IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2023] NZEmpC 221
ARC 55/2013
ARC 79/2013
ARC 48/2014
ARC 25/2014

IN THE MATTER OF	challenges to determinations of the Employment Relations Authority
AND IN THE MATTER OF	proceedings removed from the Employment Relations Authority
AND IN THE MATTER OF	an application to raise personal grievances out of time
BETWEEN	KATHLEEN CRONIN-LAMPE First Plaintiff
AND	RONALD CRONIN-LAMPE Second Plaintiff
AND	THE BOARD OF TRUSTEES OF MELVILLE HIGH SCHOOL Defendant
AND	ACCIDENT COMPENSATION CORPORATION Intervener

Hearing:	20-21, 23–24, 27 February–3 March, 6–10 March, 26–27 April, 20 July and 20 September 2023 (advice received that mediation had not succeeded) (Heard at Hamilton and Auckland and via VMR)
Appearances:	T Braun and E Anderson, counsel for plaintiffs PN White and L Fernandez, counsel for defendant S Bisley, counsel for Intervener
Judgment:	5 December 2023

JUDGMENT (NO 2) OF JUDGE B A CORKILL

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Introduction

[1] In my judgment of 30 August 2023, I found that leave should be granted to Mr and Mrs Cronin-Lampe to raise disadvantage grievances as from 2 December 2010, on the basis that there had been exceptional circumstances occasioning the delay which had occurred in actually raising those grievances.[1]

[2] I directed the parties to attend mediation as soon as possible, as is required when such a finding is made. On 20 September 2023, the Court was informed that mediation had taken place without the case being resolved.

[3] Accordingly, it is now necessary to deal with the causes of action raised by both sides, a question as to whether the statutory bar under the Accident Compensation Act 2001 (the AC Act) precludes damages/remedies being awarded and, subject to the outcome of that issue, whether damages and remedies are in fact available.

[4] In my first judgment, extensive findings of fact were made. Where relevant, I will be relying on those findings for the purposes of this judgment, although some elaboration will be necessary. It is my intention that this judgment should be read alongside the first judgment.

Liability: Common law causes of action

The pleadings

[5] It is appropriate to begin consideration of liability issues with the common law claims (the second to fourth causes of action), since they require an analysis of health

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1 *Cronin-Lampe v The Board of Trustees of Melville High School* [2023] NZEmpC 144 [*Cronin-Lampe (No 1)*] at [533].

and safety issues which is somewhat more comprehensive than that which is required for the personal grievance claims.

[6] As I explained previously, there are three contractual causes of action: for breach of terms implied by common law; for breach of terms implied by the Health and Safety in Employment Act 1992 (HSE Act), and for breaches of implied and express terms derived from the Secondary Teachers' Collective Agreement (STCA).[2]

[7] I noted that the pleaded legal foundation for each cause of action is different, but the alleged breaches are common. In short, Mr and Mrs Cronin-Lampe contend the Board of Trustees of Melville High School (the Board or MHS) failed to meet its health and safety obligations, and failed to manage workload and workplace conditions adequately.

[8] The leading authority in New Zealand as to the correct analysis of contract-based health and safety claims is *Attorney-General v Gilbert*, as was common ground between counsel.[3] The judgment provides guidance on many of the key issues that arise in this case.

Issues

[9] The first of these relates to the duty to take reasonable steps to ensure employee safety in the employment relationship. Writing for a full Court of Appeal, Elias CJ said this duty was implied into employment contracts in recognition of their special nature. The same position had been reached in other common law jurisdictions.[4] The Court said the duty implied at common law to maintain a safe workplace was to be informed and given content by modern legislation, including the provisions of the HSE Act in New Zealand.

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2 At [36].

3 *Attorney-General v Gilbert* [2002] 1 ERNZ 31 (CA) [*Gilbert (CA)*].

4 At [75]; citing *Johnson v Unisys Ltd* [2001] UKHL 13, [2001] 2 WLR 1076 at 1079 per Lord Steyn, at 1091 per Lord Hoffman, at 1101 per Lord Millet; and *Wallace v United Grain Growers Ltd* (1998) 152 DLR (4th) 1, 33 per Iacobucci J.

[10] In the second cause of action, the following were pleaded as terms implied by common law in the employment contracts/agreements between Mr and Mrs Cronin-Lampe on one hand, and MHS on the other. The Board would:

(a) take all reasonable care to avoid exposing Mr and Mrs Cronin-Lampe to unnecessary risk of injury or further or ongoing injury to their physical or psychological health, and would provide a safe working environment;

(b) take all reasonable care not to cause Mr and Mrs Cronin-Lampe physical or psychological injury by reason of the volume, nature or circumstances of the work required to be performed by them;

(c) not conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust, confidence and fairness between it and Mr and Mrs Cronin-Lampe to avoid exposing them to unnecessary risk of harm or actual harm;

(d) be a good and considerate employer, particularly in dealing with Mr and Mrs Cronin-Lampe's concerns regarding a safe working environment and in the operation and implementation of safety procedures; and

(e) take adequate steps to implement adequate processes and/or provisions to monitor Mr and Mrs Cronin-Lampe's workload and their responses to, and ability to deal with, the stress of the working environment and the demands placed upon them, in particular emotionally and psychologically.

[11] These pleaded allegations largely mirror the allegations which were before the Court in *Attorney-General v Gilbert.*[5] Having regard to my findings as to the factual context in the present case, these duties plainly existed. MHS accepted this was the case. The issue is whether the duties were in fact breached.

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5 *Gilbert (CA)*, above n 3.

[12] Turning to the third cause of action, which relates to breaches of implied contractual terms derived from statutory duties, Mr and Mrs Cronin-Lampe said the following provisions of the HSE Act described the obligations they were owed:

(a) section 6 – a duty to take all practicable steps to ensure the safety of Mr and Mrs Cronin-Lampe while at work;

(b) section 7 – a duty to ensure that effective methods were in place for systematically identifying existing and new hazards to employees at work and regularly assessing these to determine whether or not each hazard is a significant hazard;

(c) section 8 – where there was a significant hazard at work, a duty to take all practicable steps to eliminate that hazard;

(d) section 9 – where there was a significant hazard and there were no practicable steps that could be taken to eliminate it, a duty to take all practicable steps to isolate it from Mr and Mrs Cronin-Lampe;

(e) section 10 – where there was a significant hazard and there were no practicable steps that may be taken to eliminate or isolate it, a duty to take all practicable steps to minimise the likelihood that the hazard might be a cause or source of harm; to monitor exposure to the hazard; to take all practicable steps to obtain Mr and Mrs Cronin-Lampe's consent to the monitoring of their health in relation to the hazard; and monitoring, with their consent, their health in relation to exposure to a hazard;

(f) section 12 – a duty to provide Mr and Mrs Cronin-Lampe ready access to information about what to do if an emergency arose, and as to all identified hazards to which they were or might have been exposed whilst performing their work, and as to the steps to be taken to minimise the likelihood that hazards would be a cause or source of harm;

(g) section 16 – a duty, as the Board controls the place of work, to take all practicable steps to ensure no workplace hazard that arises harms people who are lawfully at work as employees;

(h) section 19B – a duty to provide reasonable opportunities for Mr and Mrs Cronin-Lampe to participate effectively in ongoing processes for the improvement of health and safety in the workplace, having regard to the relevant matters in s 19B(5); and

(i) finally, under s 19C, a duty to co-operate in good faith, so as to develop, agree, implement, and maintain a system to comply with the obligations to promote participation in the process of improving workplace health and safety.[6]

[13] It was submitted for MHS that whilst the school was subject to those statutory obligations, the Court had no jurisdiction to determine issues arising from them, since the claim was a tortious claim for breach of statutory duties. I do not agree. What are pleaded are contractual duties based on statutory provisions. I have already noted that the Court of Appeal said that the duty implied into employment contracts was informed and given content by the HSE Act.[7] I find these duties were present here.

[14] The fourth cause of action relates to the terms of the STCA. Here, Mr and Mrs Cronin-Lampe say there was a reasonable and necessary implication to their employment contracts/agreements of certain provisions of the SCTA, namely:

(a) clause 3.1.1(a) which required the Board to operate a personnel policy that complied with the principle of being a good employer;

(b) clause 3.1(b) which required the Board to make decisions for good and safe working conditions; and

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6 However, I note that this section only applies if the Board employed 30 or more employees or, if it employed fewer than 30 employees, if one or more of those employees requested the development of a system for employee participation: Health and Safety in Employment Act 1992, s 19C(1).

7 *Cronin-Lampe (No 1)*, above n 1, at [75] and [83].

(c) clause 12.1.3 which required the Board, where a teacher's health and safety were shown to be at risk in the carrying out of their duties, to take all reasonable steps as were necessary to remove or minimise the identified risk for the teacher and, if appropriate, to do so in consultation with the relevant health and safety communities.

[15] MHS pleaded that these were express terms of Mrs Cronin-Lampe's employment after 16 March 2011. This was apparently a reference to the fact that in the applicable statement of claim, the plaintiffs referred expressly to the STCA that ran from 16 March 2011 to 15 January 2013, and not to the predecessor documents. However, these were produced in evidence and the Court is therefore able to consider the position that applied under the collective agreements prior to 16 March 2011.

[16] The concession in respect of Mrs Cronin-Lampe was not made in respect of Mr Cronin-Lampe, possibly due to the apparent uncertainties which arose as to his terms and conditions of employment in the course of that year.

[17] In my first judgment,[8] I found that on 18 November 1997, Mr Cronin-Lampe was appointed as a guidance counsellor in a part-time position of 0.6 FTE on terms and conditions set out in the then current Secondary Teachers' Collective Employment Contract (STCEC). On 10 March 1998, his role was expanded so as to be full-time. On 11 February 2008, his position was amended to remove the career guidance role, with the parties proceeding on the basis that he would work 0.6 FTE guidance counselling only from then on. This did not alter the position as to the underlying collective agreement. It was not until 2011 that it was asserted by MHS that this was erroneous.

[18] The history indicates the parties throughout regarded the underlying collective contracts/agreements as applying to Mr Cronin-Lampe, either actually or by analogy. Even if this was incorrect because he was not in fact a registered teacher, the reality of the employment relationship was that the parties proceeded on the basis these documents applied. It would be unconscionable to now conclude the health and safety duties described therein did not apply.

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8 *Cronin-Lampe (No 1)*, above n 1.

[19] I find that the duties pleaded for the third cause of action in respect of Mr and Mrs Cronin-Lampe governed their employment.

[20] In summary to this point, I am satisfied that each cause of action has correctly identified the legal duties that were owed by MHS to Mr and Mrs Cronin-Lampe, whether at common law and/or under the HSE Act and/or under the relevant collective agreements, at all material times.

[21] At the end of the day, I agree with Mr White, counsel for MHS, that there is considerable overlap in the three causes of action. As a matter of law, the pleaded terms cannot be regarded as controversial. As I have said, the real issue is whether they were in fact breached.

[22] Before recording the alleged breaches, I note that in closing, Mr Braun, counsel for Mr and Mrs Cronin-Lampe, confirmed that the contractual breaches arose on a range of dates from 4 April 2008, being the earliest accrual date which could arise in light of Judge Perkins's ruling under s 4(7) of the Limitation Act 1950. Mr White queried whether this was in fact the correct date in 2008 but, as Judge Perkins expressly referred to it, I see no reason not to adopt it.[9]

[23] For ease of reference, I record the breaches in the date order in which Mr Braun said in closing they arose:

(a) failure to monitor and manage Mr and Mrs Cronin-Lampe's caseload and ensure it was within manageable levels and not causing physical or mental harm, from 4 April 2008;

(b) failure to provide training in trauma and suicide, from 4 April 2008;

(c) failure to manage and monitor Mr and Mrs Cronin-Lampe's stress levels, from 4 April 2008;

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9 *Cronin-Lampe v The Board of Trustees of Melville High School* [2017] NZEmpC 41, [2017] ERNZ 191.

(d) failure to ensure Mr and Mrs Cronin-Lampe had regular time off from the demands of on-call work and provide cover to enable this to happen, from 4 April 2008;

(e) failure to provide Mr and Mrs Cronin-Lampe with adequate supervision, from 10 February 2009;

(f) failure to provide adequate departmental resourcing, from 10 February 2009;

(g) failure to protect Mr and Mrs Cronin-Lampe from the traumatic incidents, from 2 December 2010;

(h) failure to ensure appropriate support for Mr and Mrs Cronin-Lampe to address the foreseeable trauma they suffered in the provision of the traumatic services, from 2 December 2010;

(i) failure to provide a safe system of work to ensure Mr and Mrs Cronin-Lampe's mental and emotional health and wellbeing, from 2 December 2010;

(j) failure to identify and manage the hazards or harm in the workplace, and to ensure that Mr and Mrs Cronin-Lampe did not suffer the harm or be exposed to the hazards in the workplace, from 2 December 2010;

(k) failure to support Mrs Cronin-Lampe with regard to bullying by BG, from 29 March 2011;[10]

(l) failure to provide adequate professional development, from 6 May 2011; and

(m) failure to support Mr Cronin-Lampe with regard to the circumstances concerning BJ, from 9 August 2011.

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[10] Identification of certain persons in this judgment is in accordance with my first judgment. See *Cronin-Lampe (No 1)*, above n 1, at [524]–[532], and my minute of 30 August 2023.

[24] For reasons I will come to, I regard the claims which are alleged to have arisen from 2 December 2010 as being the primary health and safety breaches. In light of the history I will outline, it is only at that point the 2008 and 2009 alleged breaches should logically be considered, given the then circumstances. I will deal with pre-2010 breaches, as well as the alleged breaches which are said to have arisen in 2011, after considering the primary 2010 breaches.

The legal framework for analysis

[25] As I have noted, MHS's defence to these claims is that it met the applicable duties. To the extent that Mr and Mrs Cronin-Lampe assert it did not, it says the consequences of the alleged failures were not reasonably foreseeable. MHS submitted that it undertook reasonable steps which were proportionate to known and avoidable risks. More generally, it relies on the dicta of the Court of Appeal which emphasised that relevant assessments had to take account of the current state of knowledge and not be made with the benefit of hindsight.

[26] The applicable dicta from *Attorney-General v Gilbert* is as follows:[11]

> [83] The standard of protection provided to employees by the Health and Safety in Employment Act is however a protection against unacceptable employment practices which have to be assessed in context. That is made clear by the definition of "all practicable steps". What is "reasonably practicable" requires a balance. Severity of harm, the current state of knowledge about its likelihood, knowledge of the means to counter the risk, and the cost and availability of those means, all have to be assessed. Moreover, under s 19 the employee must himself take all practicable steps to ensure his own safety while at work. These are formidable obstacles which a potential plaintiff must overcome in establishing breach of the contractual obligation. Foreseeability of harm and its risk will be important in considering whether an employer has failed to take all practicable steps to overcome it. These assessments must take account of the current state of knowledge and not be made with the benefit of hindsight. An employer does not guarantee to cocoon employees from stress and upset, nor is the employer a guarantor of the safety or health of the employee. Whether workplace stress is unreasonable is a matter of judgment on the facts. It may turn upon the nature of the job being performed as well as the workplace conditions. The employer's obligation will vary according to the particular circumstances. The contractual obligation requires reasonable steps which are proportionate to known and avoidable risks.
> …
> [88] The legislation requires the employer to do what is practicable to contain known and unacceptable risks. The statute seeks to prevent harm to

[11] *Gilbert (CA)*, above n 3.

> employees by promoting health and safety management. The reasonableness of the employer's conduct must therefore be measured against knowledge reasonably attained by employers mindful of their responsibilities.
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> [89] In *Johnson v Unisys Ltd* Lord Steyn (at p1084) refers to the intensification of modern work pressures and the inevitable increase in the incidence of psychiatric injury through excessive stress and suggests that the need for protection of employees through their contractual rights, express and implied by law, is markedly greater than in the past. If a plaintiff is able to show that the employer failed to do what was reasonable at the time and was in breach of the contractual obligations, no reason of policy inhibits contractual liability for psychological injury.
> …

[27] This dicta predated the enactment of s 2A of the HSE Act, which codified the approach adopted by the Court of Appeal as to reasonable foreseeability, on which I will elaborate shortly.

[28] In light of this dicta and the issues which the parties have put in issue, it is necessary to consider:

(a) whether the conduct of MHS was reasonable when measured against knowledge reasonably obtained by employers mindful of their responsibilities; this issue involves an assessment of the state of knowledge of the risk and the means available to counter the risk at the relevant time or times;

(b) relevant steps taken in respect of the elimination, isolation, or minimisation/monitoring of hazards; and

(c) whether the pleaded duties were breached and, if so, when.

Terms of the contracts/agreements

[29] The starting point is the terms of the contracts/agreements.[12] I have already found that the relevant collective documents applied to both Mr and Mrs Cronin-Lampe throughout. Therefore, those health and safety terms, in particular the relevant express terms as set out at [10], applied.

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12 At [69].

[30] As previously discussed, the implied terms included those implied via common law and the HSE Act.

State of knowledge issues

[31] Next, I consider the state of knowledge as to the foreseeability of the relevant harm and its risk, when measured against such knowledge as was reasonably available to an employer mindful of its responsibilities.[13] I remind myself that hindsight is impermissible when making this assessment.[14]

[32] Across the period of Mr and Mrs Cronin-Lampe's employment, the extent of health and safety duties developed. It became increasingly apparent that employers were required to consider the impact of hazards and, for the purposes of this case, workload stress in the workplace on employees.

[33] It is appropriate to review this issue as from 1992. When it was introduced in that year, the HSE Act began a statutory trend towards enhanced obligations. As Judge Colgan observed, the new legislation imposed upon employers proactive responsibilities in providing and maintaining safe working environments.[15] He said that the legislation itself, and early cases under it, were widely publicised among employers and the community generally.[16] In that instance, he found that the employer could not have been unaware of these obligations. The same conclusion must be reached here.

[34] Judge Colgan went on to note the dicta of Judge Everitt in *Mair v Frasers Bacon Ltd*:[17]

> A new philosophy is required by the Act; employers are now required to be analytical and critical in providing and maintaining a safe working environment. It is not just a matter of meeting minimum standards and codes laid down by statute, it requires employers to go further and to set their own standards after due analysis and criticism. This is a new duty cast upon employers. It now requires the conscious exercise of judgement and

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13 At [88]. By 2003, this consideration was provided for under s 2A of the Health and Safety in Employment Act 1992.
14 *Gilbert (CA)*, above n 3, at [83].
15 *Gilbert v Attorney-General* [2000] ERNZ 332 (EmpC) [*Gilbert (EmpC)*] at 337.
16 At 337.
17 At 387; citing *Mair v Frasers Bacon Ltd* DC Dunedin CRN3012009612, 24 February 1994 at 14.

