previous jurisprudence).[792] Or the recent decision of the Australian Federal Court in *Richardson v Oracle Corporation Australia Pty Limited*[793] - here, the Court abandoned the previous bands applied when determining awards for non-economic loss for adverse action (for which AU$20,000 was previously considered to be the top end of the scale), and made an award of AU$100,000. It may be that your client has "the case" which warrants a radical departure from the prevailing norm.

There is no specific requirement to specify in a statement of problem the exact quantum of relief that is sought from the Authority. Form 1 requires that the applicant should refer to any specific remedy that they are seeking "fully, fairly and clearly", but does not go so far as to require that this remedy is quantified. In preparing a statement of claim, Employment Court Regulation 11 requires that the statement of claim specify "the relief sought, including, in the case of money, the method by which the claim is calculated" and "any claim for interest", and these matters must be specified "with such reasonable particularity as to fully, fairly, and clearly inform the court and defendant" of the relief sought.

Although it is not necessary to specifically articulate the quantum of relief sought, there are advantages in doing so (for example, providing some idea of expectations for mediation). Furthermore, in the absence of specifying the amount sought, quantification will be left to the decision-maker. Therefore, at a minimum, it would be worthwhile considering the amounts of compensation awarded in analogous cases, and comparing the circumstances in those cases with those faced by your employee client. If substantial time has passed since the award was made, adjust the amount awarded for inflation so that the "real" value of the award is taken into account. Depending on how the investigation or hearing evolves, it would be open to the employee to file an amended statement of problem which revises the amount sought up or down (or could be dealt with in closing submissions).

---

[792] Katrine Evans "Taking Employment Cases Through the Privacy Jurisdiction: Some Thoughts" (paper presented to ADLSi "Employment and Privacy – Easing the Relationship" webinar, 22 June 2016).

[793] [2014] FCAFC 82.

DO seek interest – at least in relation to any compensation for lost monetary benefits.

Clause 11 of the Second Schedule to the ERA and cl 14 of the Third Schedule to the ERA provide the Authority and Court with the power to award interest in any matter or proceedings involving the "recovery of any money." In the Court, a claim for interest needs to be specifically pleaded, including the method by which the claim is calculated: reg 11(1)(f) of the Employment Court Regulations 2000. (There is no equivalent requirement in relation to seeking interest as part of a statement of problem in the Authority).

As discussed in the first part of this paper, although the position appears to be settled that no interest is payable on compensation for non-financial loss under s 128(i)(a), this is certainly still an arguable point. There is nothing on the face of the wording in either cl 11 or cl 14 to suggest that a claim for interest must be limited to claims relating to lost monetary benefits. Furthermore, the policy reasons that were cited by Colgan J (as he then was) in support of an award of interest on the distress damages in *Gilbert* could surely equally apply to an award of interest on compensation for non-financial loss.

Acting for the employer

If you are acting for an employer:

DO consider whether there are things that the employer can do to limit the extent of any damage.

Rather than being the ambulance at the bottom of the cliff, in some cases you might be able to provide advice to an employer *before* or *while* it takes any action as to steps it can take to limit the extent of any harm to an employee. These steps will likely help to both improve the employer's ability to justify any subsequent action or dismissal, but also limit the extent of compensation for injury to feelings awarded to the employee.

While each case will depend on its facts (and what is "fair and reasonable" in those circumstances), obvious advice would be to ensure that any process is conducted in a manner which protects an employee's dignity and reputation to the greatest extent possible. This is likely to mean maintaining confidentiality as well as a consistent thread of communications to keep the employee informed. Honest conversations with the employee about what the process will involve and possible outcomes are important, but at the same time need to be handled tactfully to avoid any inference of predetermination or a constructive dismissal claim. Good faith should be the touchstone.[794]

After the event, there may be other ways to mitigate the risk of a large compensation award under the first limb in s 123(1)(c). Part 1 of this paper notes the possibility of awards of compensation for injury to feelings being diminished by a failure to mitigate loss. There may be ways that an employer can attempt to "patch up" harm that it has caused to an employee, or offer ways to reduce any injury to feelings, after it has taken an unjustified action or unjustifiably dismissed an employee. For example, consider an employee who suffers emotional distress and loss of confidence as a result of an unfair redundancy process. After that process, the employer takes advice and realises that its process had

[794] See the description of steps taken by the employer to minimise the consequences of the employee's dismissal in *Edwards v Board of Trustees of Bay of Islands College* [2015] NZEmpC 6 at [302] (dismissal handled sensitively, employee given an opportunity to leave before any public announcement, steps in place to ensure that the announcement was sensitive to the employee, and offers put forward for some form of agreed resignation which meant that dismissal was not unexpected).

several imperfections. It then actively offers the employee free counselling or outplacement support/career coaching. While an employee's failure to accept any such offer would not amount to contribution under s 124 (because it occurred *after* the redundancy and therefore did not contribute to the situation that gave rise to the grievance), the employee's failure to avail themselves of these "self-help" options could be raised as relevant to a reduction in the award of compensation under the first limb.

DON'T assume that compensation awards will remain low.

It is not surprising that a frequent submission by lawyers acting for employers is that the amount that the employee has sought as compensation is significantly higher than the prevailing awards in the Authority and Court (as per the MBIE statistics and other analogous cases). This is to be expected, given the frequent comment in cases as to the need for decision-makers to determine awards on the basis of principle, having regard to the levels of awards in other decisions. However, the Court is now clearly indicating that the time may have come to revisit the amounts of compensation awarded.[795]

It will be important to consider this possibility and advise your client as to the risk of a higher award. This will also be relevant to any possible settlement parameters (discussed in more detail below).

DO attack any claims where it is arguable that there is an attempt at "double-counting."

Although this paper posits that s 123(1)(c) may be able to be used more creatively in order to obtain compensation for a wider range of non-financial losses there are of course counter-arguments that counsel for the employer will be able to advance in response to such claims. In particular, any claims should be analysed to ensure that there is not an attempt at "double-counting" or recovering compensation under a number of different heads for what is essentially the same loss.

DO consider causation.

Any compensation awarded under s 123(1)(c)(i) must be "causally linked to the grievance."[796]. The upshot of this principle is that if an employer can show that the employee's alleged harm results from some event or issue other than the employer's action or dismissal, then this may substantially reduce or eliminate the possible award to the employee.