> discernment on the part of employers. One can go further and say that the discharge of an employer's duties cannot be equated with conformity to a code. The employer must actively adopt and promote the principles enshrined in the Act; new attitudes and judgements are required.

[35] I refer next to civil claims which were then brought in this Court, relying on these obligations.

[36] There was of course the decision of *Gilbert v Attorney-General*, which concerned health and safety breaches at work in the early 1990s.[18] Alongside these developments were other cases raising similar issues, particularly *Brickell v Attorney-General* which related to health and safety breaches in the same period.[19] It is apparent from these cases that the Courts considered that from then on and, in particular, after the enactment of the HSE Act which took effect in 1993, more onerous health and safety obligations applied to employers.

[37] In 2001, the HSE Act was reviewed. The review resulted in a Bill being introduced in 2002 which introduced a range of amendments which were enacted with effect from May 2003.[20] When making these amendments, the findings which had been made in the civil cases to which I have just referred as to the scope of duties, were in effect codified.

[38] When introducing the Bill, the Minister of Labour said that while workplace stress and fatigue had been recognised as potential sources of harm and, therefore, as workplace hazards under the present law, the Bill proposed to make the issue explicit.[21] A similar point was also made by the Court of Appeal decision in *Gilbert*, which had been issued during the progression of the Bill. On the Bill's second reading, it was noted "stress and fatigue hazards have always been covered by the law, and the Court of Appeal has recently confirmed that".[22]

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18 *Gilbert (EmpC)*, above n 15.

19 *Brickell v Attorney-General* [2000] 2 ERNZ 529 (HC); *Benge v Attorney-General* [2000] 2 ERNZ 234 (HC); and see the convenient summary of these and other developments in Andrew Scott-Howman and Chris Wallis *Workplace Stress in New Zealand* (Thomson Brookers, 2003) at 12–28.

20 Health and Safety in Employment Amendment Act 2002.

21 (5 December 2001) 597 NZPD 321.

22 (5 December 2002) 604 NZPD 806.

[39] The definition of "harm" was amended so that it made express reference to the fact that "physical or mental harm caused by work-related stress" was included. The definition of "hazard" was amended to make it clear that a person's behaviour could be a "hazard", and be causative of actual or potential harm to that person or another person; and that a hazard could arise from a range of factors, including physical or mental fatigue as well as traumatic shock or another temporary condition affecting a person's behaviour.

[40] The concept of a "hazard" was, and continued to be, central to the operation of the HSE Act. The compound definition of "significant hazard" considered the actual or potential source of harm and the resulting harm's seriousness; whether its severity depended on the extent or frequency of exposure to the hazard; or whether the resulting harm was delayed. These criteria triggered the most significant obligations for an employer, as described in ss 7–10 of the HSE Act, on which I will elaborate later.

[41] As noted, a new definition of "all practicable steps" was enacted in s 2A. It provided that in considering this term, a court had to have regard to the nature and severity of the harm that may be suffered; the current state of knowledge about the likelihood that harm of that nature and severity will be suffered; and about harm of that nature and the means available to achieve the desired result (for example, to eliminate the hazard). For the avoidance of doubt, the new provision also clarified that the term "all practicable steps" only required a person to take steps in respect of circumstances that the person knew or ought reasonably to have known about.

[42] In my first judgment,[23] I found the Ministry of Education (MoE) produced guidelines so that Boards of Trustees could understand their health and safety obligations. These highlighted that work-related stress and fatigue were now to be regarded as harms or hazards that needed to be managed; that a Board was required to have systems in place to identify hazards and take all practicable steps to eliminate a hazard if it is significant; and if it could not be eliminated or isolated, a hazard management plan was to be developed.

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[23] *Cronin-Lampe (No 1)*, above n 1, at [78].

[43] Health and safety codes of practice were issued by MoE from time to time, with these being formally gazetted under the Education Act 1989 by 2003. These outlined the health and safety standards which were to apply to educational institutions such as MHS. The 2007 version of the code of practice, as introduced in evidence, confirmed that a Board of Trustees was bound to comply with the codes of practice, as well as the HSE Act.[24]

[44] Parallel to these developments, more elaborate provisions of the collective employment agreements were introduced. The 2007–2010 collective employment agreement specifically referred to the obligations enacted by the health and safety legislation, as well as confirming the relevant codes of practice and guidelines were reference points for gaining a common understanding of what those obligations were, what would assist in meeting those mutual obligations, and to promote best practice.

[45] In summary to this point, by 2007 at least, there was a clear and foreseeable risk of workplace stress, which gave rise to an obligation on schools such as MHS to be proactive in identifying potential hazards arising, for instance, from mental fatigue, traumatic shock or any other temporary condition affecting their employees' behaviour. The HSE Act made it clear that the more serious the risk, the more proactive the employer needed to be.

[46] The case put for MHS proceeded on the basis that in the absence of notification from Mr and Mrs Cronin-Lampe as to the effect of the stress of their work duties on them, MHS could not be expected to do more than it did. Accordingly, it is necessary to evaluate the steps which in fact it took in light of the statutory obligations.

Analysis of the statutory obligations on MHS

[47] In this section, I consider whether MHS identified relevant hazards systematically and whether it took all practicable steps, as defined, to discharge its obligations under the HSE Act. This included an obligation to take all practicable

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[24] At [79].

steps to provide and maintain a safe working environment;[25] and to eliminate, isolate, or minimise and monitor significant hazards.[26]

[48] I begin by considering s 7 of that Act. As Judge Shaw noted in *IHC Northern Vocational Services v Jordan*, the section obliges employers to have a system for identifying new hazards if possible before they arise.[27] She referred to an observation which had been made in the context of a health and safety prosecution in the District Court in 1995:[28]

> [It] is important to emphasise at the outset that the Act requires a complete change in attitude on the part of employers. It is no longer acceptable simply to react to hazardous situations as and when they arise, because [section] 7(1)(b) makes it clear that an employer must be proactive and must have a system in place so that new hazards can be identified as or even before they arise.

[49] In the early stages of Mr and Mrs Cronin-Lampe's employment, after the first cluster of suicides, it was recognised they faced significant challenges in the workplace. Mr Randall, the then Principal, said that in 1999, he recalled discussing with Mr Cronin-Lampe several times that he and Mrs Cronin-Lampe were stressed out by what had happened up to that point; that they were overworked and overburdened; and that they were enduring a lot of pressure.[29] By 2000, Mr and Mrs Cronin-Lampe were run down by the demands of their jobs, a lack of proper supervision, and the needs of the MHS community. It was his assessment in the years he was Principal that "their development as school counsellors had been shaped by long-term crisis intervention and assessment", particularly in regard to students as required by the Postvention team. The work that was generated had resulted in an unrealistic and unsustainable responsibility.[30]

[50] The Board was no doubt well aware of the substantial trauma the school had faced since 1997. I find that, via its Principal, it must have known of the onerous workload implications for the school's counsellors created by those traumatic events.

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25 Health and Safety in Employment Act 1992, s 6.
26 Sections 8, 9 and 10.
27 *IHC Northern Vocational Services v Jordan* [2004] 1 ERNZ 421 (EmpC) at [72].
28 *Department of Labour v Eaden* [1995] DCR 801.
29 *Cronin-Lampe (No 1)*, above n 1, at [121].
30 At [125].

[51] One of the members of the Postvention Team, Dr Narelle Dawson-Wells, maintained informal contact with Mr and Mrs Cronin-Lampe. Obviously recognising Mr and Mrs Cronin-Lampe needed specialist support after the experiences they had endured, in 1999 she organised three joint one-hour sessions for them with a clinical psychologist, which Mrs Cronin-Lampe described as "trauma debriefing". Mr and Mrs Cronin-Lampe felt this was worthwhile, but they also considered it was insufficient. So too did Mr Randall but the school did not offer to fund further such sessions.

[52] Drawing these themes together, it is apparent that by 1999–2000, MHS had sufficient information regarding the nature of the job and the workplace conditions at the school, and that there was a foreseeable risk of harm to Mr and Mrs Cronin-Lampe's health and safety.

[53] By 2003, it became even clearer that responsible employers needed to be proactive with regard to potential workplace stress, having regard to the amendments which took effect under the HSE Act in that year. As discussed, these important developments were reflected in MoE guidelines.

[54] During the period when Ms Crate was Principal, many traumatic events continued.[31] Again, I have no doubt that the senior leadership team of the school, the Principal and the Board were fully aware of the unusual and potentially damaging scale of those events. Mrs Cronin-Lampe made express reference to a dramatic increase in the counsellors' workload at that time. She gave full particulars of the onerous responsibilities she and Mr Cronin-Lampe were carrying.[32] I recounted earlier the circumstances which led to what witnesses described as chaos in 2004 and into 2005.[33] Given the nature of the work being undertaken, a properly informed employer could be expected to identify and control what were by then significant hazards.

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31 At [132]–[174].
32 At [143].
33 At [172].

[55] Coming forward to the inception of Mr Hamill's tenure in 2006–2007, I have found that he was vague in his evidence about his awareness of the multiple tragedies the school had faced prior to his appointment. He said he knew there had been issues with suicides and deaths, but not the details. He said he learned of these by a gradual process, most probably in the first 12 months of his appointment.[34]

[56] There is no evidence of Mr Hamill undertaking an orientation of the kind adopted by Ms Crate in 2001, when she requested all Heads of Department to provide an overview of their positions in practice. I found earlier that Mrs Cronin-Lampe, in that year, prepared such a document summarising the history of events and the Guidance Department's work activities since 1997 in detail.

[57] Given the unusual scale of traumatic events which the school had suffered over a period of years, and with which the counsellors had to contend as part of their work responsibilities, there were important missed opportunities for Mr Hamill, as well as members of the Board, to consider not only methods for the identification of the significant hazards of Mr and Mrs Cronin-Lampe's roles, but also for the elimination, isolation, or minimisation and monitoring of those hazards. I find this did not occur because there was an energetic forward-looking focus on the restorative practices project. It is likely that, as far as Mr Hamill was concerned, this obscured the significant health and safety issues which had arisen previously from the traumatic events which spanned nearly 10 years.

[58] Earlier, I referred to Mrs Cronin-Lampe's health issues in 2006 and 2007. She said she had suffered chronic fatigue following glandular fever. This was in the context of enhanced responsibilities in light of the restorative practices project. Mr Hamill understood that she was "a little tired" following the glandular fever, although this was contrary to the terms of a letter Mrs Cronin-Lampe sent to him on 7 August 2007. His understanding was also contrary to Mr Harris's observation that in 2006 and 2007, Mrs Cronin-Lampe had become noticeably fatigued.[35] About the same time, she herself told her GP that she was "burnt out",[36] and suffering "work stress". She

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34 At [176].
35 At [190].
36 At [434].

discussed with the GP working reduced hours on a regular basis in light of these factors, as recorded in her letter.

[59] The short point for present purposes is that MHS knew Mr and Mrs Cronin-Lampe had been required to deal with a significant degree of trauma including suicide, and it was known that their workload increased in 2006–2007 due to a restorative practices initiative.[37] These facts did not lead to any proactive steps being taken, as required by s 7, to systematically and effectively identify the stress created by additional work against the background of a history dealing with multiple traumatic events.

[60] By 2007/2008, a more proactive approach to health and safety issues was in fact being undertaken at MHS. Mr Hamill told the Court that a health and safety work group, of which he was a member, met two or three times a term. He said the group had in fact identified workload stress as being a general hazard for staff. As noted previously, Mr Hamill acknowledged that the potentially traumatic nature of the counselling roles, and what the counsellors had to deal with, were not, however, identified by the group. He told the Court that the school now has a policy that deals with the situation experienced by Mr and Mrs Cronin-Lampe, and said that the need for this should have been identified earlier.[38]

[61] The steps taken by MHS in 2007/2008 were a recognition of the enhanced employment duties which, by this time, fell on schools in relation to workplace stress. However, it is common ground that no identification of the hazards which the counsellors faced was made at that time.

[62] The lack of attention to these issues continued over the following two years until 2 December 2010, the date asserted to be the accrual date for Mr and Mrs Cronin-Lampe's primary health and safety claims.

[63] I have previously described the circumstances which pertained at that point, which I found made Mr and Mrs Cronin-Lampe particularly vulnerable. For ease of

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37 At [180].
38 At [482].

reference, I repeat some relevant findings, the background to which is described more fully in the first judgment.

[64] I concluded that throughout their employment to this point, Mr and Mrs Cronin-Lampe had provided extensive counselling services in the context of a wide range of traumatic circumstances arising from many suicides, other deaths, as well as other circumstances, over many years.

[65] I recorded that by this time, there was no evidence of a formal health and safety plan being in place so as to identify the hazards of Mr and Mrs Cronin-Lampe's work, the topic to which I have just referred.[39]

[66] I went on to note that the funding for supervision which had been allowed for in the job description had been constrained since 2007. By 2009, the frequency of supervision had significantly reduced, as advised to Mr Hamill when Mrs Cronin-Lampe also referred to there being an inadequate budget for departmental resources. In 2010, Mrs Cronin-Lampe had to resort to informal supervision arrangements with Ms Manson, which proceeded on an unpaid basis.

[67] I concluded that after returning from a medical leave in 2010, Mrs Cronin-Lampe bore the brunt of organising guidance duties. She had to manage the absence of Mr Cronin-Lampe, monitor a young relief counsellor to whom she was providing supervision each fortnight, and oversee two other members of Guidance, as well as carry her own significant caseload.

[68] I found that in light of these circumstances, both Mr and Mrs Cronin-Lampe were, by late 2010, very vulnerable.

[69] All of this was either known or ought reasonably to have been known by Mr Hamill as the Principal and an agent of the Board.

[70] In summary, it is clear that, as at early December 2010, MHS had not been sufficiently responsive to the stresses created by the traumatic events Mr and Mrs

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39 See above at [57].

Cronin-Lampe contended with and the associated workload. A proactive approach was required in the circumstances.

[71] However, Mr Hamill took the view that unless he was specifically alerted to particular issues, he would rely on Mrs Cronin-Lampe as HoD to judge whether sufficient protective measures were in place. This was in spite of the legal obligations which were in place and understood at MHS, as is demonstrated by the appointment of the health and safety work group described by Mr Hamill.

[72] Against the background of the various factors I have discussed, from 2 December 2010 onwards, there were further red flags that should have prompted the undertaking of steps that were well overdue.

[73] From the commencement of the next school year, Mr and Mrs Cronin-Lampe's workload increased in light of the two suicides of late 2010/early 2011, and the death of BF, all as described in my previous judgment. A further trauma, in mid 2011, arose from the suicide of a staff member's partner. No trauma debriefing was offered to them for any of these events.

[74] The workload was such that Mr Cronin-Lampe worked full-time hours, despite being employed on a 0.6 FTE basis at least during the first half of the year.

[75] Mr and Mrs Cronin-Lampe continued to be significantly concerned about the inadequacy of their arrangements for supervision. Following prompting from their supervisor, Mr Jewkes, they exceeded the Guidance budget so as to attend – separately or together – supervision on 15 occasions during 2011. This was still less than the scale of supervision recommended by NZAC. After Mrs Cronin-Lampe raised this issue, Mr Hamill wrote to her, stating he would investigate the adequacy of departmental resourcing.

[76] They had problems taking time off in lieu, which had accrued in the first months of 2011 under an arrangement they reasonably believed gave them an entitlement to do so, but which was now questioned by MHS. They had difficulties in

arranging professional development. Relationship issues within the workplace developed, which led to significant frustration.

[77] A particular example which contributed to such issues concerned their use of a cell phone out of hours, a practice which was well established and expressly provided for in the operative job descriptions. As discussed, the issue was not as straightforward as suggesting that this pre-existing expectation should cease, without first establishing transitional arrangements and/or the introduction of proper backup if Mr and Mrs Cronin-Lampe were not on duty. The instruction to them to desist from answering their cell phone out of hours left Mr and Mrs Cronin-Lampe, and those who may have needed to contact them unexpectedly, in a very difficult situation, compounded by their impression that their concerns were not being heard or understood.

[78] With regard to Mrs Cronin-Lampe, there was a noticeable decline in support of her as HoD. As well as the breakdown in the relationship with Mr Hamill from March 2011, budgetary constraints increased, were not well explained to her, and catalysed deep concern on her part as to the viability of the current Guidance operation.

[79] In addition, she felt she was not well supported in her relationships with other staff. She felt the complex responsibilities of school counsellors were not properly understood. Restorative practices were not being utilised. She also felt bullied by BG. Mr Cronin-Lampe felt his interaction with BJ should not have resulted in disciplinary action.

[80] Throughout this period, the particular issues which Mr Hamill said he would investigate and consider, such as cell phone use, adequacy of supervision, and as to how Mr Cronin-Lampe would work after he was directed to return to a 1 FTE role, were not dealt with in a timely way.

Were the pleaded duties breached and, if so, when?

Health and safety breaches

[81] I return to the pleaded assertions, beginning with those relating to the health and safety allegations. As will be apparent from the above, I am satisfied that MHS

did not meet its duty to identify relevant hazards per s 7. I also find it failed to take reasonably practicable steps (per s 2A) in respect of its health and safety duties to ensure employee safety while at work; and to eliminate, isolate, or minimise and monitor the hazards to which Mr and Mrs Cronin-Lampe were exposed.[40] I also find that the risk of serious emotional or mental harm occurring to Mr and Mrs Cronin-Lampe, in light of their roles and workload issues, was reasonably foreseeable.

[82] By late 2010, the scope of health and safety duties on MHS had become more pronounced. Against a background where there had been many opportunities to address the foreseeable risk of serious harm caused by workplace stress, the yet further traumatic events which occurred from December 2010 onwards, catalysed by an increasingly dysfunctional employment relationship, all lead to a clear conclusion that the pleaded health and safety duties were breached. I consider that from December 2010 onwards, an informed employer could be expected to have recognised that Mr and Mrs Cronin-Lampe were particularly vulnerable in light of their past experiences and having regard to the obligations in ss 7–10 of the HSE Act. In the circumstances, it was foreseeable that a failure to discharge these obligations would likely result in harm to the school counsellors.

[83] I return to the statement made by Mr Hamill that Mr and Mrs Cronin-Lampe did not spell out their concerns about their personal health issues, or as to whether they felt safe in the workplace.

[84] Two points may be made. The first is, as the Court of Appeal put it in *Gilbert*, if the risk is one which applies generally, then knowledge of specific vulnerability may be irrelevant.[41] I consider that observation applies here, given the obvious nature of Mr and Mrs Cronin-Lampe's onerous responsibilities in respect of multiple traumatic events.

[85] Secondly, were the Court to accept that notification of specific vulnerability was required, the issue would have to be assessed within the framework of the HSE Act. Section 19 requires every employee to take all practicable steps to ensure their

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40 Health and Safety in Employment Act 1992, ss 6 and 8–10.
41 *Gilbert (CA)*, above n 3, at [92].

safety while at work; and that no action, or inaction, of the employee while at work, causes harm to any other person. But in assessing the scope of that duty, the inter-relationship between the range of employers' duties and the employee's s 19 duty is relevant.

[86] It is well established that the primary health and safety duties are held by the employer.[42] That is the case here. In my view, any issue as to the application of the s 19 duty should be considered when assessing the affirmative defence raised for MHS as to contribution. Accordingly, I will return to this issue later.

[87] In summary, I am satisfied that the health and safety allegations are established. There were, in all the circumstances, breaches from 2 December 2010.

[88] I turn to consider the remaining allegations which can be considered more briefly.

Workload issues

[89] It is alleged that MHS did not identify and manage hazards or harm in the workplace so as to ensure Mr and Mrs Cronin-Lampe did not suffer harm. There is no doubt that there were workload issues prevalent throughout the entire employment period, for both Mr and Mrs Cronin-Lampe. That problem was compounded by the obligation to be available on call after hours, which continued from 2008, as alleged. This meant they were constantly on call. It was also the case that by 2008, there had been an escalation of their workload due to the implementation of the restorative practices project, including from 8 April 2008 onwards.

[90] It is evident that these issues were not addressed at the time, for instance when performance reviews were being undertaken by Mr Hamill. In 2010, Mrs Cronin-Lampe was particularly stretched for the reasons already discussed. However, I consider the issue became even more pronounced from early 2011, given the traumatic

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42 *Canterbury Concrete Cutting (NZ) Ltd v Department of Labour* (1995) NZELC 98,326 (HC); *United Fisheries Ltd v Department of Labour* HC Christchurch A67/97, 1 August 1997; and *Department of Labour v Wastecare Ltd* DC Palmerston North CRN5054008810/11, 23 October 1996.

events which had recently occurred. It is appropriate to characterise the failure to address the issue as a contractual breach which assumed particular significance from early 2011 onwards.

Training and professional development issues

[91] It is convenient to deal with these two issues together. It is alleged MHS failed to provide any training in trauma and suicide at all times during Mr and Mrs Cronin-Lampe's period of employment, and particularly from 4 April 2008. It is also alleged that they suffered by not being provided with adequate professional development for their roles, particularly in 2011.

[92] It is undoubtedly the case that in the early stages of Mr and Mrs Cronin-Lampe's employment, they suffered from an absence of relevant training, particularly with regard to handling trauma and suicide. That said, they acquired a degree of experience as time went on, through necessity. The problem with this approach, however, was that in the absence of formal training, they were unable to test their acquired skills against what might have been learned in a formal educative context.

[93] Professional development is a related concept and one which allows professional persons to test their acquired skills in a structured learning environment.

[94] By 2011, in my view, the issue was less to do with formal training in trauma and the provision of counselling services following a suicide, and more to do with their recognised need for ongoing professional development so as to update and upskill.

[95] The particular examples that are cited for Mr and Mrs Cronin-Lampe relate to requests made to attend professional development opportunities in May 2011. They applied for leave to attend a professional development course in Canada. Mr Cronin-Lampe was declined paid leave to attend despite time in lieu being owed to him, but also, once he returned from the course, he was required to write a report for the Board, setting out what was "learned by attending". In the same month, Mr Hamill required Mr and Mrs Cronin-Lampe to attend professional development sessions for staff that they considered were not relevant to their roles.

[96] These problems were part and parcel of a broader inadequate approach to ensuring that Mr and Mrs Cronin-Lampe were properly equipped to carry out their onerous roles, particularly when traumatic events occurred. To that extent, I find these alleged breaches are established from May 2011 onwards.

Managing and monitoring stress levels

[97] It is alleged that there was a failure to manage and monitor stress levels, from 4 April 2008. There is no evidence that MHS undertook such management or monitoring at any time. I am satisfied it became a pronounced issue following the traumatic events of late 2010/early 2011. I find this allegation is established from February 2011 onwards.

Failure to provide time off and cover during absence

[98] There is an alleged failure to provide time off and cover whilst Mr and Mrs Cronin-Lampe were absent from the workplace. This failure is said to have occurred from 2008 onwards. I note that there were instances where leave was able to be obtained within the period referred to, for example in February 2009.[43] However, this became a more pressing issue in 2011 with regard to the proposed trips to Samoa and Canada which Mr and Mrs Cronin-Lampe wished to undertake. Difficulties arose concerning what Mr and Mrs Cronin-Lampe described as the 2008 Memorandum of Understanding (MoU) and further employment-related issues emerged from that understanding in 2011. Mr and Mrs Cronin-Lampe say this led to a deteriorating relationship with their employer. In my view, these concerns are better considered as an aspect of the personal grievances, rather than as an aspect of the contractual health and safety breaches.

Adequacy of supervision and resourcing

[99] The allegation concerning funding for adequate supervision, and more generally for departmental resourcing, was said to have arisen in 2009. These related issues were raised in an email sent by Mrs Cronin-Lampe to senior management,

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[43] *Cronin-Lampe (No 1)*, above n 1, at [214].

including Mr Hamill, on 10 February 2009. I have already described the problem about regularity of supervision in 2009 and 2010. On 25 May 2011, after discussions between the parties regarding budget restrictions, which were understood to include insufficient funding for supervision, Mr Hamill wrote to Mrs Cronin-Lampe advising he would investigate the lack of budget that Guidance was experiencing. Later in the year, Mr McNulty informed Mr and Mrs Cronin-Lampe that Guidance was over budget. Budgetary restrictions continued. In August 2011, Mrs Cronin-Lampe prepared an enhanced budget setting out adequate provision for supervision for herself and Mr Cronin-Lampe. As discussed earlier, it was not until the end of November 2011 that the Guidance budget was increased.[44]

[100] Expert evidence was given to the Court on this topic by Dr Goodwin. He said that if MHS was to reduce the effects of trauma for Mr and Mrs Cronin-Lampe, at an absolute minimum, it would have needed to have taken several steps, the first of which was to ensure they had sufficient supervision and professional support to debrief and resolve any outstanding concerns.

[101] The obligation to provide supervision was clearly spelled out in an appendix attached to the MHS Guidance and Counselling Policy as from 2000, and in Mr Cronin-Lampe's job descriptions of 2001 and 2008. There can be no dispute that it was expected that Mr and Mrs Cronin-Lampe would attend supervision regularly, in accordance with NZAC policy and expectations.

[102] I am satisfied these problems became more significant in late 2010 and 2011. In the circumstances, there was inadequate supervision, which contributed to Mr and Mrs Cronin-Lampe's mental health issues.

Alleged bullying

[103] Next, I refer to the asserted lack of support as a result of bullying by BG. In *FGH v RST*, I considered this issue in a health and safety context, noting that an employer's failure to address bullying in the workplace may give rise to an

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[44] At [349].

unjustifiable disadvantage claim.[45] I also noted it could be seen as an aspect of the duty to provide a safe workplace.[46]

[104] The issue is whether the steps taken by Mr Hamill to deal with the issues that arose between BG and Mrs Cronin-Lampe were adequate, and whether it could be said there was a contractual breach of health and safety duties.

[105] Mr Hamill did take some steps to address the issue. The problem with BG became obvious at the Deans' meeting held on 12 April 2011.[47] On that occasion, Mr Hamill attempted to modify BG's behaviour, without success. Accordingly, he asked her to leave the meeting. Soon after, a very derogatory message was placed by BG on her Facebook page. After that development came to the attention of Mr Hamill, the possibility of mediation was raised, but BG was unwilling to attend. Eventually, after Mr Hamill had discussed the issue with BG on 15 July 2011, she sent Mrs Cronin-Lampe an apology by email.

[106] The essence of Mrs Cronin-Lampe's concerns, however, related to the time it took for this issue to be advanced with BG and the fact that Mr Hamill required her to attend HoD meetings, which BG also attended, where she felt particularly vulnerable in light of the manner in which BG had been interacting with her. She had not previously been required to attend such meetings. She was fearful of meeting BG in school precincts, and did not wish to go to the staff room unless accompanied by Guidance colleagues. This problem which was compounded by the fact they were then placed together at a school ceremony, when BG again referred to her in a derogatory fashion.

[107] Whilst I consider there were inadequacies in the way in which this difficult issue was dealt with – including the time to arrange for BG to proffer an apology, as well as the insistence that Mrs Cronin-Lampe attend the staffroom against her wishes given the circumstances – it is preferable to address this issue as an aspect of Mrs Cronin-Lampe's personal grievance.

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45 *FGH v RST* [2018] NZEmpC 60.
46 At [201].
47 *Cronin-Lampe (No 1)*, above n 1, at [308]–[311].

Issues with BJ

[108] A similar contractual breach is raised with regard to an alleged lack of support for Mr Cronin-Lampe in light of the way in which the complaint raised by BJ was dealt with. It is submitted that the problem should not have been escalated to a referral to a subcommittee of the Board, and that doing so gave rise to disparity. BG was not referred for discipline, despite there being a similar offence on her part. Again, I consider this problem is better considered as an aspect of Mr Cronin-Lampe's personal grievance, rather than as a breach of contract issue.

Causation

[109] While there is no formal test for causation, MHS's breaches must have been a material factor in the harm suffered by the Mr and Mrs Cronin-Lampe, namely their mental distress culminating in post-traumatic stress disorder (PTSD). Whether a breach is a material cause of the loss is a question of fact.[48]

[110] The health practitioners were unable to identify a particular event, or series of events, as having caused each of Mr and Mrs Cronin-Lampe's PTSD.[49] However, Ms Farrell and Dr Goodwin agreed that the totality of multiple traumatic events occurring over the course of Mr and Mrs Cronin-Lampe's employment with MHS caused the PTSD conditions.[50] Dr Barry-Walsh also acknowledged there was good argument to be made for contribution from the work environment; the events in the breach period either worsened or had driven their distress and suffering.[51] As I have previously found, the events after 2 December 2010, which include MHS's breaches, compounded the PTSD conditions and contributed to their vulnerabilities.[52] I find there is sufficient evidence to conclude that MHS's breaches were a material cause of each of Mr and Mrs Cronin-Lampe's PTSD.

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48 *Gilbert (CA)*, above n 3, at [64].
49 *Cronin-Lampe (No 1)*, above n 1, at [408], [423] and [458].
50 At [411] and [458].
51 At [423].
52 At [460] and [499].

Conclusion for the breach of contract claims

[111] For the reasons I have given, I find in summary:

(a) MHS breached express and implied contractual health and safety duties it owed to Mr and Mrs Cronin-Lampe as pleaded (with the exception of the alleged failure to provide time off and cover during absence, alleged bullying and issues with BJ which will be assessed under the personal grievance regime), from 2 December 2010.

(b) Each of Mr and Mrs Cronin-Lampe suffered mental harm in the form of PTSD as a result of those breaches. Their injuries were caused by the established breaches of contract.

(c) It was foreseeable that Mr and Mrs Cronin-Lampe would suffer harm of the kind which occurred if the employer did not take all practicable steps to eliminate, isolate, or minimise and monitor the hazards of their occupation.

(d) Section 113 of the Act does not operate as a statutory bar to the breach of contract claims because Mr and Mrs Cronin-Lampe do not seek to challenge a dismissal; there was no dismissal in the circumstances.

Liability: personal grievances

Personal grievance claims

> **103 Personal grievance**
> (1) For the purposes of this Act, personal grievance means any grievance that an employee may have against the employee's employer or former employer because of a claim—
> …
> (b) that the employee's employment, or 1 or more conditions of the employee's employment (including any condition that survives termination of the employment), is or are or was (during employment that has since been terminated) affected to the employee's disadvantage by some unjustifiable action by the employer; …
> …

[112] It is well established that "disadvantage" under s 103(1)(b) is broad in nature. There is no restriction on the type of disadvantage that may fall for consideration. In considering whether there has been a disadvantage, the Authority or Court may consider the actual effect of the decision on the employment. Whether the employment is affected to the employee's disadvantage by some unjustifiable action necessarily involves focusing on what has occurred, and then assessing the impact on the employee.[53]

[113] What constitutes an 'action' by the employer in terms of s 103(1)(b) has also been interpreted broadly, and can encompass failings on behalf of the employer.[54]

[114] It is also well established that terms of employment are all the rights, benefits and obligations arising out of the employment relationship.[55] The phrase "conditions of the employee's employment" includes not only contractual terms and conditions but also those which were understood and applied by the parties in practice, or habitually.[56] I have previously observed that this broad approach leads to a conclusion that there are many ways in which disadvantage may arise.[57]

Pleadings

[115] Turning to the personal grievances as pleaded, there was a problem in the statement of claim. There was an erroneous reference to the date from which the personal grievances were alleged to have arisen, if leave to extend time was not granted.[58] This error was inadvertently repeated in the statement of defence. This date was later corrected. I interpolate that it appears that corrected date was still selected by counting backwards by 90 days from the date that the personal grievances were

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53 *Matthes v New Zealand Post Ltd* [1994] 1 ERNZ 994 (CA) at 997.

54 See, for example, *FGH v RST*, above n 45, where an employer's failure to comply with applicable obligations to maintain a safe and healthy work environment was the basis for establishing the disadvantage grievance.

55 *Tranz Rail Ltd v Rail & Maritime Transport Union (Inc)* [1999] 1 ERNZ 460 (CA) at [26]; and more recently cited in *Spotless Facility Services NZ Ltd v Mackay (No 2)* [2017] NZEmpC 15 at [50].

56 *ANZ National Bank v Doidge* [2005] ERNZ 518 (EmpC) at [50]; relying on *BBC v Hearn* [1977] 1 WLR 1004 (CA); as cited by a full bench of the Court of Appeal in *Tranz Rail Ltd v Rail & Maritime Transport Union (Inc),* above n 55, at [27].

57 *Johnson v Chief of the New Zealand Defence Force* [2019] NZEmpC 192 at [78].

58 It was alleged that the period of 90 days which preceded the raising of the grievances was 22 September 2011; in fact, as was clarified after I raised the issue, the correct date was 28 October 2011.

formally raised. Such an approach is somewhat unusual, given the foundation of the s 103(1)(b) grievance relies upon the identification of some "unjustifiable action by the employer", and that the statutory 90-day limit usually runs from that date.

[116] The plaintiffs' pleading then recited the same alleged failures as had also been pleaded for the purpose of the contractual causes of action, as dealt with earlier.[59] The events described as relevant in the pleadings preceded the 90-day period (once it was correctly calculated). In addition, however, the entire history was also pleaded as being relevant to the personal grievances.[60] It was thereby suggested that relevant incidents dated as far back as 1996 in the case of Mrs Cronin-Lampe, and 1997 in the case of Mr Cronin-Lampe.[61]

[117] Subsequently, Mr Braun identified 2 December 2010, the date of BD's death, as the date from which an exceptional circumstances finding was sought. He said this was the date the plaintiffs became so affected by the cumulative trauma that they would have been unable to consider raising a personal grievance regarding this event and the events that followed over 2011. It was submitted that the result of these events was that Mr and Mrs Cronin-Lampe were unable to continue their employment physically or mentally. I infer that this consequence is also the alleged "disadvantage" in their employment forming the basis of their grievances, although this was not immediately apparent from the pleading.

[118] For the avoidance of doubt, I raised with Mr Braun whether the pleading required an amendment to state what the particulars of the grievances would be, were an exceptional circumstances finding to be made. He responded by stating that after considering the disadvantage pleadings, including the broad scope of the issues the plaintiffs say contributed to the cumulative trauma they suffered, the relevant failings of the school to identify and support them, and the other incidents that were material to the personal grievances (such as bullying suffered, the unilateral changes to employment arrangements and unsustainable workloads), it was his view the pleadings did not need to be amended.

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59 As set out above at [23].
60 At [107] of the statement of claim.
61 At [91] of the statement of claim.

[119] It is necessary to apply common sense. Greater clarity in the statement of claim would have been helpful. However, the grounds relied upon for the personal grievances became more apparent in the course of the hearing, as did the alleged elements of disadvantage. Moreover, I am satisfied no prejudice to the defendant arises, given the substantial overlap with the contractual causes of action. Each and every issue raised for the purposes of the personal grievances was the subject of fulsome evidence and submissions by both parties for the purposes of all the causes of action.

[120] Given the exceptional circumstances finding, I proceed on the basis that the alleged personal grievances arose on and after 2 December 2010. That is the necessary implication of a finding under s 115(a); for an employee to be "so affected or traumatised by the matter giving rise to the grievance" from 2 December 2010, the grievance must have arisen by or on that date. As I shall explain, the occurrences of disadvantage escalated following that date. I now turn to consider whether the grievances are established.

Consideration of the personal grievance allegations

Disadvantage

[121] I rely again on the findings made in my first judgment as to the position as at 2 December 2010,[62] which showed Mr and Mrs Cronin-Lampe were very vulnerable. I rely also on the findings I made as to the events which followed that date. Those events aggravated their vulnerabilities.[63]

[122] Evaluating the problems which I examined in detail in my first judgment and earlier in this judgment, I am satisfied that from early December 2010, Mr and Mrs Cronin-Lampe's conditions of employment were affected to their disadvantage, given the services they were required to deliver in connection with the traumatic events which then occurred.

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62 *Cronin-Lampe (No 1)*, above n 1, at [479]–[486].
63 At [487]–[499].

[123] The workload increased following the suicides of BD and BE, as well as the death of BF. Additionally, Mr and Mrs Cronin-Lampe had to deal with the traumatic circumstances of the suicide of a staff member's partner. No debriefing was offered for any of these events.

[124] Earlier, I found, on the basis of the expert evidence, that Mr and Mrs Cronin-Lampe's pre-existing PTSD was exacerbated by these events, which arose from MHS inaction; the school should have been proactive in identifying the multiple aspects of their workplace responsibilities which gave rise to a distinct risk of mental harm. In summary, to this point they suffered significant disadvantage.

[125] Given their vulnerabilities, the problems that arose thereafter resulted in yet further disadvantage. Their relationships with Mr Hamill, and other members of senior management, deteriorated. I have discussed these when concluding that there are numerous contractual breaches. These also constitute unjustified conduct on the part of MHS, with regard to the established contractual breaches which also constitute unjustified conduct on the part of MHS. In addition, there are four further relationship problems with which I now deal:

(a) Failure to provide time off and cover during absence: I have outlined the nature of this problem.[64] As noted, the problems which arose related to taking time in lieu under what they believed was an "MoU". The manner in which this issue was dealt with contributed to a deteriorating relationship with Mr Hamill. Whereas previously a somewhat informal and trusting relationship had existed, this was no longer the case. The increasing tension commenced with the way in which the MoU issue was dealt with. I am not persuaded, given the nature of the employment relationship which had existed over several years, that it was reasonable for Mr Hamill to deal with workplace issues in a manner which became increasingly adversarial. I conclude that the procedure for dealing with this issue compounded the disadvantages which had become significant in late 2010/early 2011.