For example, in *Robinson v Pacific Seals New Zealand Ltd*, the Authority distinguished between the hurt and humiliation that arose out of the employer's breaches (procedural deficiencies leading to the employee's dismissal) and the hurt and humiliation suffered as a result of an accident in the workplace which had preceded the employee's dismissal. The Authority awarded $5,000 compensation, and that award was not disturbed by the Court when it heard the non de novo challenge. This logic is similar to that applied in some redundancy cases, where the redundancy was substantively justified but implemented in a procedurally unfair manner – in which case a distinction is drawn between the hurt and humiliation suffered as a result of the loss of the job (for which compensation cannot be

[795] For example, in *Hall v Dionex Ltd*, Inglis J observed at [88] that "while there is a need for a degree of consistency with other cases, there is a danger of using consistency to keep awards at an artificially low level."

[796] *Robinson v Pacific Seals New Zealand Ltd* [2014] ERNZ 813 at [63].

awarded) and that suffered as a result of the procedural deficiencies (for which compensation can be awarded).

DO consider providing evidence about the employer's ability to pay (and consider asking for any award to be paid in instalments).

Although this would be hard, it may be possible for an employer to resist a large award of compensation for humiliation and distress on the basis of the employer's ability to pay. In *Waugh*, Chief Judge Goddard noted that in assessing the amount of compensation, "regard is to be had to fairness to the employer including its ability to pay."[797] In *Trotter*, his Honour noted that this can sometimes result "in no award being made", and sometimes a "diminution of the award that would otherwise be made in the absence of this feature."[798] An employer's ability to pay is taken into account in other contexts, such as when setting reparations awards for health and safety breaches.

Notwithstanding these indications that ability to pay should be taken into account in setting compensation awards, there are few decisions which consider this point. In one recent determination, the Authority expressly took account of the employer's ability to pay in reducing the amount of compensation, on the basis that the "Authority would not be supporting successful employment relationships if the effect of its determination was to drive an employer out of business."[799]

Settlement

When acting for either party, a key concern for the client will of course be the likely award if the grievance is successful in the Authority or Court. This advice is usually required at an early stage in order to have the most benefit when considering possible settlement parameters. The banding approach put forward in Part I of this paper would, of course, greatly assist in the ability to have confidence and certainty in any such advice.

In relation to any private settlement involving a payment of compensation under s 123(1)(c)(i), the IRD Public Ruling (BR Pub 06/05) applies. This confirms that compensation payments under this first limb are treated as tax-free capital payments rather than income, because it is not compensation for services rendered or for actions that take place in the usual course of employment. However, this tax treatment requires two conditions to be satisfied:

1. The payment is made in relation to a personal grievance (this is a remedy available in relation to personal grievances only under the ERA).
2. The payment is "genuinely and entirely compensation for humiliation, loss of dignity, or injury to feelings", and is not "in reality for lost wages or other income."

The tax treatment does not apply where the payment is a "sham." The Public Ruling states that where the Commissioner has some doubt about the *amount* attributed to humiliation, loss of dignity, or injury to feelings, he or she may ask the parties to an agreement what steps they took to evaluate objectively what would be a reasonable amount to attribute to humiliation, loss of dignity, or injury to feelings. This is the case whether or not the

---

[797] [2004] 1 ERNZ 450 at [136].
[798] *Trotter v Telecom Corporation of New Zealand Ltd* at 700-701.
[799] *Simkin v Gillespie t/a Clean and Gleam Services* [2014] NZERA Wellington 73 at [21].

payment was made as part of a private settlement or one certified by a mediator. Possible outcomes if the IRD considers a payment of compensation to represent (in whole or in part) lost income include PAYE, penalties, and interest.

It is widely known that many of the payments made pursuant to private settlements and/or certified settlement agreements are higher than those that would be awarded by the Authority or Court. There is no specific number at which it can be said that a payment would definitely be described as a "sham"; however, if one considers the research conducted in the preparation of this paper, awards above $20,000 are highly unusual and therefore could attract scrutiny. Of course, there is no clear guidance about the circumstances in which the IRD *will* closely review such payments – anecdotally, it is understood that this scrutiny is only applied in the event of a full IRD audit, and such audits are relatively rare.

If a banding approach (as mooted in Part I) was adopted, this might provide the parties to settlement agreements with greater certainty as to the level of compensation for injury to feelings which would be a "reasonable amount" given the particular circumstances of the case. Furthermore, if the trend continues towards higher amounts of compensation being awarded in the Authority or Court (in line with other jurisdictions), then this would help to support a higher amount being paid as reasonable compensation under settlement agreements.

If you are acting for a public sector employer (or employee), the Office of the Auditor-General's 2012 "good practice guide" to severance payments in the public sector contains some specific comments regarding payments under s 123(1)(c)(i).[800] Although public sector employers will need to comply with this official guidance (as they will be audited to these standards by the Auditor-General), the opinions expressed in the guide are debateable. For example, the guide suggests that settlements may include a payment to compensation an employee for "proven" distress and humiliation, and that it will not be appropriate to make a payment of this kind "if there are no grounds for a claim and the employee has not suffered distress and humiliation."[801] Furthermore, it suggests that a payment of more than $15,000 "will attract attention" from the IRD. This may well be an overstatement, as there are several settlements which take place that involve larger payments than this, and IRD scrutiny of such payments is relatively unusual in practice. In addition, given that the Authority and Court have awarded more than $15,000 compensation in several cases, it is unclear where this particular figure comes from.

Public sector employers may also be required to report on compensation amounts paid as part of settlement agreements. Local authorities and Crown entities have specific disclosure obligations in relation to severance payments under the Local Government Act 2002 and Crown Entities Act 2004 respectively. (Government departments do not have any equivalent duty). A local authority's annual report must state the amount of any "severance payment" made in the year to any person who has vacated the position of chief executive, the number of employees of the local authority to whom severance payments were made, and the amount of each payment.[802]

---

800 http://www.oag.govt.nz/2012/severance-payments/docs/severance-payments.pdf.

801 The author makes two comments in response to this: first, where a matter is settled the employee will not have "proven" any distress or humiliation in a legal sense; and secondly, the guidance sets the requirements for justifying a payment as part of a settlement higher than those in the Public Ruling (as set out above).

802 "Severance payment" is defined in the Local Government Act 2002 as "any consideration that a local authority has agreed to provide to an employee in respect of that employee's agreement to the termination of his or her employment, being consideration, whether of a monetary nature or otherwise, additional to any entitlement of that employee to – (a) any final payment of salary; or (b) any holiday pay; or (c) any superannuation contributions."

Summary

Since the Court of Appeal's decision in *NCR Corporation Ltd v Blowes*,[803] the Court of Appeal has not had cause to consider (in any great detail) the issues raised in this paper. In particular, there has not been any recent guidance as to the appropriate level of compensation awards in the employment arena generally, or any indication that the notional "upper limit" should be raised.