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64 See above at [98].

(b) Bullying issue: As already noted, the question here relates to the way in which Mr Hamill dealt with the inappropriate conduct of BG. I have already commented on the time it took for her to be required to proffer an apology, as well as an insistence that Mrs Cronin-Lampe attend HoD meetings against her wishes, when it was obvious relationships had become strained. This episode was a yet further catalyst for a deteriorating employment relationship. It too created disadvantage for Mrs Cronin-Lampe.

(c) Issues with BJ: The problem in connection with this issue relates to a discrepancy which occurred when Mr Cronin-Lampe was referred to a hearing before a disciplinary committee, when compared with the relatively benign approach taken with regard to BG. This step created additional disadvantage for Mr Cronin-Lampe.

(d) Status issue: This final point relates to the way in which Mr Cronin-Lampe's status was handled in the second half of 2011. MHS had, for many years, regarded Mr Cronin-Lampe as being a permanent employee. When doubt arose as to that status, no proactive steps were taken by Mr Hamill on behalf of the employer to resolve that difficulty, or even to provide an amended job description when Mr Cronin-Lampe was required to work on a full-time basis. His position over the second half of 2011 was uncertain, both as to status and as to what he was in fact going to be required to do over and above his counselling responsibilities. The way this issue was handled contributed to the workplace stress. It was not supportive. It caused yet further disadvantage for Mr Cronin-Lampe.

[126] As the expert evidence shows, the mental health conditions of Mr and Mrs Cronin-Lampe continued to deteriorate, so that by the end of 2011, they could not continue in the workplace. By that time, I find they had suffered serious harm as identified by Ms Farrell and Dr Goodwin. Dr Goodwin noted that the extreme emotional workload and the lack of resources available to Mr and Mrs Cronin-Lampe

added to the harm they experienced. As a result, I find their employment, or conditions of their employment were "affected" by MHS's actions, or multiple failures to act.

Justification

[127] I turn next to the issue of justification. The question which the Employment Relations Act 2000 (the Act) poses is whether what MHS did was what a fair and reasonable employer could have done in all the circumstances which applied at the relevant time.[65]

[128] The traumatic incidents, with the allied need to provide services to those affected by those events, could be expected to have raised a red flag as to the steps a fair and reasonable employer could be expected to have taken to rectify the absence of relevant health and safety measures up to that point.[66]

[129] A fair and reasonable employer could also have been expected to understand that there were, in 2011, significant workload issues following the traumatic events which needed to be expressly identified and monitored.

[130] This did not happen. For example, these issues were glossed over at the time of the Board meeting in late March 2011. At Mr Hamill's direction, Mr and Mrs Cronin-Lampe were encouraged to present their work activities in a positive way to members of the Board. This was notwithstanding the fact that by then, Board members knew about the declining relationship between Mr and Mrs Cronin-Lampe and Mr Hamill which was not referred to. By way of example, Mr Russell, a Board member, confirmed this; he said that he – and he thought other members of the Board – knew there were frictions between them.

[131] At the Board meeting, reference was made to the fact that what Mr and Mrs Cronin-Lampe were facing aligned with the difficult issues they had been required to confront at least 15 years previously when they started at MHS. On any view, those circumstances had been very challenging. Mr Hamill took the position that he had not

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65 Employment Relations Act 2000, s 103A.
66 See above at [54] and [62]–[80].

been employed at the school at that time and was thus not well placed to understand these events.

[132] In my view, a fair and reasonable employer could be expected to find out what those circumstances were if there was any doubt as to what was meant. There were plainly persons still employed at the school who were present at the time, and of course Mr and Mrs Cronin-Lampe themselves were well aware as to what had occurred. There was also available documentation relating to the traumatic events that had occurred. Moreover, it is clear from the evidence that Mr Hamill was brought in as Principal to effect positive change, including to the culture of the school. That suggested there needed to be a clear focus on history.

[133] MHS submitted that it was not advised until 26 January 2012 that Mr and Mrs Cronin-Lampe's health was suffering. Against the backdrop of the expert medical and contemporaneous evidence, I find this unlikely. But if it was indeed the case, a fair and reasonable employer could have been expected to take steps to check in and reassure itself of its employees' wellbeing well prior to this date.

[134] From early 2011 onwards, there were also numerous employment-related events, such as bullying (Mrs Cronin-Lampe), uncertainty of employment status (Mr Cronin-Lampe), and disparity of disciplinary treatment (Mr Cronin-Lampe), that caused anxiety to Mr and Mrs Cronin-Lampe, as confirmed in the evidence of Ms Farrell and Dr Goodwin. As I have noted, a fair and reasonable employer could be expected to realise that vulnerable employees would find a sudden transition from a friendly and communicative style of communication to a formal and adversarial one difficult and, having realised that, could have taken different actions.

[135] In summary, I find that the actions of MHS, and how it acted, were not steps which a fair and reasonable employer could have taken in all the circumstances. The personal grievances are, accordingly, established.

Affirmative defence relating to s 317 of the AC Act

[136] MHS pleaded that the statutory bar of the AC Act[67] precluded Mrs Cronin-Lampe from seeking damages in this proceeding because under s 21B of that Act, she had cover for mental injury. This defence was initially raised also in respect of Mr Cronin-Lampe, but in his final address, Mr White confirmed such a defence would not be maintained in respect of his claims.

[137] Having determined that the various causes of action are established, it is now appropriate to consider this issue.

[138] A preliminary point to make is that it is common ground that, although the Accident Compensation Corporation (ACC) has declined an application for cover made by Mrs Cronin-Lampe,[68] the terms of s 317 can nonetheless be raised in this proceeding, and must be considered by the Court irrespective of the conclusion reached by ACC as to whether, in its view, cover is available under s 21B.

[139] The statutory bar provision relevantly states:

> **317 Proceedings for personal injury**
>
> (1) No person may bring proceedings independently of this Act, whether under any rule of law or any enactment, in any court in New Zealand, for damages arising directly or indirectly out of—
>
> (a) personal injury covered by this Act; or
>
> (b) personal injury covered by the former Acts.
>
> (2) Subsection (1) does not prevent any person bringing proceedings relating to, or arising from,—
>
> (a) any damage to property; or
>
> (b) any express term of any contract or agreement (other than an accident insurance contract under the Accident Insurance Act 1998); or
>
> (c) the unjustifiable dismissal of any person or any other personal grievance arising out of a contract of service.
>
> (3) However, no court, tribunal, or other body may award compensation in any proceedings referred to in subsection (2) for personal injury of the kinds described in subsection (1).
>
> …

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67 Accident Compensation Act 2001, s 317.

68 And also for Mr Cronin-Lampe.

[140] Section 319 provides that the statutory bar does not preclude an application for exemplary damages, which has in fact been advanced in this case.

[141] Section 21B, on which MHS relies, provides for cover for work-related mental injury in these terms:

> **21B Cover for work-related mental injury**
>
> (1) A person has cover for a personal injury that is a work-related mental injury if—
>
> (a) he or she suffers the mental injury inside or outside New Zealand on or after 1 October 2008; and
>
> (b) the mental injury is caused by a single event of a kind described in subsection (2).
>
> (2) Subsection (1)(b) applies to an event that—
>
> (a) the person experiences, sees, or hears directly in the circumstances described in section 28(1); and
>
> (b) is an event that could reasonably be expected to cause mental injury to people generally; and
>
> (c) occurs—
>
> (i) in New Zealand; or
>
> (ii) outside New Zealand to a person who is ordinarily resident in New Zealand when the event occurs.
>
> (3) For the purposes of this section, it is irrelevant whether or not the person is ordinarily resident in New Zealand on the date on which he or she suffers the mental injury.
>
> (4) Section 36(1) describes how the date referred to in subsection (3) is determined.
>
> (5) In subsection (2)(a), a person experiences, sees, or hears an event directly if that person—
>
> (a) is involved in or witnesses the event himself or herself; and
>
> (b) is in close physical proximity to the event at the time it occurs.
>
> (6) To avoid doubt, a person does not experience, see, or hear an event directly if that person experiences, sees, or hears it through a secondary source, for example, by—
>
> (a) seeing it on television (including closed circuit television):
>
> (b) seeing pictures of, or reading about, it in news media:
>
> (c) hearing it on radio or by telephone:
>
> (d) hearing about it from radio, telephone, or another person.
>
> (7) In this section, event—
>
> (a) means—
>
> (i) an event that is sudden; or
>
> (ii) a direct outcome of a sudden event; and

(b) includes a series of events that—
  (i) arise from the same cause or circumstance; and
  (ii) together comprise a single incident or occasion; but
(c) does not include a gradual process.

[142] I refer also to s 36 which provides that the date on which a person suffers mental injury as described in ss 21 and 21B is the date on which the person seeking cover first receives treatment for that mental injury.

[143] In their closing addresses in late April 2023, counsel for the parties and for the intervener, ACC, addressed me in detail on a judgment of the Court of Appeal, which was at the time regarded as being the leading authority on s 21B.[69] I was advised that leave to appeal that judgment had been granted, and that a hearing before the Supreme Court had in fact occurred, although its judgment had yet to be delivered. At that stage, counsel considered that it would not be necessary for this Court to defer consideration of the ACC defence until the Supreme Court had issued its judgment.

[144] As it happened, that view did not turn out to be correct. The Supreme Court judgment was issued on 12 May 2023.

[145] The case concerned the application of s 317 of the AC Act.[70] Ms Taylor had sought compensation for PTSD caused by Mr Roper sexually assaulting and falsely imprisoning her in the late 1980s while she was employed by the Royal New Zealand Air Force. Mr Roper's conduct included indecently assaulting Ms Taylor while she was driving him home late at night, and regularly locking and leaving her in a tyre cage. The issues on appeal related to the effect of the ACC scheme on Ms Taylor's common law causes of action, and whether they were statute barred. Mr Roper appealed the Court of Appeal's finding that s 21B of the AC Act did not apply, as well as its finding that Ms Taylor could seek compensatory damages for false imprisonment. Ms Taylor cross appealed the holding that she was entitled to ACC cover.

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69 *Taylor v Roper* [2021] NZCA 691, [2022] 2 NZLR 671 [*Roper (CA)*].
70 *Roper v Taylor* [2023] NZSC 49, [2023] 1 NZLR 1 [*Roper (SC)*].

[146] The Supreme Court first considered that cross appeal which related to the application of s 21A of the AC Act, for mental injury caused by certain criminal acts, and whether the statutory bar would preclude her claim for false imprisonment on the basis of that section. The Court was satisfied Ms Taylor had cover under the accident compensation scheme, s 317 applied to bar the claim and the cross appeal was dismissed.[71]

[147] The Supreme Court then considered the appeal, determining that Ms Taylor could not sue for compensatory damages for false imprisonment, also due to the s 317 bar and policy reasons for disallowing double recovery.[72]

[148] It then moved on to consider s 21B of the AC Act. It noted that because of its conclusions as to the cross appeal and the compensatory damages issue, there was no need to come to a definitive view on the application of s 21B.[73]

[149] The Supreme Court did, however, consider the terms of that section in some detail. It disagreed with the Court of Appeal on several points as I will describe shortly, and then concluded that s 21B could be engaged on the facts of the case which was before it.[74]

[150] It is common ground that the Supreme Court's statements in relation to s 21B are both obiter dicta and tentative.[75] Moreover, although the Court made general observations about the section, it did not consider the corpus of jurisprudence which had discussed the section previously. This contrasted with the approach adopted by the Court of Appeal, which did. As Mr Bisley, counsel for ACC, put it, that may mean the Supreme Court did not intend to have the last word on the subject.

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71 At [51].
72 At [63], [69] and [71].
73 At [72].
74 At [103].
75 The cautionary statements of the Court were expressed at: [72] it did "not need to come to a definitive view on the application of s 21B"; [92] the Supreme Court "questions" the Court of Appeal's approach to the meaning of "sudden" in relation to the definition of an event; [95] the Supreme Court has "distinct reservations" about the Court of Appeal's exclusion of a prolonged event; [102] it "may well be" that multiple distinct causes can qualify for cover under s 21B; and [103] the Supreme Court "[did] not need to decide the point" and "tentatively" concluded that the requirements of s 21B(1)(a) were met.

[151] As Mr Bisley went on to submit, the issues relating to s 21B came before the Supreme Court in an unusual way. It was not raised or considered in either of the courts below in the first instance.[76] The Supreme Court itself raised the potential relevance of s 21B in the course of considering two applications for leave to appeal the Court of Appeal's first judgment; it dismissed those applications and directed that the applicants may instead seek a recall of the Court of Appeal judgment so that the issue of s 21B could be ventilated.[77] This advice was followed with the Court of Appeal then considering the section in a further judgment.[78] It was these views about s 21B which were ultimately considered in some detail by the Supreme Court.

[152] These circumstances give rise to a possible stare decisis problem. Having regard to the Supreme Court's primary findings on the appeal (allowed) and cross appeal (dismissed), its consideration of s 21B was not necessarily required (being another ground of appeal). Nonetheless it went on to consider the Court of Appeal's analysis of s 21B. While the Supreme Court "[did] not need to decide the point", it appears to suggest the s 21B appeal may have also succeeded.[79] Since the Supreme Court did not formally overturn the Court of Appeal's findings as to s 21B, those conclusions stand and bind lower courts. Presumably it would be for the Court of Appeal to now decide in another case whether it should follow its own decision, or reconsider its approach in light of the Supreme Court's comments. Alternatively, the Supreme Court itself could be required to consider the issues on a definitive basis.[80]

[153] Counsel agreed that the conclusions reached by the Supreme Court on s 21B are, notwithstanding the above difficulties, entitled to considerable weight.[81] A strong direction from the Supreme Court, even if obiter, is likely to be paid appropriate deference.[82]

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76 *Taylor v Roper* [2020] NZCA 268; and *M v Roper* [2018] NZHC 2330.
77 *Attorney-General v Taylor* [2020] NZSC 152 at [11].
78 *Roper (CA)*, above n 69.
79 *Roper (SC)*, above n 70, at [103].
80 Either by way of appeal from the Court of Appeal or by a leapfrog provision: see Senior Courts Act 2016, s 69; and *R v Chilton* [2006] 2 NZLR 341 (CA).
81 See, for example, Douglas White "Originality or Obedience? The Doctrine of Precedent in the 21st Century" (2019) 28 NZULR 653 at 654.
82 See, for example, *Lockley v R* [2011] NZCA 439 at [14].

[154] Having reflected on these issues, I have concluded that in this particular case, issues as to stare decisis are not in the end decisive.

[155] Although, as I will explain shortly, analysis of some of the threshold issues are not straightforward, in the end AC cover is not available because causation cannot be established on either court's approach.

The key issues

[156] For present purposes, there are three key areas of dispute between the defendant on the one hand (it contends the statutory bar applies), and the plaintiffs and the intervener on the other (they contend it does not apply). They are:

(a) how the definition of "event" in either limb of s 21B(7)(a) is to be construed and applied;

(b) whether the requirements of s 21B(2) are made out;

(c) whether causation is established.

[157] Those issues must be addressed to determine whether there is a qualifying mental injury; if so, the statutory bar would operate.

The facts relied on for the purposes of the affirmative defence

[158] For the purposes of the affirmative defence, MHS says that what occurred when Mrs Cronin-Lampe attended the household of AA, after his suicide in 1997, must be the focus of inquiry for the purposes of s 21B issues.

[159] The direct evidence as to what occurred was given by Mr and Mrs Cronin-Lampe, and by Mr Randell.

[160] Mrs Cronin-Lampe had been working with AA in 1996, and on and off before the suicide in 1997. She had developed a close connection with him and his mother.

[161] She met AA briefly on the day of the death. She spoke to him immediately before he undertook a detention, so as to reassure him.

[162] The suicide took place after he left the school that day. The next day, while Mrs Cronin-Lampe was at a professional development course in Auckland, her name was called over a speaker and she was asked to return to Hamilton. She did so, crying all the way back.

[163] AA's older brother came to the school and attempted to assault Mr Randell, but was able to be subdued by Mr Randell and others that were present. Some time later, the police informed Mr Randell that they had been to AA's home and the family would be happy for him to visit. He then met the family who were apologetic as to what had occurred, albeit they were grieving for the loss of a family member.

[164] At about this time, Mrs Cronin-Lampe was asked to assist by giving pastoral support. Mr Randell knew she had a positive relationship with the family and would have a calming and soothing influence. He also asked her to visit the family to ascertain its needs regarding funeral arrangements.

[165] Mr and Mrs Cronin-Lampe then attended the family home, the visit being the first of several.

[166] Mrs Cronin-Lampe says AA's body had just arrived at his home. She sat with AA's mother, who was distraught, on the floor near the open casket. Rope marks were visible around his neck.

[167] Later that day, Mrs Cronin-Lampe was verbally abused and was the subject of an attempted physical assault by two of AA's brothers. She said there were many people in the room, some of whom restrained the abusive family members. AA's mother and father were not abusive towards her. On that occasion, she was asked by one of AA's brothers what kind of counsellor she was; AA had been her client and his brothers did not understand why she had not fixed him.

[168] Mrs Cronin-Lampe said the sight of AA's body would remain with her forever. Whilst stunned and shocked – but not in a physical sense – by what she saw and how she was confronted, it is apparent she continued with the visit as she had been requested to.

[169] The next day she and Mr Cronin-Lampe attended the home again for a poroporoaki where one of AA's brothers asked what kind of a counsellor she was. Then AA's funeral was led by Mr Cronin-Lampe on the school marae.

[170] Mrs Cronin-Lampe worked with AA's family to assist with the funeral. This entailed about an hour and a half of work each day over a week. Following the funeral, she continued to work with the family on grief issues.

Section 21B(7): The legislative history

[171] The Supreme Court reviewed the legislative history of this provision in detail. It said that the explanatory note had described a gap in cover which s 21B was introduced to address,[83] by providing cover for mental injury caused by exposure to a sudden traumatic event during the course of employment.[84]

[172] Prior to the passage of the Bill, the relevant select committee recommended that it be amended due to concerns that the subject clause as drafted might exclude certain claims that it was intended should be covered. The Committee noted that the Bill:[85]

> … was intended to provide cover for work-related mental injury caused by a single event, such as a road accident, even where that single event might be interpreted as consisting of a number of interrelated events.

[173] Thus, the Bill was amended to include an expanded provision which became s 21B(7). Whereas the Bill had originally provided that an event had to be "sudden", reasonably expected to cause mental injury, and experienced, seen or heard directly; the amendment extended the definition of "event", expressly extending the term's

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83 *Roper (SC)*, above n 70, at [84].
84 At [85].
85 At [86].

scope to preclude situations where a single event would be excluded due to being treated as a series of interrelated events.[86]

[174] This history is relevant to the text of the two limbs of s 21B(7)(a) on which counsel focused. In particular, Mr White submitted it was clear that Mrs Cronin-Lampe's attendance at AA's home following his suicide meets the requirements of s 21B(7)(a)(i) or (ii). I deal with each.

The meaning and application of "sudden": Section 21B(7)(a)(i)

[175] The Court of Appeal had interpreted "sudden" as including both "an absence of foreseeability or warning" and "a temporal connotation namely rapid or instantaneous".[87] In particular, that Court held that "sudden" does not include an event that was foreseeable in the ordinary course of employment. This was questioned by the Supreme Court for two reasons.

[176] The first reason was that such an approach might exclude cases which were otherwise paradigmatic for the application of s 21B. The Court gave various examples including "witnessing a colleague shot in a bank robbery", or someone employed in a dangerous area whose place of work is robbed after being threatened by a local group of robbers, which could be said to be foreseeable.[88]

[177] Secondly, the Supreme Court said policy reasons did not favour the approach which had been adopted by the Court of Appeal. Its interpretation would counterintuitively place workers who are highly vulnerable at a disadvantage compared to workers for whom dangerous events occur more infrequently. Further, such an interpretation seemed to violate the requirement that the interpretation of the statute be "non-niggardly".[89]

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86 At [87].
87 *Roper (CA)*, above n 69, at [19] and [31].
88 *Roper (SC)*, above n 70, at [93].
89 At [94]; citing *Harrild v Director of Proceedings* [2003] 3 NZLR 289 (CA).

[178] I note that, while the Supreme Court discussed the foreseeability element touched on by the Court of Appeal, it did not discuss the second element, that is the need for a temporal connection. I assume that element was not in issue.

[179] Mr White submitted that there was no room, in light of this dicta, to restrict the term "sudden" so as to exclude foreseeable events, such as, in this case, Mrs Cronin-Lampe attending the household of AA. He also submitted that some of the incidents that occurred during that visit were unanticipated, such as seeing AA's body with the rope marks and the verbal abuse and attempted physical assault on Mrs Cronin-Lampe. This was said to be consistent with Mrs Cronin-Lampe's evidence that she was stunned and in shock as a result of these incidents. I understood the submission to be two-fold – that the attendance at the household is a qualifying "sudden" event; or, alternatively, those incidents in themselves each a "sudden" event.

[180] Mr Bisley, by contrast, submitted that what the Supreme Court intended was that cover under s 21B would still be available only if the risk of a particular *type* of event was foreseeable. However, he submitted those comments cannot extend to specific events that the claimant knew, in advance, would occur at a particular time; such events would not be sudden. Mr Braun agreed.

[181] Mr Bisley and Mr Braun also submitted that care should be taken not to adopt an interpretive process that would deprive the word "sudden" of any meaning whatsoever. Undue reliance on the comprehensive coverage and/or an overly generous approach to interpretation ran that risk.

[182] Mr Bisley developed this conclusion with reference to two points:

(a) The dictionary definition of the word "sudden" which included, amongst its meanings, "[h]appening or coming without warning; unexpected; unforeseen; abrupt; hasty";[90] and

[90] Shorter Oxford Dictionary (6th ed, Oxford University Press, 2007).

(b) the parliamentary explanation as to the purpose of s 21B, and the examples given by the Supreme Court (a worker who was robbed; a train crash; a mine collapse).

[183] I accept Mr Bisley's submission that the Supreme Court dicta cannot be understood as meaning that a qualifying event can be entirely foreseeable or expected, since that would deprive the word "sudden" of any meaning. I agree that it is reasonable to interpret the Supreme Court's analysis of a sudden event as including events of a foreseeable type only; in other words, events which are not anticipated with any specificity, but are known risks in a particular line of work. Such an approach would not exclude the examples given by that Court for which cover was envisaged.[91] Further, such an interpretation appears to sit comfortably with the policy reasons raised by that Court for a less restrictive approach – vulnerable workers who are more often exposed to dangerous events would not be denied cover simply because that type of event was foreseeable in that line of work.

[184] Reading the Court of Appeal and Supreme Court's comments on foreseeability together, an assessment of the nature of foreseeability in the present case may be necessary to determine whether an event was "sudden" for the purposes of s 21B(7).

[185] I turn to the application of the subsection to the present facts. Mr White did not put the school's case on the basis that the suicide itself was the sudden event, nor that the funeral was. Rather, his focus was on what happened at AA's home when Mrs Cronin-Lampe first became involved with the family following his death.

[186] Mr Bisley submitted that the event the school sought to rely on could not be classified as "sudden" because Mrs Cronin-Lampe knew they would occur on a particular date. While initially this submission was made in respect of AA's funeral, he later clarified that the same reasoning applied to the attendance at AA's household. I infer this was because Mrs Cronin-Lampe knew, in advance, she would be attending a family home where the body of a suicide victim would likely be present, and family members who were known to be distressed by what had occurred would likely be

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91 For example, *Roper (SC)*, above n 70, at [93].

present. I understood the submission to be that, as a result, the event relied upon was fully foreseeable or expected, as opposed to being merely a foreseeable type of event (which, under Mr Bisley's submissions, would attract cover).

[187] Mr White says this approach would be contrary to the Supreme Court's dicta, exclude cover for paradigmatic cases and amount to adopting a niggardly interpretation. Such an approach would involve, as the Supreme Court put it, a strained interpretation.

[188] I agree with Mr Bisley that the attendance at the family home itself was not a sudden event. Although there may have been elements of the visit that were not entirely foreseen and indeed were shocking for Mrs Cronin-Lampe, such as seeing the actual state of AA's body as well as being the victim of verbal abuse and a potential assault, together they do not meet other essential elements of s 21B. These are s 21B(2)(b) as to whether those events would cause harm to people generally, and s 21B(1)(b) as to causation.

The meaning and application of "direct outcome of a sudden event": Section 21B(7)(a)(ii)

[189] The second, and alternative, definition of event is found in s 21B(7)(a)(ii). The Court of Appeal did not consider this provision, and the Supreme Court touched on it briefly without any comment as to its interpretation.[92] Accordingly, I must consider this issue in light of counsel's submissions.

[190] Mr White acknowledged there was a dearth of authority as to the interpretation of the subsection. He said the most relevant decision to date was provided in a District Court decision, *Griffiths v Accident Compensation Corp*,[93] which he acknowledged did not squarely address the issue, although it provided some general guidance. That Court was required to consider when an employee had suffered mental injury, which necessarily required looking at the cause of that injury. The Court said that a particular earthquake had been "sudden", and the trauma suffered by an employee was a direct

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92 *Roper (SC)*, above n 70, at [97].
93 *Griffiths v Accident Compensation Corp* [2021] NZACC 129.

outcome of that sudden event.[94] The Court made this finding "for the sake of completeness"; it did not analyse the subsection and simply adopted its language.

[191] Mr White went on to submit that a restrictive interpretation of the word "direct" would not be in accordance with the non-niggardly application of ACC cover and would exclude paradigmatic cases from cover. He also submitted it would result in an inconsistent application of the meaning of the word as used elsewhere in the AC Act; for instance, in ss 81 and 82, where the use of a restrictive approach would offend against the purpose of those provisions. I interpolate that Mr Bisley disagreed, submitting that placing reliance on the language used elsewhere in the AC Act did not assist in the interpretation of s 21B. Fundamentally, these were discrete provisions, each with their own purpose and context. I agree.

[192] In the result, Mr White said the events experienced by Mrs Cronin-Lampe were the direct outcome of a sudden event, that is, AA's suicide, and caused Mrs Cronin-Lampe's PTSD so that s 21B(7)(a)(ii) was an avenue for obtaining cover.

[193] In reply, Mr Bisley submitted that the broad interpretation argued for by Mr White would be inconsistent with the purpose of the section, being to provide cover for mental injury caused by *exposure* to a sudden traumatic event. That broad interpretation would provide cover to claimants who did not directly experience the sudden event, but who experienced only a consequence of that event even if that consequence was not sudden, occurred some time later and in different circumstances, and could not be regarded as being of the same character as the "sudden event". He provided a hypothetical comparator in which cover would be arbitrarily dictated by the suddenness or otherwise of the original event (for example, a death), even if the mental injury was caused by the same type of "direct outcome" (for example, a funeral). Mr Bisley submitted that this would give rise to an anomalous regime that no rational drafter could have intended.

[194] Mr Bisley also pointed to the ordinary meaning of the word "direct": "existing or occurring without intermediaries or intervention; immediate, uninterrupted."[95] He

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94 At [77].
95 Shorter Oxford Dictionary, above n 90.

said that the application of the word in this sense was also supported by the wider context of the section in three ways.

[195] First, the "direct outcome" must be experienced, seen or heard "directly" as required under s 21B(2)(a). As the Court of Appeal had found, that reflected a need for immediacy of the event for the claimant, and was given greater specificity by the language in ss 21B(5) and (6) which "preclud[e] delayed exposure to the event."[96]

[196] Secondly, MHS's interpretation would transform the requirement that the event be "sudden" from an overarching requirement reflecting Parliament's clear intention to cover sudden traumatic events, to an arbitrary threshold with a loose relationship to the actual injury suffered or its circumstances.

[197] Thirdly, Mr Bisley relied on the context of subs (7). Subsection (7)(b) provides that the word "event" includes a series of events, if they arise from the same cause or circumstance, and together comprise a single incident or occasion. This suggests that the subsection was intended to ensure that cover is available for a person affected by a sudden event, even if the mental injury were to be caused by a series of events of which the sudden event is the immediate trigger, but which are all in effect part of the same incident.

[198] Mr Bisley submitted that these three contextual points indicate that a close connection between the subject sudden event and its outcome is required; it must be both caused by, and have a temporal relationship with, the sudden event. Mr Braun agreed, submitting that proximity in both time and geography to the subject sudden event was required to fall within subs (7)(a)(ii).

[199] Mr Bisley went on to submit that *Griffiths* did not support the interpretation advanced by MHS; subs (7) did not appear to be the subject of argument or evidence. Although s 21B(7) was satisfied, it was not clear whether the District Court considered both limbs of s 21B(7)(a) were satisfied, or whether only para (ii) was.[97] The interpretation and effect of s 21B(7)(a)(ii) and the concept of a "direct outcome" were

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96 *Roper (CA)*, above n 69, at [31].
97 *Griffiths v Accident Compensation Corp*, above n 93, at [77].

not addressed at all, save to confirm the traumatic events occurring post-earthquake qualified. Mr Bisley argued it could not be said that the case amounted to being an expansion of the ambit of that subsection.

[200] I accept Mr Bisley's submissions. In my view, reference to a "direct outcome" was not intended to expand cover by entirely disconnecting, in time, an outcome from a sudden event which would have qualified had the person experienced it. The boundaries of subs (7) are intended to limit cover to the sudden event, to a direct outcome of that event, and to a series of events which arise from the same cause or circumstance and together comprise one incident or occasion.

[201] Turning to Mrs Cronin-Lampe's circumstances, I find that s 21B(7)(a)(ii) does not apply. It cannot be concluded that there was sufficient immediacy between the suicide (the sudden event) and the attendance at the family home as well as the occurrences that then took place. There was, to adopt the language of the Court of Appeal, a "delayed exposure to the event".[98]

Other threshold requirements

[202] There are two other threshold issues, which I mention for completeness.

[203] Section 21B(2)(a) requires the claimant to "directly" experience, see or hear the qualifying event in the circumstances described in s 28(1). Section 28(1) provides when a personal injury will be deemed "work-related". Those requirements are not in issue here.

[204] More complex is the requirement in s 21B(2)(b), which provides that if there is a qualifying event, it has to be one that could reasonably be expected to cause mental injury to people generally.

[205] Even if the events I referred to earlier were to qualify – that is, seeing rope marks on the deceased and being subject to abuse and the threat of an assault – there is no evidence that such circumstances would reasonably be expected to cause mental

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98 *Roper (CA)*, above n 69, at [31].

injury to people generally. The only expert evidence as to impacts on the general population was Dr Goodwin's statement that Mr and Mrs Cronin-Lampe's cumulative experience during the entire period of their employment, culminating in the two suicides in late 2010 and early 2011, would have resulted in psychological harm to most, if not all, people.[99] This opinion was not made with regard to any particular event.

Causation

[206] For completeness, I address causation under s 21B(1)(b).

[207] I was addressed by counsel in some detail as to how causation should be approached in light of this language and comments made about it by the Supreme Court. A particular focus of Mr White's submission was a reference to dicta of the Supreme Court that "a material cause" would suffice.[100]

[208] While the Supreme Court said it was inclined to accept the test of material contribution, it also recognised there may be some scope for debate about the level of materiality required and how this is best expressed.[101] The Court said in obiter dicta that where there are multiple actions, some of which may meet the definition of "event' while others do not, it must also be established that the actions constituting the "single event" are a material cause of the injury when separated from the whole course of actions.[102] The Court also said in obiter dicta that where there are a number of *separate* qualifying events that cumulatively caused mental injury, each could potentially be seen as a material cause of the relevant mental injury.[103] It is apparent the Court considered the test of material cause to be a broad one, which could potentially apply to a range of scenarios.

[209] However, on the view I have reached as to the facts in the present case, neither approach would give rise to a finding of causation for the purposes of this case.

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99 *Cronin-Lampe (No 1),* above n 1, at [416].
100 *Roper (SC)*, above n 70, at [62] and [67].
101 At [62]. This approach was derived from *W v Accident Compensation Corporation* [2018] NZHC 937, [2018] 3 NZLR 859 at [44]–[68]. The Supreme Court noted the discussion of the relevant authorities as to the level of contribution required.
102 At [90].
103 At [102]–[103] (emphasis added).

[210] On this topic, Mr White emphasised a number of evidential references, particularly statements made by Mrs Cronin-Lampe from time to time about the events involving AA. She had said in evidence that AA's death had left "a real mark" on her. Mr White also highlighted historical references to AA. In 1998, she dedicated a paper to him. In September 1999, she wrote to Mr Randell, noting that it was the second anniversary of AA's death.

[211] Fifteen years later, she was recorded by Dr Dean as experiencing memories about AA's death, as well as those of other young men who she saw in coffins with rope marks around their necks. A similar reference was recorded by Ms Farrell, also in 2012. Mr White also referred to a description of AA's suicide as given to Dr Bierman as recently as in 2017, which led him to conclude that this and other suicides were a material cause of Mrs Cronin-Lampe's PTSD (although cover was not granted on the basis of this opinion, I place that fact to one side).

[212] Mr Braun pointed to other aspects of the evidence; for instance, that Mrs Cronin-Lampe said she had worked with AA and felt grief at his loss but was not overwhelmed. She said she was fully mobilised doing everything she could to deal with the aftermath in the MHS community. She had also said that the event gave her a keen sense of purpose and responsibility that drove her to do better and to do more after AA's death. It had given her a renewed vigour to make a difference to change things in schools so that young people could learn in safe environments. Mr Braun submitted that these statements were not consistent with the behaviour and feelings of a person who suffered from PTSD, or who suffered a severe injury after a traumatic incident.

[213] He also relied on the opinions of the experts who gave evidence to the effect that no single traumatic incident could be regarded as being causative of Mrs Cronin-Lampe's ultimate PTSD. He submitted that this was encapsulated in Mrs Cronin-Lampe's evidence that what she had suffered was an "avalanche of trauma". Another apt description, he said, was that adopted in a recent ACC case, where Judge Spiller

had referred to mental injury in that instance as being "the result of an accumulation or constellation of stressors".[104]

[214] In essence, Mr Bisley concurred with this position, although he described Mrs Cronin-Lampe's mental injury as being "the consequence of a number of causative factors over many years". What must be considered for the purposes of s 21B is whether the qualifying event "caused" the "mental injury"; that is, "a clinically significant behavioural cognitive or psychological dysfunction".[105]

[215] This issue was specifically addressed by health experts having the necessary expertise to make the required clinical judgement. I consider it is their evidence which the Court must assess when considering the statutory test as to causation of mental harm.

[216] I previously accepted that the "mental injury" in question is PTSD. There are particular criteria which must be satisfied for the purposes of that diagnosis which were discussed in detail by the experts. Only one of these relates to the recurrence of nightmares.

[217] Relying on the applicable criteria, the expert witnesses were unable to pinpoint the cause of Mrs Cronin-Lampe's PTSD, or mental injury more generally.[106]

[218] Dr Goodwin and Ms Farrell did not consider it possible to conclude that the events relating to AA were causative of mental harm, including to the point of being a "material cause" of the PTSD.

[219] While Dr Barry-Walsh said there were limited descriptions of Mrs Cronin-Lampe's symptoms evolving or developing from 1997 onwards, I did not take this as a suggestion that AA's death, or the subsequent events at AA's residence – these being two discrete occurrences – could be taken to have caused the PTSD, materially or otherwise. Indeed, Dr Barry-Walsh considered there was a lack of clarity as to when post-traumatic symptoms emerged, and that uncertainty as to cause remained.

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104 *Lothian v Accident Compensation Corp* [2023] NZACC 99 at [46(a)].
105 Accident Compensation Act 2001, s 27
106 *Cronin-Lampe (No 1)*, above n 1, at [423],[458] and [459], and in this judgment see above at [110].

[220] Based on the evidence of the experts, I find the evidence does not support a conclusion that the events which occurred during Mrs Cronin-Lampe's visits to AA's residence were a material cause of her subsequent PTSD. What the evidence in fact establishes is that a constellation of traumatic events which took place over many years ultimately led to her mental injury.

[221] In summary, I am not satisfied that the criteria of s 21B are made out as alleged. It follows that s 317 of the AC Act does not act as a bar in respect of Mrs Cronin-Lampe's claims for relief.

Damages/remedies

Introductory points

[222] Both damages and statutory remedies are sought. The quantum claimed is the same for the damages claims on the one hand, and the remedies claims on the other.

[223] In *Attorney-General v Gilbert*, the Court of Appeal confirmed that an employee may, in a case such as the present, seek remedies both at common law and under statute.[107]

[224] The following table summarises the claims as at December 2022, as given at the hearing. Interest is also sought for each head of loss. I place the claims in the order in which I will address them:

Mrs Cronin-Lampe	Mr Cronin-Lampe	Total
Non-economic loss/compensation for hurt, humiliation and anxiety		
$123,000	$110,000	$233,000
Lost remuneration		
$1,005,436	$983,711	$1,989,147
Superannuation loss		
$32,084	$13,741	$45,825

[107] *Gilbert (CA)*, above n 3, at [94].