Given the trends towards increased awards of compensation for injury to feelings and other intangible harms in other jurisdictions (both overseas and in the human rights/privacy arena in New Zealand), the time is surely ripe for the Court of Appeal to consider such questions as:

- Whether the "upper limit" for compensation under s 123(1)(c)(i) needs to be revised (and indeed, whether any "upper limit" is appropriate at all);
- Whether the Tribunal's awards are too high, or the employment institutions' awards are too low, and the extent to which the courts should (if at all) strive for consistency between the two jurisdictions; and
- Whether the second limb of s 123(1)(c) may be able to be put to a wider variety of uses for non-pecuniary loss.

[803] In which an upper limit of $27,000 compensation under s 123(1)(c)(i) was suggested: [2005] ERNZ 932 at [42].

Appendix 1: Sections 123 and 124

123 Remedies

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

(a) reinstatement of the employee in the employee's former position or the placement of the employee in a position no less advantageous to the employee:

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

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

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

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

(ca) if the Authority or the court finds that any workplace conduct or practices are a significant factor in the personal grievance, recommendations to the employer concerning the action the employer should take to prevent similar employment relationship problems occurring:

(d) if the Authority or the court finds an employee to have been sexually or racially harassed in his or her employment, recommendations to the employer—

(i) concerning the action the employer should take in respect of the person who made the request or was guilty of the harassing behaviour, which action may include the transfer of that person, the taking of disciplinary action against that person, or the taking of rehabilitative action in respect of that person:

(ii) about any other action that it is necessary for the employer to take to prevent further harassment of the employee concerned or any other employee.

(2) When making an order under subsection (1)(b) or (c), the Authority or the court may order payment to the employee by instalments, but only if the financial position of the employer requires it.

124 Remedy reduced if contributing behaviour by employee

Where the Authority or the court determines that an employee has a personal grievance, the Authority or the court must, in deciding both the nature and the extent of the remedies to be provided in respect of that personal grievance,—

(a) consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance; and

(b) if those actions so require, reduce the remedies that would otherwise have been awarded accordingly.

Appendix 2: Total award tables

Total Awards:[804] Court and Authority (2013-2016)[805]				
Type of Award	**Total Mean[806]**	**Total Median[807]**	**Total Range[808]**	**Total Mode(s)[809]**
Serious Misconduct				
Global Award[810]	$10,416	$9,250	$13,000	$8,000 $10,000
Standard Award[811]	$6,817	$6,000	$21,000	$5,000
Suspension				
Global Award	$1,333	$1,000	$2,000	$1,000
Standard Award	$3,125	$2,500	$7,000	$1,000 $2,000 $3,000
Redundancy				
Global Award	$6,875	$6,000	$11,500	N/A
Standard Award	$8,140	$6,500	$17,500	$5,000
Poor Performance				
Global Award	N/A	N/A	N/A	N/A
Standard Award	$5,923	$5,000	$8,500	$5,000
Warning				
Global Award	$2,500	$2,500	$3,000	N/A
Standard Award	$2,700	$2,000	$4,500	$2,000

[804] The award values considered were those decided before contribution was taken into account (if at all) under s 124.

[805] The cases surveyed were all Employment Relations Authority and Employment Court decisions between January 2013 and mid-July 2016, where awards of compensation under s 123(1)(c)(i) were made on either a global or standard basis, for: unjustified dismissal for serious misconduct; unjustified dismissal for poor performance; unjustified dismissal for redundancy; unjustified suspension; or unjustified warning. The cases are not therefore a complete list of every award of compensation under s 123(1)(c)(i), because it does not cover cases which fell outside these categories. The number of cases surveyed in each category is set out further below.

[806] Mean = average award.

[807] Median = the award at the midpoint of all cases surveyed.

[808] Range = the range between the lowest and highest awards in the cases surveyed.

[809] Mode = the most common awards of all cases surveyed.

[810] "Global award" means a combined award for more than one type of grievance eg a combined award of $7,00 for an unjustified warning and unjustified dismissal for serious misconduct. "Standard" and "global" awards have been considered separately as the award associated with each particular type of grievance is not always specified in a decision, and the award amount could therefore skew the data. Where a "global award" has been made in any particular case, that award is referred to only once in the tables, under the award type that tends to see a higher award made (eg a global award for an unjustified warning and unjustified dismissal for serious misconduct would appear in the serious misconduct section of the table).

[811] "Standard award" means an award made for a single type of grievance.

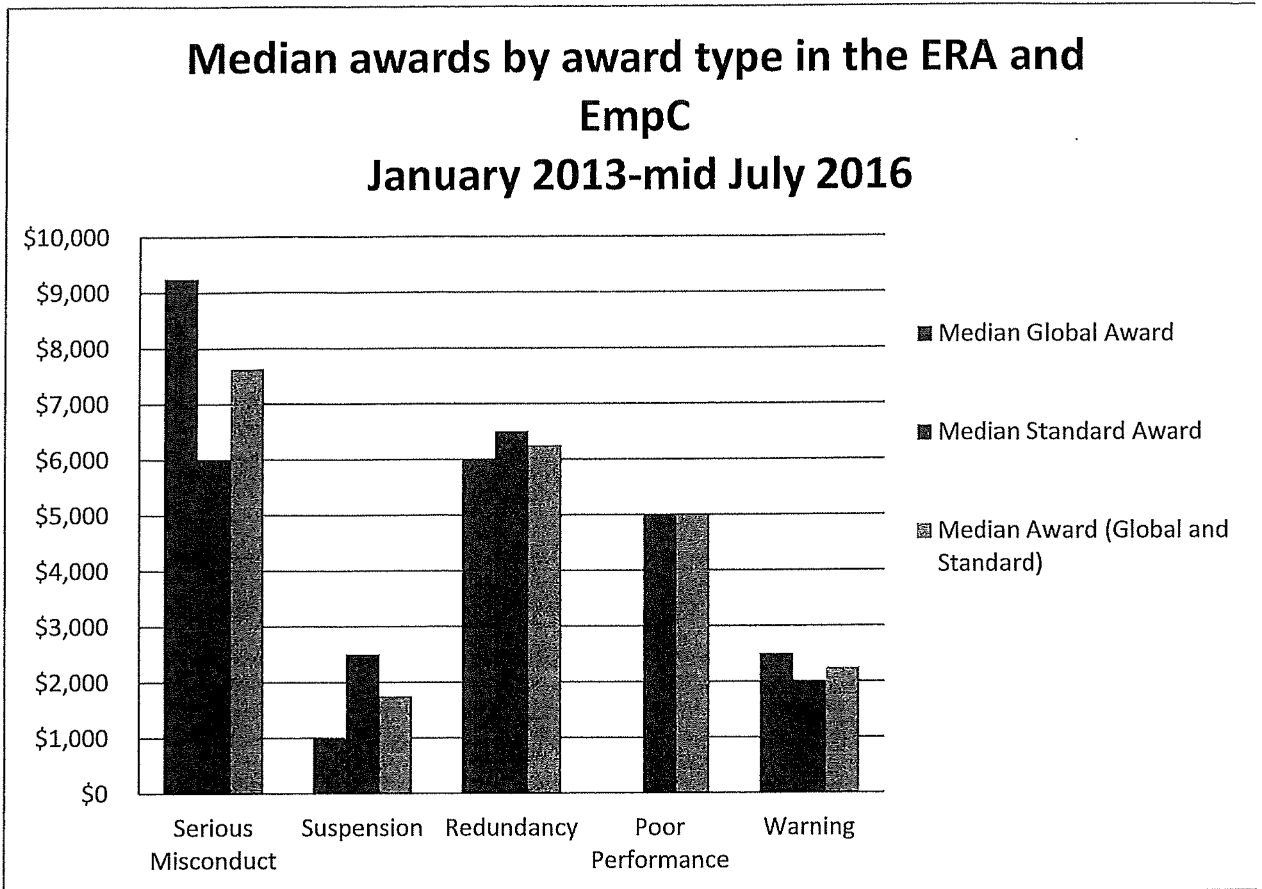
Total Awards: Court (2013-2016)				
Type of Award	**Total Mean**	**Total Median**	**Total Range**	**Total Mode(s)**
Serious Misconduct				
Global Award	$18,000	$18,000	N/A	N/A
Standard Award	$11,272	$12,000	$19,000	$3,000 $12,000 $20,000
Suspension				
Global Award	$1,500	$1,000	$1,500	$1,000
Standard Award	$1,500	$1,000	$1,500	$1,000
Redundancy				
Global Award	N/A	N/A	N/A	N/A
Standard Award	$15,000	$15,000	N/A	N/A
Poor Performance				
Global Award	N/A	N/A	N/A	N/A
Standard Award	N/A	N/A	N/A	N/A
Warning				
Global Award	N/A	N/A	N/A	N/A
Standard Award	N/A	N/A	N/A	N/A