		Total (contd)
Loss of capital gain on rental property		
		$410,000
Lost rental income from rental property		
		$78,053
Interest claimed as damages		
		$22,081
Medical expenses		
		$44,319

[225] Because Mr and Mrs Cronin-Lampe have established both their contractual claims and their claims under the Act, it is necessary to consider the availability of both damages and remedies.[108] Where one approach results in an outcome which is higher than the other, I will award the higher. There cannot of course be a double recovery.[109]

[226] The relevant contract law principles as to the award of damages are not in issue. Contractual damages are intended to put the wronged party in the position they would otherwise have been in had the relevant breach not occurred.[110] Any award of damages for loss must be sufficient linked to the breach to merit recovery in all the circumstances. Loss of the type suffered will usually be sufficiently linked to the breach if within the contemplation of the parties as a not unlikely consequence of the breach.[111] That will be a question of fact and degree.[112]

[227] General damages tend by their nature to be incapable of precise calculation, and are a matter of assessment by a court taking into account a wide range of considerations.[113]

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108 *JCE v Chief Executive of the Department of Corrections* [2020] NZEmpC 46 at [63].
109 *Ogilvy & Mather (New Zealand) Ltd v Turner*, CA355/92, 10 November 1993.
110 *Hadley v Baxendale* (1854) 9 Ex 341, 156 ER 145 (Exch); cited in *Rooney Earthmoving v McTeague* [2012] NZEmpC 63, [2012] ERNZ 273 at [19]–[21]. See too *Medic Corp Ltd v Barrett (No 2)* [1992] 3 ERNZ 977 (EmpC) at 983.
111 *Gilbert (CA)*, above n 3, at [96]; and citing *McElroy Milne v Commercial Electronics Ltd* [1993] 1 NZLR 39.
112 *Medic Corp Ltd v Barrett (No 2)*, above n 110, at 984.
113 At 984.

[228] Special damages usually consist of items that are capable of being ascertained with great, almost absolute, precision such as loss of wages or of profits or expenses incurred.[114]

[229] While a plaintiff must prove their loss, in some areas it will be neither necessary nor possible to do so with great precision, and the Court must then do its best, on the material presented, to make an assessment using its general knowledge of human and business affairs and common sense.[115]

[230] The applicable principles in respect of remedies under the Act are more well known, so it is unnecessary to describe them in detail at this stage.[116] I will refer to particular authorities later, where necessary.

[231] Expert evidence has been called from chartered accountants on each side for the purposes of assisting the Court in fixing damages/remedies. Both have significant relevant experience, including the provision of opinions for litigation purposes.

[232] Brendan Lyne was called for the plaintiffs. He is a principal and director of Lyne Davis Opinion Ltd, providing specialist independent financial opinions in the areas of business valuation, litigation and associated fields. He said that for more than 25 years the majority of his professional time has been involved in valuation, expert evidence, dispute resolution and corporate finance. He holds relevant academic and professional qualifications. He has provided detailed calculations to support the plaintiffs' claims.

[233] Grant Graham was called for the defendant. He is a partner in the chartered accounting practice of Calibre Partners (formerly KordaMentha), specialising in valuation, litigation, insolvency and financial restructuring. He too holds relevant academic and professional qualifications. His instructions required him to comment on the assessments made by Mr Lyne.

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114 At 984.
115 At 984.
116 See, for example, *Telecom New Zealand Ltd v Nutter* [2004] 1 ERNZ 315 (CA).

[234] I have been assisted by the robust exchange which has followed from the evidence of Mr Lyne and Mr Graham which I will discuss where relevant.

[235] Mr Lyne laid out his understanding of the factual circumstances, both before and after the end of Mr and Mrs Cronin-Lampe's employment at MHS. Both accountants confirmed that they only expressed opinions as to matters within their expertise. As will become evident, the position advanced for MHS is that the detailed claims advanced for Mr and Mrs Cronin-Lampe are either excessive or lacking in supporting information to the point where it is impossible to quantify loss.

[236] The claims, as confirmed in the plaintiffs' closing submissions,[117] extend across the full period from the end of each of Mr and Mrs Cronin-Lampe's employment (14 November 2012) until a notional date shortly before the hearing commenced in February 2023 (31 December 2022), which is in excess of 10 years.[118] Mr Lyne's assessment, however, of Mrs Cronin-Lampe's lost income was on a full-time basis until she attained the age of 65 (2021) and on a part-time basis to age 70 (2026). The assessment for Mr Cronin-Lampe ran until his age of retirement of 65 (2024).

The correct period for the assessment of loss

[237] Since it is submitted that most of the damages/remedies should span 2012 to late 2022, it is necessary to review what happened in those years and whether claims for that period are fair and reasonable.

[238] In one way or another, Mr and Mrs Cronin-Lampe have struggled to advance their claims for the duration, but not all of the relevant stages have taken place in this jurisdiction. As outlined in the chronology I recorded in my first judgment, the first employment relationship problem was filed in the Employment Relations Authority in January 2013. A relevant determination was issued on 12 June 2013, a challenge was filed subsequently, and this was followed by removal of a further statement of problem

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117 See table above at [224].

118 The issues relating to a rental property run from 1 April 2014 to 31 December 2022.

to the Court;[119] all of this took until 1 April 2014. Prehearing matters continued from then.[120]

[239] However, in 2016 Mr and Mrs Cronin-Lampe made applications to ACC for cover under the AC Act for work-related mental injury.

[240] On 1 August 2017, a joint memorandum of counsel was filed advising the Court that ACC claims had been lodged. The Court was also told there were parallel proceedings in the High Court, commenced on a concern there were jurisdictional limitations under the Act. Then, the parties consented to directions adjourning the proceedings in this Court "to allow the ACC process to run its course".

[241] Thus, by late 2017, Mr and Mrs Cronin-Lampe had decided to pause their proceeding in this Court – and I assume in the High Court – so that a primary focus could be brought to bear on the ACC claims. The ACC process did not prove to be straightforward,[121] but they persevered with those claims until February 2020. At that point, they discontinued their applications for review of a second decision made by ACC declining cover and resumed the prosecution of their claims in this Court. This was because they had been unsuccessful in advancing their ACC claims.

[242] It is understandable why Mr and Mrs Cronin-Lampe raised claims under the AC Act. However, this presents a problem as to the period of the claim raised in this Court. As a matter of principle, I am not persuaded that Mr and Mrs Cronin-Lampe's claim for a 10-year period up to the date of hearing this year is sustainable when, for approximately two and a half years of that period, they were seeking ACC cover and not actively advancing their claims in this Court.

[243] A related problem is that Mr and Mrs Cronin-Lampe's treatment for PTSD was, on advice, deferred until after the hearing in this Court. The longevity of their mental health conditions, with the flow-on impact on the assessment of damages, was in part

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119 *Cronin-Lampe v Board of Trustees of Melville High School* [2013] NZERA 249 (Member Crichton) [*Authority determination*]; and *Cronin-Lampe v Board of Trustees of Melville High School* [2014] NZERA 146 (Member Crichton).

120 *Cronin-Lampe v The Board of Trustees of Melville High School*, above n 9.

121 The details are described in *Cronin-Lampe v The Board of Trustees of Melville High School* [2021] NZEmpC 201 at [10]–[21].

due to the hearing being deferred whilst the ACC steps were undertaken. This factor must also be considered when assessing the current dates for recovery of losses.

[244] In these circumstances, I think it is appropriate for the upper ceiling for all claims to be a notional date of judgment, had the ACC claims not been advanced. I proceed on the basis that absent those claims, MHS would not have sought a preliminary determination as to the effect of s 133 of the AC Act since there would no longer be a basis for such a claim; nor would it have appealed this Court's finding on that issue. I find it is probable that, with reasonable diligence, the substantive hearing in this Court would have occurred and a judgment would have been issued by 31 March 2019. In this judgment, that date is the notional judgment date, and it sets the upper limit for all claims, with the exception of interest.

[245] This conclusion is justified by cautionary considerations that apply to both the common law and statutory claims.

[246] In *Brickell v Attorney-General*, McGechan J, when considering damages in a case involving workplace-induced PTSD, said the test is essentially one of fairness and community expectations.[122] In the words of Lord Devlin in *H West & Son Ltd v Shephard,* what was required is a "fair" but "yet not full" compensation.[123]

[247] In numerous authorities, appellate courts have stated that a loss must be sufficiently linked to the breach of the particular duty to merit recovery.[124] In undertaking this exercise, Cooke P emphasised:[125]

> A *common sense solution* must of course be sought in light of criteria – such as reasonable, foreseeable, natural and probable – found judicially to be useful from time to time.

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122 *Brickell v Attorney-General*, above n 19, at [144]. This dicta was noted as relevant in this Court when considering a common law contractual claim in *Davis v Portage Licensing Trust* [2006] ERNZ 268 (EmpC).

123 *H West & Son Ltd v Shephard* [1964] AC 326, [1963] 2 All ER 625 (HL); as cited with some caution in *Brickell v Attorney-General*, above n 19, at [144]: "this essentially is the flexible and general approach to be adopted to quantifying the unquantifiable".

124 See, for example, *McElroy Milne v Commercial Electronics Ltd*, above n 111, at 41; and the authorities cited in *Gilbert (CA)*, above n 3, at [96].

125 *Fleming v Securities Commission* [1995] 2 NZLR 514 (CA) at 524 (emphasis added).

[248] The Court of Appeal in *Telecom New Zealand Ltd v Nutter* also made observations as to moderation when determining compensation under the Act for financial loss[126] and non-economic loss.[127] These principles were reaffirmed subsequently in *Sam's Fukuyama Food Services Ltd v Zhang.*[128]

[249] All these issues fall for consideration when fixing damages and assessing compensation in this case.

[250] Later, I will be allowing for interest on the claims for economic loss where appropriate. It is convenient to set out the principles I will apply, since these are not straightforward.

[251] The Court's jurisdiction to award interest is provided for in cl 14 of sch 3 of the Act. That provision refers to the use of the provisions of the Interest on Money Claims Act 2016 (IMCA), which took effect on 1 January 2018. The interest calculator which is mandated under that Act uses the average of six observations for the retail six-month term deposit rate most recently published by the Reserve Bank of New Zealand, supplemented by a set percentage rate of 0.15 per cent.[129]

[252] Prior to 1 January 2018, cl 14 stated that interest could be awarded by the Court under s 87(3) of the Judicature Act 1908 (the JA Act).

[253] The transitional provisions of the IMCA preserve the provisions of the JA Act for outstanding civil proceedings brought in senior courts, as commenced before 1 January 2018.[130] There is no such transitional provision in the Act, which deals with proceedings before this Court.

[254] However, given the language which was used in cl 14 of sch 3 up to 1 January 2018, it is reasonable to conclude that in respect of any proceeding filed in this Court prior to that date, cl 14 applies in its pre-amended form. This means that s 87 of the JA Act is the applicable interest provision.

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126 *Telecom New Zealand Ltd v Nutter*, above n 116, at [79].
127 At [85].
128 *Sam's Fukuyama Food Services Ltd v Zhang* [2011] NZCA 608, [2011] ERNZ 482 at [24]–[26].
129 Interest on Money Claims Act 2016, s 12.
130 Schedule 1, cl 1.

[255] Section 87 of the JA Act provides for the ordering of interest up to the prescribed rate. From 1 July 2011, the prescribed rate was five per cent.[131]

[256] However, in this case, calculating interest at a rate of five per cent per annum exceeds the applicable calculations under the calculator mandated by the IMCA. Since the Court has a discretion when fixing interest under both iterations of cl 14, I consider it is appropriate to utilise the discretion by adopting the more accurate assessment provided by the calculator, so long as the outcome is otherwise less than five per cent per annum.[132]

[257] It is well established under the JA Act regime that pre-judgment interest may be awarded at the Court's discretion. The discretion is to be exercised as the justice of the case requires. There is no fixed rule as to the dates between which interest should run.[133]

[258] In light of my discussion as to the appropriate date for assessing loss, I will be doing so as at 31 March 2019. Because, however, the defendant has had not been required to pay the sums involved at the time of those assessments, and the plaintiffs have not had the use of those monies in the meantime, it is appropriate to award interest from then until 20 December 2023, a date which is soon after the date of this judgment. If payment is not made by that date, I will order interest to be paid thereafter until the date of payment, as is the usual practice.

[259] The relevant calculations are set out in Schedule 1 for Mrs Cronin-Lampe and Schedule 2 for Mr Cronin-Lampe.

Overview of Mr and Mrs Cronin-Lampe's circumstances from 2012

[260] Before turning to the individual claims, it is necessary to summarise the extensive evidence which was led as to Mr and Mrs Cronin-Lampe's circumstances

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131 Judicature (Prescribed Rate of Interest) Order 2011.

132 See *Apollo Bathroom & Kitchen Ltd (in Liq) v Ling* [2019] NZHC 237; *Blumberg v Frucor Beverages Ltd* [2018] NZHC 1876; and that approach was approved by the Court of Appeal in *Frucor Beverages Ltd v Blumburg* [2019] NZCA 547 at [150].

133 *Attorney-General v N* [2022] 1 NZLR 651, [2001] ERNZ 629 (CA) at [25]–[26].

from 2012 to 2023, since this provides the context for the assessment of damages/remedies.

[261] In January 2012, Mr Hamill granted Mr and Mrs Cronin-Lampe four weeks' special paid leave from 27 January 2012, and confirmed that each would have four individual sessions with psychologist Ms Arcus in that period.

[262] In her report of 1 August 2012, Mrs Farrell described the situation at that time. She said Mrs Cronin-Lampe was without employment or income, and Mr Cronin-Lampe was without full-time employment but was providing minimal income due to irregular and casual work.

[263] As discussed previously, Mrs Farrell went on to make a diagnosis of PTSD as at the date of her report.

[264] Dr Goodwin saw Mr and Mrs Cronin-Lampe much later – in the period late December 2021 to September 2022, with his report being issued on 8 December 2022 in which he said Mr and Mrs Cronin-Lampe met PTSD criteria at that time. The Court thus has the advantage of his opinion about the ongoing impacts from the date of Mrs Farrell's report in 2012 to the date of his report of 2022.

[265] Dr Goodwin also recorded that since 2012, Mr and Mrs Cronin-Lampe had survived on one salary, with significant psychological distress and minimal psychiatric/psychological interventions.

[266] He noted that Mrs Cronin-Lampe found it difficult to leave her home, and tended to be avoidant of interactions with others or situations that may have reminded her of the previous traumas she had experienced when employed at MHS.

[267] This finding is supported by Mrs Cronin-Lampe's own evidence. She referred to recurring memories, the avoidance of subjects such as any form of subjugation or cruelty, the struggles of supporting her daughter who married in 2013 when she and Mr Cronin-Lampe were impecunious, the avoidance of friends or cancellation of arrangements to meet them, and an overall lack of stamina and resilience.

[268] With regard to Mr Cronin-Lampe, Dr Goodwin observed that he tended to be more withdrawn, although with intense emotional outbursts. He was described as displaying more avoidance of potentially triggering situations than his wife. That said, he experienced considerable impairment of social and occupational functioning.

[269] These conclusions are supported by Mr Cronin-Lampe's direct evidence. He said that PTSD had impacted his mood, making him reactive, intolerant and angry. When he stopped moving, his body and mind were so exhausted that any sleep was not restful. It was peppered with nightmares, or being woken by recurrent recollections of the trauma at MHS, with the stress of ongoing litigation and its demands all impacting on him emotionally and physically. He was able to work, but not to the extent which had previously been the case. Mr Cronin-Lampe said he lived with chronic fatigue, which prevented him from socialising beyond family, as he had no energy to do so.

[270] In summary, the evidence and expert opinion clearly establishes ongoing PTSD impacts until the hearing, and an acknowledgement that Mr and Mrs Cronin-Lampe had not been treated for these issues up to that point, on advice. It is necessary to review particular aspects of this issue when considering the individual claims for damages and remedies.

Compensatory damages/compensation for humiliation, loss of dignity and injury to feelings

[271] In this section I will deal, first, with the non-economic loss remedy which is available for breaches of the common law claims; and secondly, with the humiliation, loss of dignity and injury to feelings for the established personal grievances under the Act.[134]

[272] For the purposes of the non-economic claims, counsel referred to a number of cases involving awards for such a loss, both in the High Court and in this Court, being cases which were decided more than 20 years ago. There have been relatively few

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134 Employment Relations Act 2000, s 123(1)(c)(i).

cases involving workplace stress claims at common law since then. The awards in these cases range up to $75,000. I turn to consider those which are of most assistance.

[273] In *Gilbert v Attorney-General*, the employee had been a probation officer exposed to avoidable workplace stress over many years, arising from work overload, management failure and office and resource deficiencies.[135] This caused a severe impact on his health. Judge Colgan held that the past, present and ongoing consequences for the employee were amongst the most severe and enduring seen by the Court, and resulted in an award of $75,000.[136]

[274] In *Brickell v Attorney-General*, McGechan J ordered damages of $75,000 to a police video producer who developed a stress disorder after prolonged exposure to horrific material. In the course of his duties, he filmed scenes of violent crime and, later, edited those images for use by the Police in their investigations. The Judge adopted a staged approach. For a more intense period of suffering and loss of amenity over a period of two years, a fair and just figure was considered to be $50,000. Because there was an improvement in his condition thereafter, $20,000 was allowed for the three subsequent years. The Judge also added $5,000 against a contingency of a possible return of more acute suffering in old age.[137]

[275] In *Benge v Attorney-General*, a claim in contract, although tort and equitable claims were also pleaded, the Court was required to consider claims by two former police officers in relation to their disengagement from the Police after many years of service. They claimed long-term damages for mental stress and loss of amenity amongst other claims. Due to staff shortages, they were required to work long and continuous hours, and were regularly called out at night. Durie J reviewed the head of non-economic losses in detail, referring particularly to the awards made in *Gilbert v Attorney-General* and *Brickell v Attorney-General*. He relied principally on *Brickell v Attorney-General* and, with principles of consistency in mind, awarded $70,000 to one of the employee claimants, and $10,000 to the other. [138]

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135 *Gilbert (CA)*, above n 3, at [51].
136 *Gilbert (EmpC)*, above n 15, at 394. This aspect of damages was not challenged on appeal.
137 *Brickell v Attorney-General*, above n 19, at [147].
138 *Benge v Attorney-General*, above n 19, at [94].

[276] Finally, I mention the case of *Whelan v Attorney-General*, where an award of $60,000 was made to a former employee who had suffered significant stress and clinical depression arising from her employer's breach of contract.[139] She developed panic attacks, became depressed, lost her sense of humour and suffered personality changes which led to social and emotional withdrawal. She had aged visibly and had difficulty sleeping. Judge Travis said that had she not developed coping techniques to enable her to remain in gainful employment, the $60,000 award which was made, would have been higher.[140]

[277] I have considered carefully all authorities to which I have been referred, as well as others. The cases reflect varying levels of seriousness, which is obviously a central consideration. I am assisted by the classifications adopted in the United Kingdom, which of course utilises a comprehensive personal injury regime based on common law principles. There, the Judicial College publishes Guidelines for the Assessment of Damages in Personal Injury Cases from time to time; the publication is now in its 16th edition.[141] When assessing the extent of psychiatric and psychological damage, the guidelines adopt the classification of severe, moderately severe, moderate and less severe. Factors to be taken into account in classifying such claims are the injured person's ability to cope with life, education and work; the effect on the injured person's relationship with family and friends; the extent to which treatment would be successful; future vulnerability; prognosis; and whether medical help has been sought. Although developed in a different jurisdiction, these considerations are nonetheless useful for present purposes.

[278] I recognise the importance of consistency, although upgrading of the awards I mentioned earlier is necessary because of the change in value of money over time. I will return shortly to the question of which, if any, cases might be comparators in this case.

[279] I agree that an individual assessment is required, and that the result may need to be different for Mrs Cronin-Lampe who suffered more serious impacts, on the one

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139 *Whelan v Attorney-General* [2006] ERNZ 1126 (EmpC) at [67]–[72].
140 At [71]–[72].
141 Guidelines of the Assessment of Damages in Personal Injury Cases (16th ed, Oxford University Press, 2022).

hand, and Mr Cronin-Lampe who in some respects was more resilient although nonetheless significantly affected by PTSD, on the other.

[280] An assessment extends from the period of the breaches, that is from late 2010 onwards. That assessment involves both the effect of PTSD whilst Mr and Mrs Cronin-Lampe were still at work, as well as the period following their employment when there was an understandable focus on their claims, but which was plainly a difficult process; and will include some regard for ongoing consequences.

[281] An aspect of non-economic loss relates to the impact of PTSD on Mr and Mrs Cronin-Lampe's ability to work. Both were highly motivated school counsellors who, despite the difficulties, found their employment fulfilling. From late 2011, they had been unable to continue in these roles and indeed were advised not to. Mrs Cronin-Lampe has been unable to work and, as noted, Mr Cronin-Lampe has done so but on a somewhat limited basis.

[282] A compounding factor is that Mr and Mrs Cronin-Lampe are husband and wife. Each has had to witness the reactions of the other to trauma, as well as providing support.

[283] I turn to the issue of treatment. At the time Mr and Mrs Cronin-Lampe saw Ms Farrell in 2012, it was her view that effective treatment would take some 18 months. However, they had also been advised by Ms Arcus in late 2011 that it would not be desirable for such a treatment to be undertaken whilst the litigation was proceeding. Dr Barry-Walsh said he would not necessarily have given such advice himself, but he understood the rationale. This is an area of clinical judgement which Mr and Mrs Cronin-Lampe relied on. They are not to be criticised for having accepted the advice in their circumstances. The result is that the PTSD has remained untreated, and has significantly affected their professional and personal lives, as I have outlined. The evidence establishes treatment is likely to be successful, although it will span a lengthy period of time.

[284] I turn to decisions that provide some guidance. *Gilbert* is an important case as it considered significant stress issues in the workplace, and the award for non-

economic loss was not challenged on appeal. *Brickell* is another workplace stress case where a careful and useful analytical approach was adopted. There were significant problems associated with the diagnosis of the employee involved, but the prognosis allowed for some optimism following treatment. These are both cases involving moderately severe harm and, in my view, are appropriate comparators. In both instances, $75,000 was awarded for non-economic loss.

[285] Mr Lyne produced a table in which he updated awards derived from a number of cases in the Authority and in the Courts for damages and for awards for hurt, humiliation, loss of dignity and injury to feelings. The award in *Gilbert*, $75,000, was updated by reference to the CPI Index as published by the Reserve Bank to produce a figure of $129,476. I accept the accuracy of this methodology.

[286] I have concluded that the correct award for economic loss for Mrs Cronin-Lampe is, in light of the foregoing considerations, $130,000 for past, present and ongoing mental harm.

[287] In his claim, Mr Cronin-Lampe accepted that he had been better able to withstand the nonetheless significant consequences of PTSD and other effects of the contractual breaches than had Mrs Cronin-Lampe. I consider 75 per cent of the amount awarded in relation to her circumstances is appropriate, being $97,500 for past, present and ongoing mental harm to Mr Cronin-Lampe.

[288] I next consider the question as to whether a different award would be justified under s 123(1)(c)(i) of the Act.

[289] In *Brickell v Attorney-General*, when considering quantum for pain, suffering and loss of amenities, McGechan J said he did not gain much assistance from approaches adopted in relation to awards made by the Employment Court in cases of unjustifiable dismissal because a "deliberately conservative pattern has been set by the Court of Appeal (not without dissent). That underlying caution is to be kept in mind, but it is a special field."[142] The clear inference was that a common law award under this head would more likely exceed a statutory award.

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142 *Brickell v Attorney-General*, above n 19, at [143].

[290] This issue fell for more specific consideration in *Davis v Portage Licensing Trust* where the Court dealt with an argument that the Court of Appeal's emphasis on the need for restraint in *NCR (NZ) Corp Ltd v Blowes* would also apply to actions for breach of contract.[143] Judge Travis said that general damages for non-economic loss in contract or tort claims would not necessarily correspond precisely to the more limited claims for compensation for humiliation, loss of dignity and injury to feelings under the Act, or its predecessors.[144]

[291] In fact, the findings I have made in the present case with regard to the common law claims on the one hand, and the disadvantage grievance claims on the other, differ. I found that there were mirror breaches on both the contractual claim and the grievance claims, but with regard to the grievance claims I found four additional employment-related issues were established. Thus, the findings with regard to the grievances are broader than those relating to the common law claims. This distinction is to be acknowledged when making the necessary assessment.

[292] Turning to quantum for personal grievances, I am satisfied that Mr and Mrs Cronin-Lampe each experienced harm under all of the elements described in s 123(1)(c)(i).[145] The harm was, as I have indicated, significant for both, although more so for Mrs Cronin-Lampe.

[293] As is well known, the Court utilises a banding approach to fix awards of this kind.[146] Recently, Chief Judge Inglis in *GF v Comptroller of the New Zealand Customs Service* suggested that the *Archibald*[147] bands should be updated – with reference to the Reserve Bank's calculator.[148] She said this would lead to the following: band 1 $0-$12,000; band 2 $12,000-$50,000; band 3 over $50,000. I respectfully adopt this approach.

[294] I am satisfied that each of the claims made by Mr and Mrs Cronin-Lampe fall into band 3 – high level loss/damage injury, and do so by a substantial margin.

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143 *NCR (NZ) Corp Ltd v Blowes* [2005] ERNZ 932 (CA).
144 *Davis v Portage Licensing Trust*, above n 122, at [169].
145 See above at [260]–[270].
146 See *Richora Group Ltd v Cheng* [2018] NZEmpC 113, [2018] ERNZ 337 at [67].
147 *Waikato District Health Board v Archibald* [2017] NZEmpC 132, [2017] ERNZ 791.
148 *GF v Comptroller of the New Zealand Customs Service* [2023] NZEmpC 101 at [162].

[295] In the event, I conclude that for the purposes of their established personal grievances, Mrs Cronin-Lampe's level of compensation is $85,000, and 75 per cent of that award is appropriate for Mr Cronin-Lampe, being $63,750.

[296] Because Mr and Mrs Cronin-Lampe are entitled to the higher of the two approaches, judgment should be entered on the basis of the contractual causes of action.

[297] These assessments are subject to considerations as to contributory fault. Interest on the non-economic award should not be awarded since it covers past, present and future consequences, and is being fixed as at the date of this judgment.[149]

Economic losses

Lost remuneration

[298] I begin this topic by considering the potential length for which damages for lost remuneration may be awarded at common law. A helpful review of cases for economic losses and lost future earnings based on PTSD or similar injury was undertaken in 2006 by Judge Travis.[150] He considered claims for past and future losses which ran beyond the date of hearing through to the date when the various employees could reasonably have expected to have maintained their employment with the defendant employer. Reference was made to *Benge*,[151] *Brickell*[152] and *Gilbert.*[153]

[299] However, I have concluded, for the purposes of this particular case, that the maximum period for which such an assessment can be undertaken is until 31 March

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149 See *Whelan v Attorney-General*, above n 139, at [73]–[76].

150 *Davis v Portage Licensing Trust*, above n 122, at [287].

151 In *Benge v Attorney-General*, above n 19, on a breach of contract claim, an award of lost earnings to retiring age was granted to one employee of $337,350, and to another, of $52,250.

152 In *Brickell v Attorney-General*, above n 19, there was a claim for future earnings based on an actuarial approach up to the date of ordinary retirement, $275,000 was awarded with actual earnings being removed from that figure as well as a reduction for contributory conduct.

153 In *Gilbert v Attorney-General,* an award of approximately $380,000 in lost earnings was made in 2003, along with reimbursement for future earnings for an additional eight years, plus interest to be calculated by the parties: *Gilbert v Attorney-General* EMC Auckland AC63/03, 4 December 2003. A recall judgment was issued in *Gilbert v Attorney-General* [2006] ERNZ 1 (EmpC), with a second remedies judgment issued on 28 April 2009: *Gilbert v Attorney-General* (2009) 6 NZELR 441 (EmpC); all of which were reviewed by the Court of Appeal in 2010: *Gilbert v Attorney-General* [2010] NZCA 421, (2010) 8 NZELR 72 [*Gilbert (CA) 2010*]. The conceptual approach for lost earnings was not varied in the post-2003 decisions.

2019. This is, first, in light of the ACC issue I outlined earlier; and, secondly, because any longer period would give rise to significant problems of foreseeability and causation, on which I will elaborate shortly. The real issue at this stage is quantum.

[300] I start with Mrs Cronin-Lampe's claim. First, Mr Lyne assessed what she would have earned across the period he considered (that is, until 2026 when she will turn 70). This was described as a "but for" scenario. Then, he estimated what she would have earned if she had worked full-time at MHS between November 2012 and March 2021 when she turns 65, and then part-time until March 2026. This was an "actual and/or assumed" scenario, and was deducted from the figures produced in the "but for" scenario.

[301] A base salary rate of G5, the maximum step under the SCTA, was used. It is common ground that this figure for the hypothetical "but for" calculation is correct. When working at MHS, Mrs Cronin-Lampe received two management units and one middle management allowance as a full-time lead counsellor. It is common ground that these items were correctly valued in the years of Mr Lyne's table, until 2021.

[302] Mr Graham, however, raised a number of issues with other assumptions on the counterfactual scenario from 2016. Mr Lyne provided responses to these in his reply brief.

[303] The first issue raised by Mr Graham related to the fact that in the "but for" counterfactual scenario, it had been assumed Mrs Cronin-Lampe would have worked full-time in her prior role at MHS, or equivalent, until March 2021. Mr Graham said there had been no consideration of the possibility that she may have stepped back from that role, regardless of any alleged breaches by the School. He said that, for example, she may have wanted to work for Pilgrim Practices Ltd (Pilgrim) which Mr Cronin-Lampe had established as the vehicle for private work activities from 2016. Mr Graham said such a step would have impacted on Mrs Cronin-Lampe's ability to work at MHS; and is relevant because Mr Lyne's assessment as to her husband's counterfactual scenario was based on her working at least part time for Pilgrim.

[304] Mr Lyne acknowledged this was a matter for the Court, but noted it was also Mrs Cronin-Lampe's evidence that she loved the work of a school counsellor, felt that she was making a meaningful contribution, and that she would have worked until her retirement.

[305] Mrs Cronin-Lampe's direct evidence was to the effect that she had no intention of stepping back from her role. In an email she sent to Mr Hamill in early 2011, and in a document she prepared in mid-2011, she referred to the fact that she might job-share the role with her husband in the future, particularly after their investment property was sold. In reply evidence she said that there was no basis to support Mr Graham's contention that she would step back in order to undertake more private work; she says that she would have been able to undertake private work while still employed on a full-time basis. The investment property was in fact sold, as I will outline shortly, in 2014, but that was due to unforeseen circumstances; its sale then does not assist in assessing whether Mrs Cronin-Lampe may have stepped back, absent the MHS breaches. In short, there is no evidence she would likely have reduced her MHS role prior to the date with which I am concerned – March 2019.

[306] I also note that Mr Lyne's calculations of Mr Cronin-Lampe's "but for" loss proceeded on the basis that he would have been employed by the school on a 90 per cent base salary to the year end March 2013, and on a 50 per cent base salary to the year end March 2014, with no employment at the school thereafter. Mr Lyne thereby assumed there would have been a short period when both were employed at the school, but the sole employee from March 2014 onwards would have been Mrs Cronin-Lampe.

[307] Accordingly, I am satisfied that Mr Lyne's assumption as to Mrs Cronin-Lampe's likely income from MHS in the period from 13 November 2012 to 31 March 2019 is reasonable.

[308] Mr Graham then raised several points as to what Mrs Cronin-Lampe may have done once she attained the age of 65, that is from 2021 onwards. These included consequences to her salary and management unit entitlements associated with reducing her role to part-time work, the impact of MHS ceasing to exist from

2024 and uncertainty as to Mrs Cronin-Lampe's ability to find alternative work on similar terms, and superannuation issues. I place those issues to one side as they are not relevant to my assessment, although I note they illustrate the foreseeability and causation problems which would have arisen had I considered a longer date range for the claim.

[309] Mr Graham suggested that consideration had not been given to the possibility of Mrs Cronin-Lampe being able, in fact, to obtain work after November 2012 but choosing not to, or to earn less than she otherwise could have. He said either of these factors would reduce the loss assessment. Mr Lyne said he relied on the evidence that Mrs Cronin-Lampe was in no fit state to return to work. I accept this reality, since it is confirmed by the expert evidence of Mrs Farrell and Dr Goodwin.

[310] The next point relates to the adequacy of the information which was available to Mr Lyne when carrying out his assessment of lost remuneration. Mr Graham considered that there was a lack of financial and other information available to him. He said that on numerous occasions, Mr Lyne had reconstructed details or proceeded on hypothetical scenarios rather than actual data. He said that whilst he appreciated any counterfactual assessment must make certain assumptions, in many respects he did not consider these had a sufficient evidential foundation.

[311] In support of this view, he produced a spreadsheet which summarised source material, whether from Inland Revenue (IR) records or, in the case of Pilgrim, financial reports. IR documentation was not available for 2014 (Mr and Mrs Cronin-Lampe), 2016 (Mrs Cronin-Lampe), and prior to 2020 (Pilgrim and its predecessors). His point was that those problems meant it was not possible to carry out an accurate lost income assessment. He had reservations about relying upon letters prepared by Mr and Mrs Cronin-Lampe's accountant summarising their historical earnings, since Mr Graham says that he himself has not been provided with the "source information" that formed the basis of those summaries.

[312] In his reply brief, Mr Lyne explained that for many years, he had provided expert evidence on financial issues, including loss of profits, economic loss and loss of opportunity assessments. He said that typically this type of loss involved a comparison against a counterfactual which, by definition, could not be substantiated with the degree of certainty that Mr Graham appeared to seek. By way of example, he said that even where businesses are able to demonstrate long-established trading histories, comprehensive accounting systems/record-keeping and reference data, the establishment of a counterfactual is often difficult with opposing experts' views differing quite markedly. He considered the approach he had adopted in this instance was appropriate.

[313] Mr Lyne went on to say that the spreadsheet produced by Mr Graham did not refer to a key report he had relied on, being income information summarised by a chartered accountant, Steven Mundy of Auctus Advisory Ltd who, for some of the period, had acted for Mr and Mrs Cronin-Lampe.

[314] Mr Mundy stated in his letter that the information for 2011 to 2015 was derived from either IR or from Mr and Mrs Cronin-Lampe, not from records held by his office. He also said the information for 2016 to 2019 was derived from copies of the tax returns filed with IR.

[315] Mr Lyne stated, in summary, that he had access to the IR information that was before the Court, as well as Mr Mundy's report. The former provided a measure of comfort in relation to the years for which IR information was available. He also said he relied on the fact that chartered accountants, who acted for the couple, had prepared their report on the basis of information they had available. Accordingly, he considered the date he relied on was the best information that could be obtained.

[316] The evidence establishes that, with regard to Mrs Cronin-Lampe's remuneration loss assessment, backup IR material was available for consideration by Mr Lyne as a check against the content of Mr Mundy's report, for all years except for 2014 and 2016. In those years, she was recorded as not having received work-related income. In 2015, she earned only $831.

[317] With regard to Mrs Cronin-Lampe's shareholder's salary from Pilgrim, a shareholder's income figure of $20,000 was used for her actual income assessment for the years 2017 to 2022. This was as stated by Mr Mundy and is consistent with the shareholder salaries paid in the years for which financial reports and associated IR returns are available, being 2020 and 2021 signed returns, and 2022 in draft form.

[318] Apart from a government subsidy received in 2021 and 2022, in these years, no independent income was earned by Mrs Cronin-Lampe. In short, from 2014 to 2022, the only income credited was the shareholder's salary and government subsidy. That is plainly because of Mrs Cronin-Lampe's moderately serious PTSD condition. The absence of IR data for 2014 and 2016 does not weaken Mr Lyne's assumption as to the absence of income in those years.

[319] I return to the principles which apply in a situation such as the present where there may be an issue as to sufficiency of evidence. As it was put by the Court of Appeal in *Gilbert*, once a plaintiff had proved, on the balance of probabilities, they had lost something of value, any difficulty in assessing damages would not deprive them of a remedy. The Court would have to do the best it could on the evidence to assess the amount of the loss.[154]

[320] That principle applies here. Considerable care has been taken by Mr Lyne to produce an accurate assessment for the Court. It is his professional judgement that the material with which he has been provided is reliable. Standing back, the amounts relied on and the manner in which they have been calculated, particularly as to assumed salary for the years in question, are, in my view, credible. I consider Mr Lyne's approach is safe in light of the authorities on this point.

[321] Next, I refer to a request made by Mr Graham of Mr Lyne for copies of his spreadsheets, which underpinned each of the tables contained in his brief. When asked for these, Mr Lyne had advised Mr Graham that he was unwilling to provide them as they were, in essence, draft documents. In cross-examination, Mr Lyne explained that these documents were his personal work papers and not the source data itself on which he had relied. He said that to provide this information would have involved

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154 *Gilbert (CA)*, above n 3, at [95].

considerable reformatting; it was not a simple matter of handing over work documents which would show how the tables had been produced. He said he and his analyst would have had to undertake a substantial amount of work so as to provide his workings in a presentable form. He considered this was an unreasonable request due to cost. There was also an issue as to whether those papers contained privileged information. He said he would never ask another expert to provide this type of information.