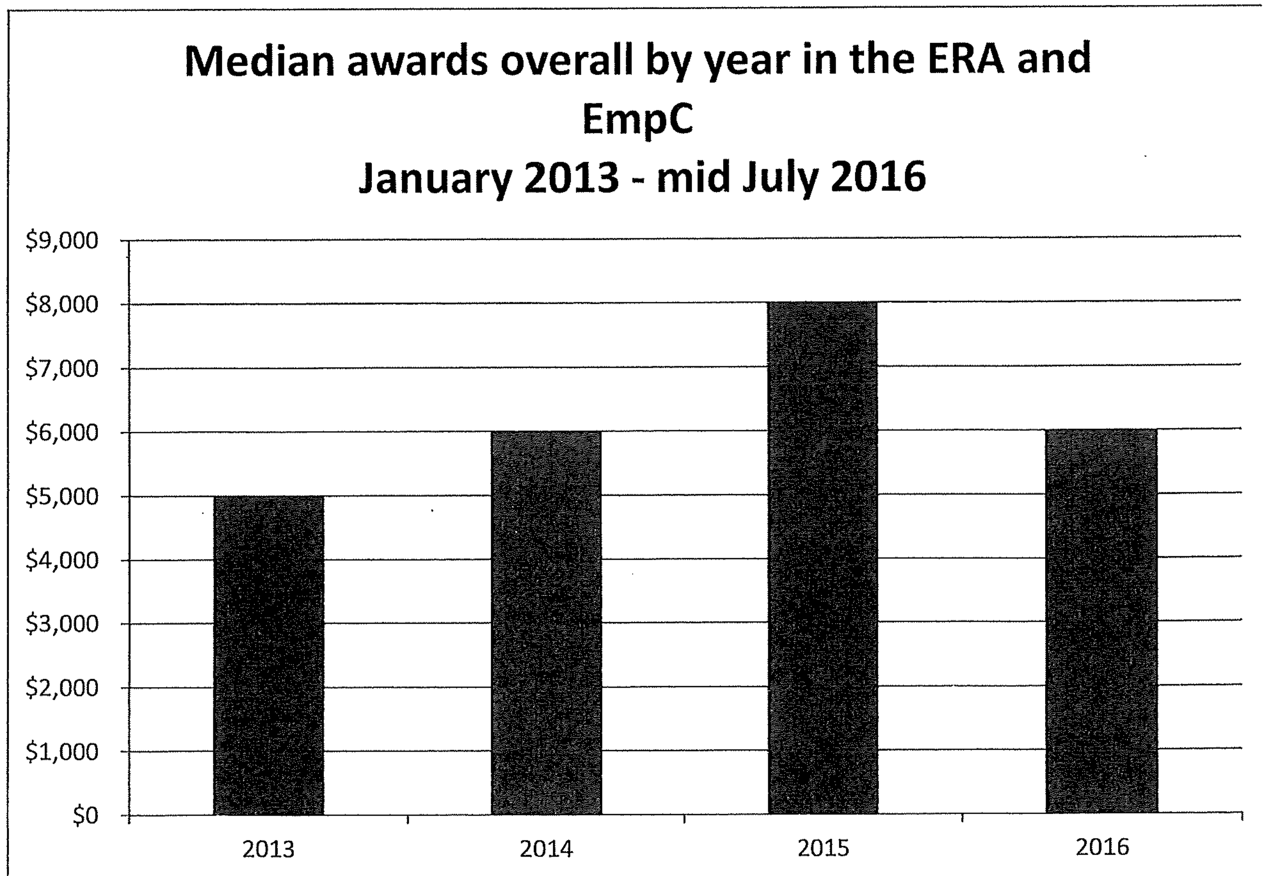
Total Awards: Authority (2013-2016)				
Type of Award	**Total Mean**	**Total Median**	**Total Range**	**Total Mode(s**
Serious Misconduct				
Global Award	$7,156	$7,750	$15,000	$1,000 $2,000 $8,000
Standard Award	$6,155	$5,000	$19,000	$5,000
Suspension				
Global Award	$1,500	$1,000	$1,500	$1,000
Standard Award	$2,833	$2,000	$7,500	$1,000 $2,000 $3,000
Redundancy				
Global Award	$6,875	$6,000	$11,500	N/A
Standard Award	$7,919	$6,000	$17,500	$5,000
Poor Performance				
Global Award	N/A	N/A	N/A	N/A
Standard Award	$5,923	$5,000	$8,500	$5,000
Warning				
Global Award	$2,500	$2,500	$3,000	N/A
Standard Award	$2,700	$2,000	$4,500	$2,000

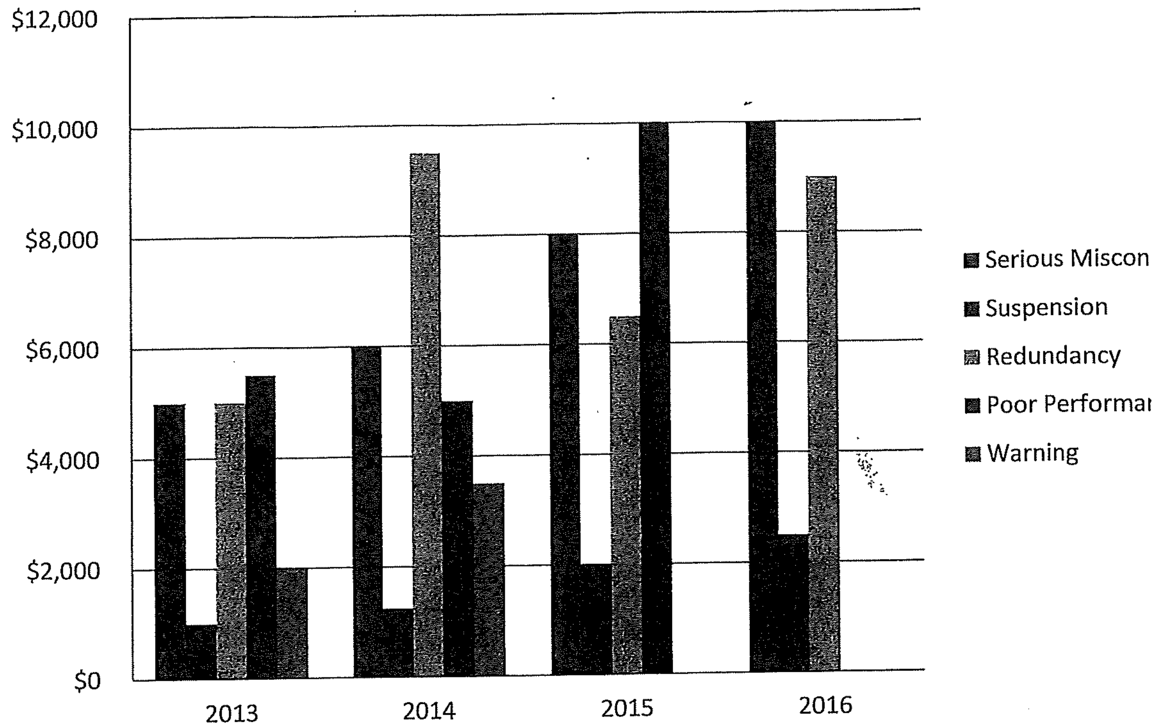
Number of awards surveyed: 2013 – 2016

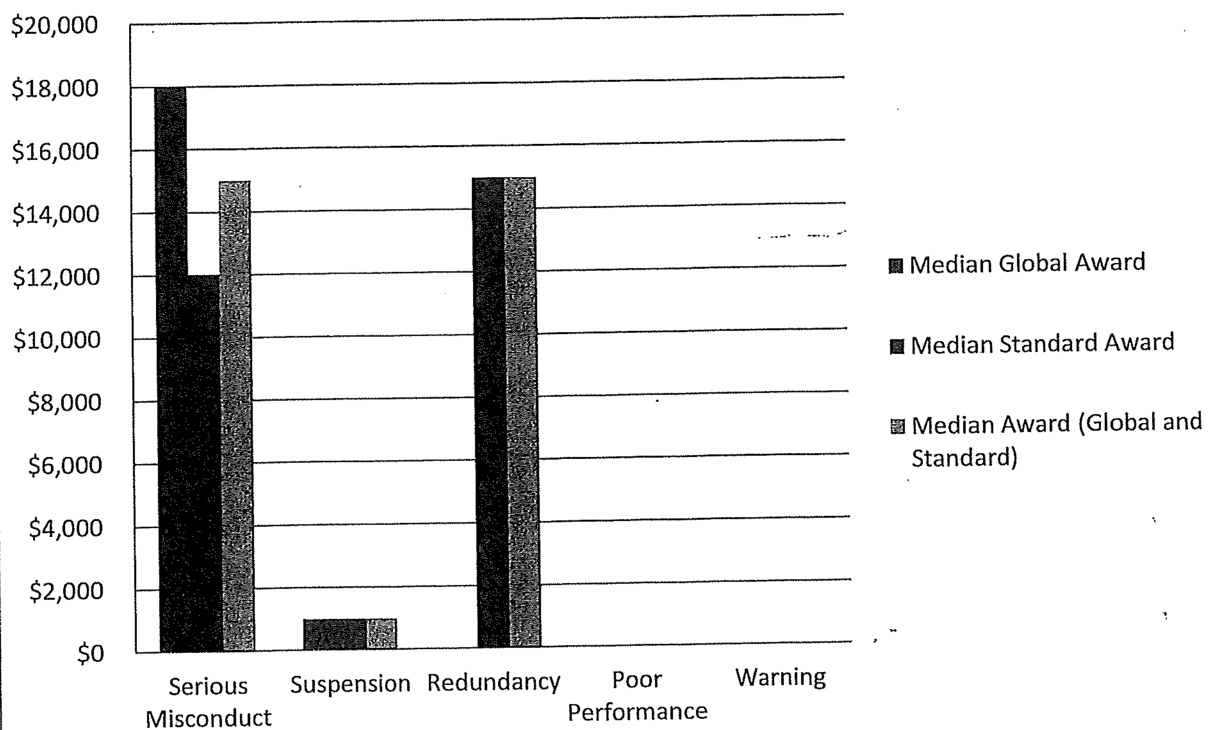
Type of award	Global awards	Standard awards	Total number of awards
Serious misconduct	11	86	97
Suspension	4	11	15
Redundancy	3	33	36
Poor performance	0	13	13
Warning	2	5	7

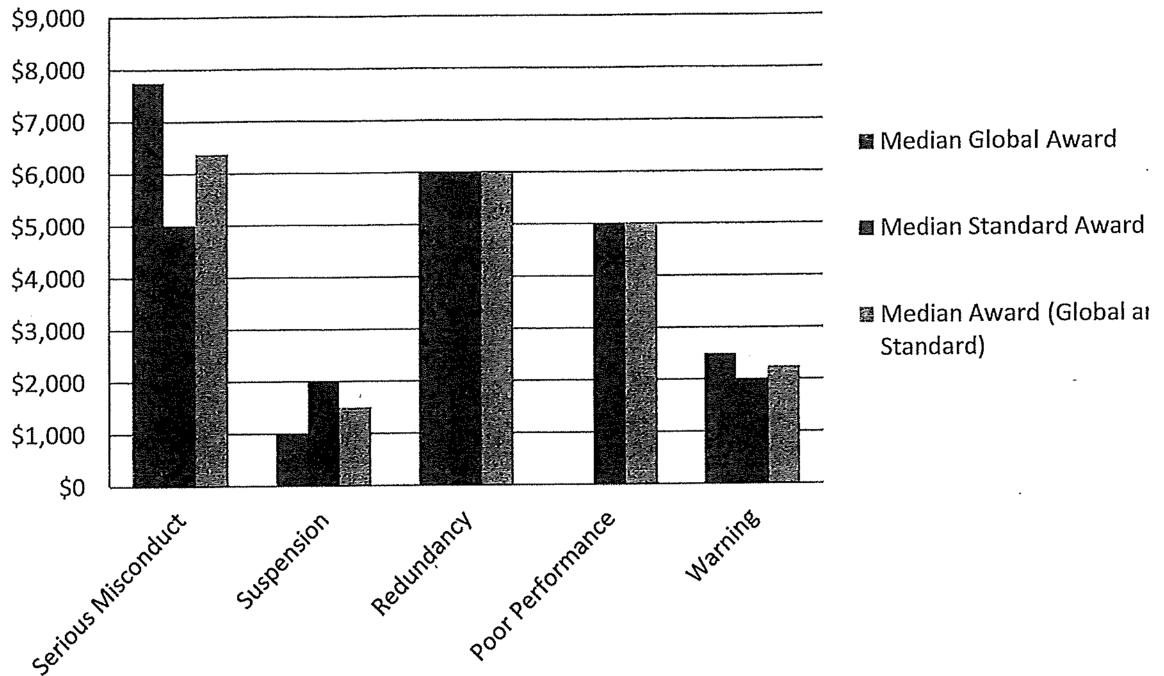
Appendix 3: Relevant graphs

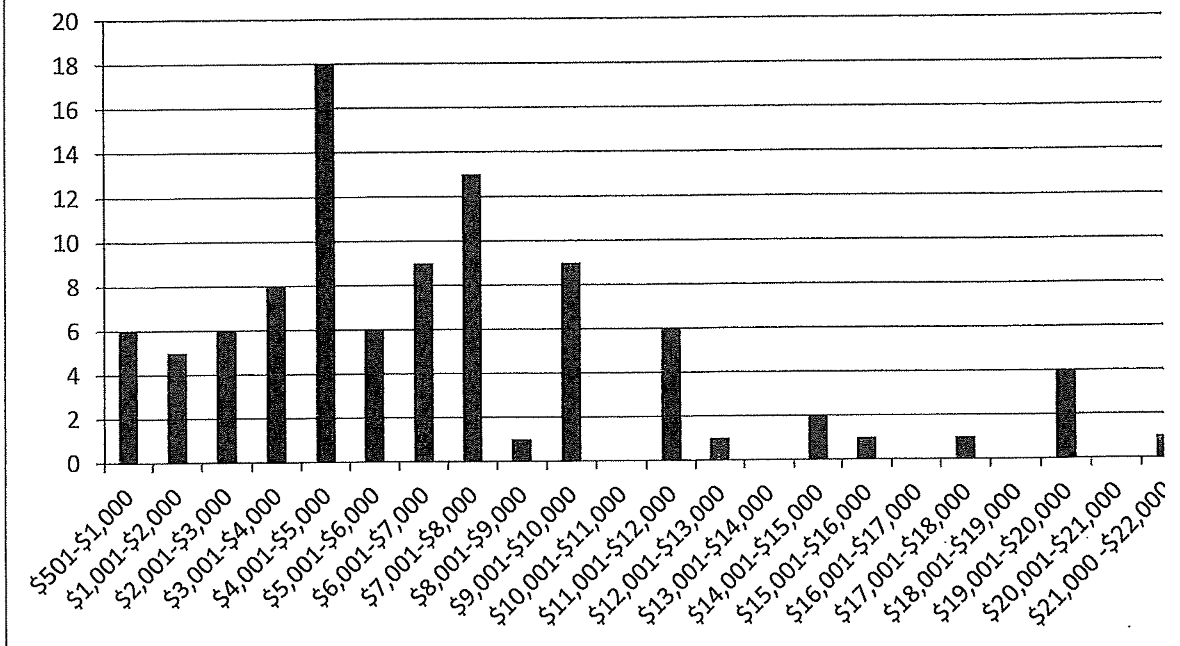


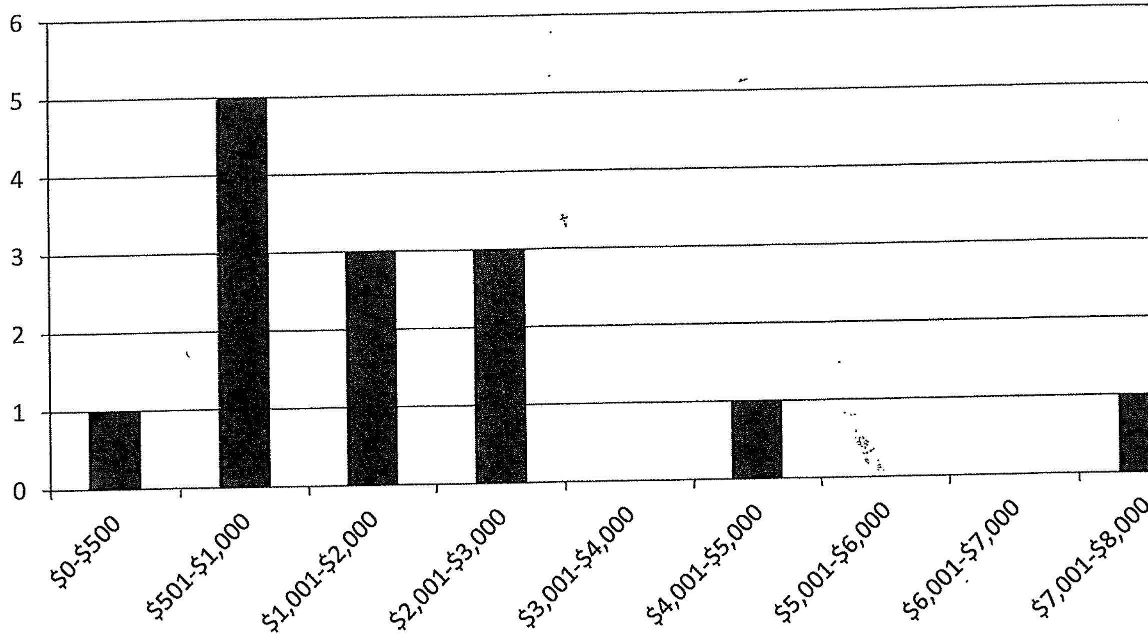


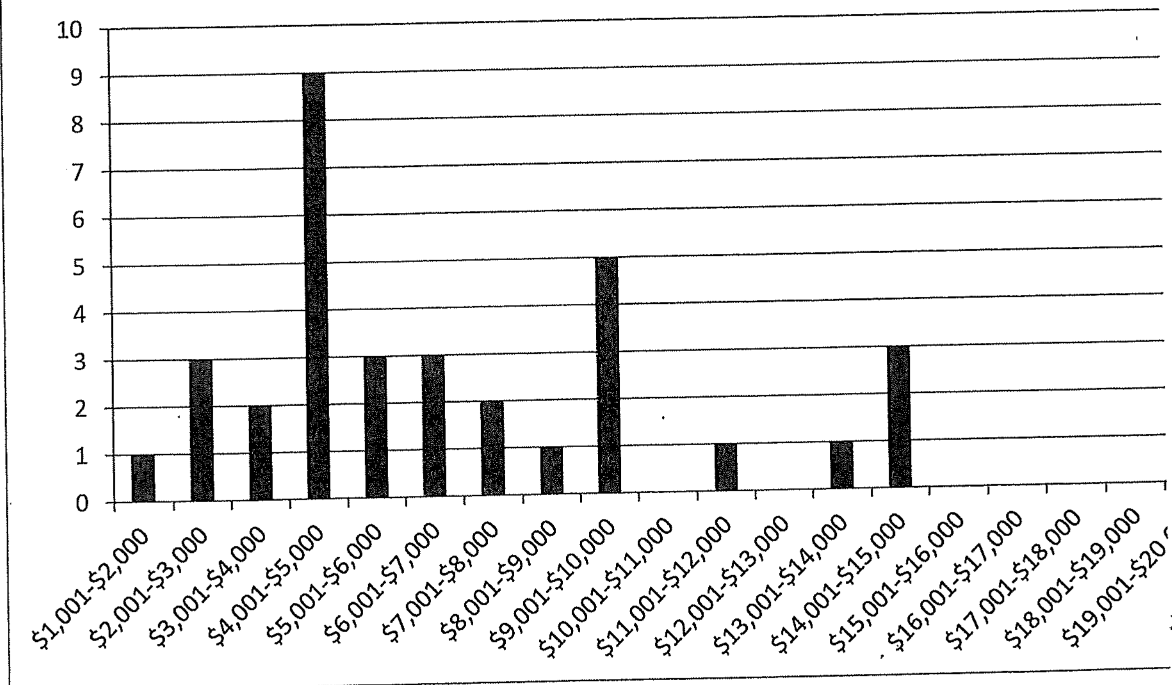

Median awards by year in the ERA and EmpC
January 2013-mid July 2016
$12,000
$10,000
$8,000
$6,000
$4,000
$2,000
$0
2013
2014
2015
2016
Serious Miscon
Suspension
Redundancy
Poor Performa
Warning

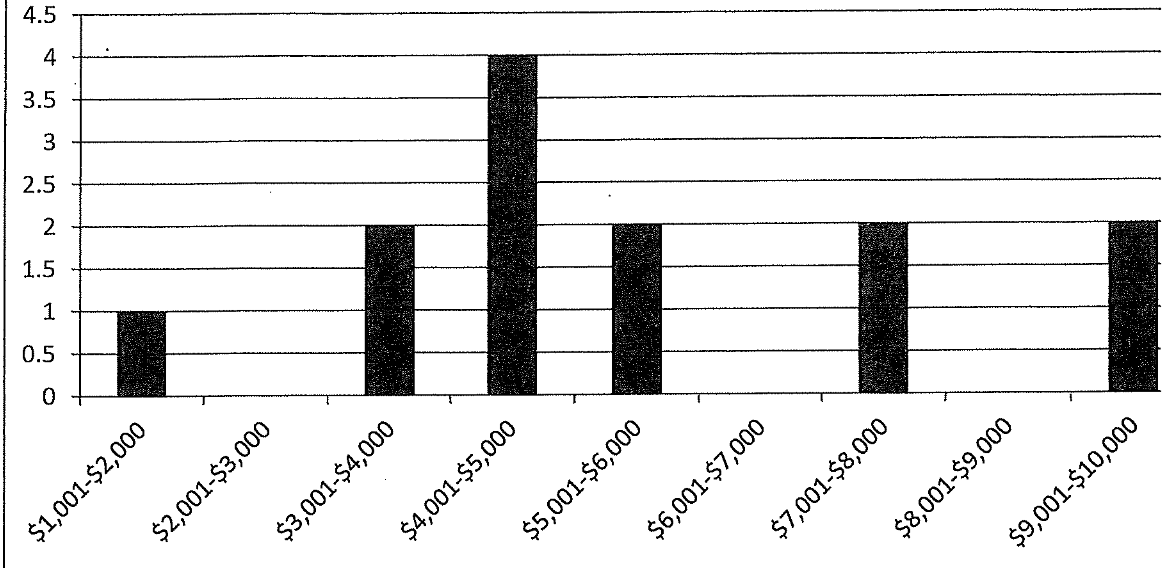

Median awards in the EmpC
January 2013-mid July 2016
$20,000
$18,000
$16,000
$14,000
$12,000
$10,000
$8,000
$6,000
$4,000
$2,000
$0
Serious Misconduct
Suspension
Redundancy
Poor Performance
Warning
Median Global Award
Median Standard Award
Median Award (Global and Standard)

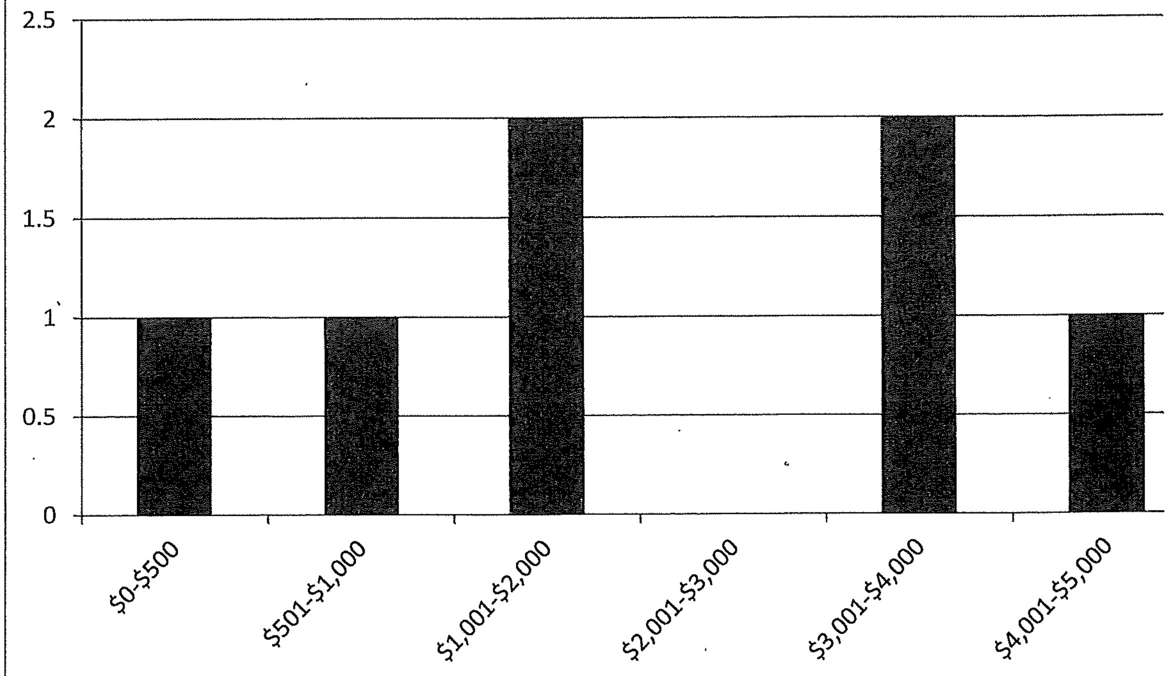

Median awards in the ERA
January 2013-mid July 2016
$9,000
$8,000
$7,000
$6,000
$5,000
$4,000
$3,000
$2,000
$1,000
$0
Serious Misconduct
Suspension
Redundancy
Poor Performance
Warning
Median Global Award
Median Standard Award
Median Award (Global ar
Standard)


Unjustified dismissal for serious misconduct:
number of awards in the ERA and EmpC
January 2013-mid July 2016
20
18
16
14
12
10
8
6
4
2
0
$501-$1,000
$1,001-$2,000
$2,001-$3,000
$3,001-$4,000
$4,001-$5,000
$5,001-$6,000
$6,001-$7,000
$7,001-$8,000
$8,001-$9,000
$9,001-$10,000
$10,001-$11,000
$11,001-$12,000
$12,001-$13,000
$13,001-$14,000
$14,001-$15,000
$15,001-$16,000
$16,001-$17,000
$17,001-$18,000
$18,001-$19,000
$19,001-$20,000
$20,001-$21,000
$21,000 -$22,00


Unjustified suspension: number of awards in the ERA and EmpC
January 2013-mid July 2016
6
5
4
3
2
1
0
$0-$500
$501-$1,000
$1,001-$2,000
$2,001-$3,000
$3,001-$4,000
$4,001-$5,000
$5,001-$6,000
$6,001-$7,000
$7,001-$8,000


Unjustified dismissal for redundancy: number of awards in the ERA and EmpC
January 2013-mid July 2016
10
9
8
7
6
5
4
3
2
1
0
$1,001-$2,000
$2,001-$3,000
$3,001-$4,000
$4,001-$5,000
$5,001-$6,000
$6,001-$7,000
$7,001-$8,000
$8,001-$9,000
$9,001-$10,000
$10,001-$11,000
$11,001-$12,000
$12,001-$13,000
$13,001-$14,000
$14,001-$15,000
$15,001-$16,000
$16,001-$17,000
$17,001-$18,000
$18,001-$19,000


Unjustified dismissal for poor performance: number of awards in the ERA and EmpC January 2013-mid July 2016
4.5
4
3.5
3
2.5
2
1.5
1
0.5
0
$1,001-$2,000
$2,001-$3,000
$3,001-$4,000
$4,001-$5,000
$5,001-$6,000
$6,001-$7,000
$7,001-$8,000
$8,001-$9,000
$9,001-$10,000


Unjustified warning: number of awards in the ERA and EmpC January 2013-mid July 2016
2.5
2
1.5
1
0.5
0
$0-$500
$501-$1,000
$1,001-$2,000
$2,001-$3,000
$3,001-$4,000
$4,001-$5,000

Appendix 4: Proof matrix

[employee] vs [employer] – Proof Matrix [simple redundancy]

Allegation	Pleading	Issue	Witness	Document	Comment
eg [employer] is a duly incorporated company	Statement of claim (SOC), para [x]	Identity of parties	[witness name]	ABD [xx]	eg Admitted
eg [employee] was employed by [employer] on [date], pursuant to a signed individual employment agreement	SOC, para [x]	Identity of parties	[witness name]	ABD [xx]	eg Admitted
eg [employee]'s employment agreement included the following express, implied and incorporated terms: [insert details of specific contractual terms]	SOC, para [x]	Contractual terms	[witness name]	ABD [xx]	eg Admitted
eg [employee]'s employment with [employer] continued until date, when [employee's] employment was terminated by [employer]	SOC, para [x]	Termination date	[witness name]	ABD [xx]	eg Admitted
eg [employee's] employment was terminated on the grounds of redundancy	SOC, para [x]	Reason for redundancy	[witness name]	ABD [xx]	eg Admitted
eg [paragraphs relating to steps undertaken during process alleged to have been inadequate]	SOC, para [x]	Procedural fairness	[witness name]	ABD [xx]	eg Admits [x, y and z], but otherwise denied
eg cause of action: [unjustified dismissal]	SOC, para [x]	Cause of action	[witness name]	ABD [xx]	eg Denied
eg [employee] was unjustifiably dismissed	SOC, para [x]	Cause of action	[witness name]	ABD [xx]	eg Denied

Allegation	Pleading	Issue	Witness	Document	Comment
eg [employer] reached decision to terminate employment on the grounds of redundancy without conducting a consultation process in good faith [with particulars]	SOC, para [x]	Procedural fairness	[witness name]	ABD [xx]	eg Denied
eg [employer] did not have genuine commercial reasons to terminate [employee]'s employment on the grounds of redundancy, and the decision to terminate was motivated by an ulterior purpose [with particulars]	SOC, para [x]	Substantive justification	[witness name]	ABD [xx]	eg Denied
eg as a result of the dismissal, [employee] has suffered:					
- Loss of remuneration	SOC, para [x]	Loss/damage	[witness name]	ABD [xx]	eg Denied
- Injury to feelings	SOC, para [x]	Loss/damage	[witness name]	ABD [xx]	eg Denied for lack of knowledge
- Damage to reputation	SOC, para [x]	Loss/damage	[witness name]	ABD [xx]	eg Denied for lack of knowledge
- Loss of benefits, including the loss of long-term secure employment and KiwiSaver contributions/holiday pay on remuneration lost	SOC, para [x]	Loss/damage	[witness name]	ABD [xx]	eg Denied for lack of knowledge
Relief sought: [employee] seeks the following relief – [list]	SOC, para [x]	Remedies	[witness name]	ABD [xx]	eg Not required to plead to