[322] I accept this explanation. My Lyne's methodology, as demonstrated in the detailed tables set out in his briefs of evidence, are transparent and readily able to be followed. Mr Graham's concerns centred on the reliability of Mr Lyne's source information. This issue was able to be explored fully in evidence. It was not necessary to refer to work papers so as to test his assumptions.

[323] Mr Graham was not instructed to advance an alternative calculation, so the Court is left with the assessments undertaken by Mr Lyne. In the absence of any contrary or alternative approach to the assessment of remuneration loss for Mrs Cronin-Lampe, I accept that Mr Lyne's approach proceeded on the basis of reasonable assumptions, and should be accepted by the Court.

[324] However, a final issue, not discussed by either expert, concerns tax. Mr Lyne dealt with this issue in a way which was designed to recognise that because a number of years of income would, if awarded, be paid simultaneously, the likely rate would be 35 per cent.[155] This rate would be greater than that which would have applied were the income to have been received and taxed in the individual years to which the income applied. Accordingly, Mr Lyne removed the tax in each of the individual years which he considered, to produce a net figure in each instance, then, after calculating interest, grossed the total assessment by 35 per cent, so as to address the perceived inequity.

[325] This issue has been addressed on several occasions by the Court of Appeal, and most recently in 2010 in *Gilbert v Attorney-General*.[156] There, the Court was invited

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[155] Mr Graham stated that the 35 per cent rate is applied to an individual who earned about $500,000 in a year, or a couple who earned $1,000,000 split equally.

[156] *Gilbert (CA) 2010*, above n 153.

to reconsider longstanding previous authority to the effect that no allowance should be made for the tax consequences of an award for lost income.[157] The Court of Appeal concluded that any change to the well-established approach would need to be properly explored,[158] and that this was not possible in *Gilbert* itself. Thus, the established dicta remains binding.

[326] Accordingly, I must proceed on the basis of the gross sums assessed for each individual year of lost income, both in the counterfactual and actual scenarios.

[327] In summary, I accept Mr Lyne's assessment as to Mrs Cronin-Lampe's income loss on a gross basis for the period November 2012 to 31 March 2019. She is entitled to interest thereon. The calculations are shown in Schedule 1, in which it will be apparent those figures are subject to contribution.

[328] I turn now to the assessment of lost remuneration in respect of Mr Cronin-Lampe, considering the concerns raised by Mr Graham. Mr Lyne adopted the same methodology as used for Mrs Cronin-Lampe's claim.

[329] Mr Lyne was cross-examined concerning the assumptions he adopted when estimating remuneration derived from self-employed activities, including from Pilgrim, from 2014 onwards, for the purposes of his "but for" scenario. A key point related to the percentage adopted for operating expenses of this entity, which he fixed at 12 per cent of revenue. He accepted in cross-examination that, based on the 2020 financial records for the company, the operating expenses would be lower. But he also said that if a lower percentage were to be adopted for the earlier years, profits would have been higher, and the claim would have increased accordingly. His central point was, however, that as an expert, he was undertaking a judgement based on his view as to what a reasonable approximation of what Mr Cronin-Lampe's earnings would have been across the period.

[330] Next, I consider the manner in which self-employed income had been treated for the purposes of Mr Lyne's "actual and/or assessed" scenario. In

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157 *North Island Wholesale Groceries Ltd v Hewin* [1982] 2 NZLR 176 (CA); and *Horsburgh v New Zealand Meat Processing Industrial Union of Workers* [1988] 1 NZLR 698 (CA).

158 *Gilbert (CA) 2010,* above n 153, at [91].

reliance on the information received from Mr Mundy, Mr Cronin-Lampe's income from any source other than the MoE was described as "self-employment" income. From 2017, the figures he presented were described as "shareholder salary". Mr Graham was critical of this approach. The inference was that Mr Cronin-Lampe's income prior to 2017 should have been via the Pilgrim entity or one of its predecessors which had ceased trading. However, the central point is that the figures relied on as to Mr Cronin-Lampe's income were as recorded by Mr Mundy and can accordingly be relied on, as discussed previously.

[331] The next point raised by Mr Graham is that it was unreasonable to have proceeded on the basis that Mr Cronin-Lampe would have earned a significantly higher income from Pilgrim than he actually earned, particularly in the latter years of the period of review. Mr Lyne said he had relied on Mr Cronin-Lampe's information.

[332] In his evidence, Mr Cronin-Lampe said that the work he was undertaking at the time of the hearing before the Court was "severely limited and restricted". He said if he had not been impaired, he would have continued to develop his private practice, working with young people and educational institutions locally and globally, which would have allowed him to access significantly larger income streams.

[333] On the basis of the expert evidence received by the Court, particularly from Dr Goodwin who assessed Mr Cronin-Lampe not long before the hearing commenced, I have accepted that Mr Cronin-Lampe remained affected by a moderately serious PTSD condition. As discussed earlier, that problem affected him across the period under review and, in particular, from 2011 to 2019. I accept that the impairment affected his ability to earn. Accordingly, Mr Lyne's reliance on Mr Cronin-Lampe's evidence is reasonable.

[334] Mr Lyne was also questioned as to whether his assessment of estimated remuneration via Pilgrim from 2014 onwards was inaccurate because there were no financial statements for the company prior to 2020. I understood Mr White to suggest there may have been a hoarding of profit (to adopt a phrase used by Mr

Lyne), whether deliberately or otherwise, which would mean the information used was unreliable.

[335] Mr Lyne explained that the "but for" scenario which he examined was necessarily an approximation of the company's financial position over time. Whilst equity of some $30,000 may have been retained and not paid out by way of shareholder's salary in 2021, contrary to the position in the previous year when there was no such retention, the assumptions adopted for estimated revenue of the company, less operating expenses and Mrs Cronin-Lampe's shareholder's salary, were not shown to involve unreasonable assumptions.

[336] In the absence of any contrary analysis from Mr Graham which might have suggested otherwise, I accept this opinion. I am not persuaded that the retention of equity in 2021 leads to a conclusion that the assumptions made for previous years are unreliable.

[337] I interpolate reference to an issue raised by Mr Graham that two letters were provided by Mr Mundy as to income received, which contained different figures for Mr Cronin-Lampe's income in 2014. In the first letter, Mr Mundy showed Mr Cronin-Lampe as having earned $732, the source being "Gardiner", but the letter states there was a problem with the provision of IR reports for income earned because that entity was unable to transfer details from its old platform to a new platform which it had introduced. The second letter referred to income from that year as being $44,177 for "self-employment". Other evidence shows that Mr Cronin-Lampe worked as a reliever at Ōtorohanga College from June until September 2014, so it is likely he earned considerably more than the sum shown in the first letter, and more likely that he earned the precise sum referred to by Mr Mundy in the second letter. I accordingly accept it as accurate.

[338] In the result, I accept Mr Lyne's assessment as to Mr Cronin-Lampe's income loss on a gross basis for the period November 2012 to 31 March 2019. He is entitled to interest thereon. The calculations are shown in Schedule 2, from which it will be apparent those figures are subject to contribution.

[339] For completeness, I consider the alternative approach to lost remuneration on the basis of the established personal grievances.

[340] Having regard to the foregoing analysis, the quantum assessments of Mr Lyne may be relied on. The real issue is the period for which lost income would be awarded under s 128 of the Act, since the other elements of the section are plainly made out.

[341] I referred earlier to the principle of moderation as discussed by the Court of Appeal in *Telecom New Zealand Ltd v Nutter*.[159] That Court commented that it is perfectly clear compensation which exceeds the equivalent of 12 months' remuneration can be awarded, but those fixing compensation in this area must have regard to the actual loss suffered by the employee.[160]

[342] The Court also referred, with apparent approval, to a remark made by Judge Travis in *Betta Foods (NZ) Ltd v Briggs* to the effect that an award of more than 18 months' remuneration would be at the "higher end of the exercise of the discretion".[161]

[343] The starting point is, of course, the default three-month period for such an award, with the remaining issue being whether a greater sum should be awarded.[162]

[344] Given the significant impact of Mr and Mrs Cronin-Lampe's PTSD symptoms, I consider the case is one where it is appropriate to exercise the discretion. I conclude that a two-year award for loss of income would have been appropriate in each instance under s 128 of the Act.

[345] It is clear the common law damages awards are greater than the amount which is appropriate for reimbursement under the Act, so it is inappropriate to make formal orders for payment of this particular remedy.

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159 *Telecom New Zealand Ltd v Nutter*, above n 116, at [79].
160 At [80]–[81].
161 At [78]; citing *Betta Foods (NZ) Ltd v Briggs* [1997] ERNZ 456 (EmpC) at 460.
162 Employment Relations Act 2000, s 128.

Superannuation loss

[346] At the time the employment of Mr and Mrs Cronin-Lampe ended, each held an interest in a superannuation fund operated by AXA New Zealand (AXA), described as an Aspire State Sector Retirement Savings Scheme. Each withdrew their entitlements in August 2012. They say this occurred through necessity.

[347] Mr Lyne calculated loss in each instance by assessing the "but for" superannuation entitlement, deducting "actual" superannuation representing the balance remaining after the cash withdrawals which were made, and deducting again the "but for" figure the amount of a notional employee contribution so as to avoid double-accounting for amounts claimed in the lost income remuneration loss calculation.

[348] Mr Lyne assumed that absent the breaches, Mrs Cronin-Lampe would have continued to contribute 1.5 per cent of her earnings, which would have been matched by her employer. He concluded she would not have continued to contribute to the fund after reaching age 65. His valuation of her interest ran to 31 December 2022. He identified the annual rates of return as provided by AMP which acquired AXA in about 2014. Her loss was originally calculated as being $61,942, after allowing for the amount she received when cashing up her entitlement of $16,948.

[349] With regard to Mr Cronin-Lampe's claim, Mr Lyne proceeded on the basis of Mr Cronin-Lampe's advice that he would not have contributed to the fund after leaving MHS, but his interest would have continued to accrue at rates of return utilised for the purposes of AMP's high growth fund. His loss was originally calculated as being $29,250 after allowing for the amount received of $12,411.

[350] Mr Graham said there were a number of issues with this assessment.

[351] He said there had been a failure to take into account the time value of money benefit from the cashed-in policies, in August 2012. He said the counterfactual had not provided for this time value. Mr Graham was of the view

that each could have invested the cashed-up sums, and that this should have been reflected in the assessment.

[352] Mr Lyne responded by stating that Mr and Mrs Cronin-Lampe were in no position to invest the money; the cashed-in sums were spent on living, since neither was in receipt of regular income at the time.

[353] The available income data supports this conclusion. Mr and Mrs Cronin-Lampe received modest income only in the year to March 2013. It was accordingly reasonable for Mr Lyne to proceed on the basis that the fruits of the fund were not available for investment because they were required for living expenses, as Mr and Mrs Cronin-Lampe explained in their evidence.

[354] Mr Graham also suggested that there was no loss because each of Mr and Mrs Cronin-Lampe received the full value of their entitlements in August 2012. They were then able to utilise the funds as they saw fit. He went on to say that the better approach would have been to adopt an assessment of the present-day value of the cashed-up sums.

[355] In response, Mr Lyne repeated that his analysis proceeded on the basis that there was no choice but to expend the cashed-up sums on living expenses. Adopting some other scenario in the analysis was not therefore reasonable. Nor would it be correct to take the present value of a sum of money which no longer existed if it was necessarily used to fund daily living.

[356] I do not accept this reasoning. The hypothetical assessment concerns the value of superannuation entitlements at a date later than the actual date when the entitlements were cashed up. In order to provide a proper focus as at that later date, there are at least two options. First, there is the option referred to by Mr Graham. But in the absence of any 'present-day' figures being provided for the cashed-up amounts, a second option is preferable. That is to assess the superannuation entitlements on the later date on the assumption there was no cash-up. I prefer this approach as it ensures a consistent method can be adopted to value the balance each held at the date of the termination of their employment.

[357] I interpolate that Mr Lyne deducted tax in his calculations, as to the alleged superannuation loss, on a PIR basis. He did not explain why, but this step may have been taken in recognition that tax at a PIR rate is usually deducted by the relevant fund at source, so that a net recovery was considered appropriate. Here, however, a fund will not be reimbursing the superannuation losses, MHS will be. Accordingly, deduction of tax is not warranted.

[358] Finally, Mr Graham criticised the adoption of investment returns as based on the after-fees, pre-tax rates of return provided by AMP and the S&P/NZX 50 Index. Both Mr and Mrs Cronin-Lampe were shown as having a residual balance of superannuation in the assessment, and if that was so, Mr Graham said there should be annual statements and tax certificates from the fund manager showing investment balances, actual returns, taxable returns and tax deductions for all prior years. Thus, a counterfactual could be more accurately calculated.

[359] Mr Lyne said that his instructions were that Mr and Mrs Cronin-Lampe had gone to considerable efforts to obtain more supporting information, but were unable to do so. Accordingly, he relied on either AMP growth fund returns or, when that information was not available, the best information available. However, he accepted that some of the figures relied on from the AMP growth fund data contained out-of-date or unclear assessments. He updated his assessment accordingly. Mr Lyne calculated that Mrs Cronin-Lampe's claim therefore reduced to $58,869, and Mr Cronin-Lampe's claim to $17,142. This was a fair concession.

[360] In the result, I am satisfied that each of the claims should be awarded on the basis reflected in Mr Lyne's amended tables, but only for the period from 31 August 2012 to end March 2019. The calculations are shown in Schedules 3 and 4. In the case of Mrs Cronin-Lampe, the total is $21,190, and for Mr Cronin-Lampe $4,349, these figures being subject to contribution.

[361] For completeness, I confirm that analysis for the lost superannuation entitlement, if considered under s 123(1)(c)(ii) of the Act, would have produced the same award.

[362] Both such awards are subject to a consideration of contribution. Interest should also be paid, as allowed for in Schedules 1 and 2.

Sale of rental property

[363] Until early 2014, Mr and Mrs Cronin-Lampe had owned a house which was on a subdivided property adjacent to their own home. It was occupied by Mrs Cronin-Lampe's mother who paid for some expenses associated with the property.

[364] The evidence is that Mr and Mrs Cronin-Lampe came under significant financial stress so that, on 3 February 2014, the property was sold below its capital value to Aimie Cronin-Taylor and her husband. This relieved Mr and Mrs Cronin-Lampe of the mortgage indebtedness secured over the property and also allowed them to apply the proceeds to meet living expenses in the absence of work-related income. Mrs Cronin-Lampe's mother remained in the property for a short period before having to reside with Mr and Mrs Cronin-Lampe. I find this occurred in late March 2014.

[365] Mr Cronin-Lampe said that had the property not been sold at the time, any future sale proceeds would have been applied to reduce debt; historically, the couple had applied 80 per cent of his earnings in reduction of debt.

[366] Mr Lyne was cross-examined in detail on an issue concerning Mr and Mrs Cronin-Lampe's financial circumstances at the time they ceased their employment at MHS, and whether the decision to sell the property was due to over-commitment at the time of sale, rather than the School's breaches.

[367] Mr Lyne was taken to the income figures recorded by Mr Mundy, as discussed earlier. These suggested a fluctuating income starting with the figure shown for March 2010 ($171,416). There was a decline in joint income for the period to March 2011 ($123,606), and a modest increase in joint income for the year to March 2012 ($128,633). In the last of those years, bank commitments would have required repayments in the order of $68,000. Mr White said this showed a substantial bank commitment even before Mr and Mrs Cronin-Lampe left MHS.

[368] Mr Lyne acknowledged that an aspect of these figures was Mr Cronin-Lampe's diminished income for the year to March 2011, due to the accident he had suffered in early 2010. He received ACC earnings-related income in that year. However, income increased in the following tax year, which led Mr Lyne to conclude that although Mr and Mrs Cronin-Lampe were stretched, the available information led to a conclusion that they were able to keep their heads above water, notwithstanding the income consequences of Mr Cronin-Lampe's accident.

[369] Mr Lyne was also taken to an observation made by Mrs Cronin-Lampe in a letter she wrote to Mr Hamill in May 2011, which acknowledged that, due to Mr Cronin-Lampe's disability in the previous year, their financial situation had gone "hugely backwards". Such a statement is consistent with the point just made as to Mr Cronin-Lampe's more limited income post accident.

[370] Mr Lyne said that whilst this did indicate financial pressure, on the information available, including the actual reductions in borrowings that were made, the situation may have been uncomfortable, but he did not consider there was evidence of financial distress.

[371] Nor did he think there was evidence of extravagant lifestyle or other spending problems, such as gambling. Rather, the reverse – in his view, it was apparent that Mr and Mrs Cronin-Lampe worked extremely long hours in order to meet their financial commitments.

[372] Coming forward, I am not persuaded their decision to sell the rental property was caused by the pressure of excessive borrowings.

[373] Moreover, the assessment of their financial circumstances has to be considered, not from the time when Mr and Mrs Cronin-Lampe ceased to be employed at MHS, but from the time of the established breaches (early December 2010). The evidence shows that by this time, they were already suffering PTSD and that their mental health was deteriorating. They were affected significantly by their respective disabilities, which were compounded by the range of issues which occurred in 2011. Any decline in income for the purposes of the present issue must be considered in the context that

they were impaired during and after the March 2011 tax year. From mid-2011 onwards, after Mr Hamill confirmed MHS would employ Mr Cronin-Lampe on a full-time basis, he was unable to earn private income which previously had resulted in higher gross income.

[374] I conclude that the decision to sell the rental property was driven by the deterioration in Mr and Mrs Cronin-Lampe's income position, which became pronounced after their employment ended.

[375] Mr White also questioned Mr Lyne closely on the issue of whether the rental property would have in reality been maintained for the period up to 2022, and whether rental would have been obtained from the property for the entirety of that period.

[376] Mr Lyne said that he understood that Mr and Mrs Cronin-Lampe wanted to retain the property for their retirement.

[377] Mr Cronin-Lampe's evidence was that the property would be sold in due course, and the proceeds applied to debt. He did not say that it was intended the property would be retained for ultimate retirement.

[378] Some allowance, therefore, needs to be made for the possibility that the property would have been sold short of the respective dates of Mr and Mrs Cronin-Lampe's retirement. However, it is established that, but for the income challenges faced by Mr and Mrs Cronin-Lampe in 2014, the property would have been retained and available for subsequent sale and utilisation of proceeds. Allowing for the contingency that a sale prior to retirement might have occurred, I find the claim should run from April 2014, but only until end March 2019.

[379] In his submissions, Mr White said that some of the alleged losses were "exceedingly remote", footnoting the sale of the rental property as an example.

[380] I touched earlier on the dicta of the Court of Appeal in *Attorney-General v Gilbert*, where it was found that loss of the type suffered would usually be sufficiently linked to a breach if it was within the contemplation of the parties as a not unlikely

consequence of the breach.[163] The Court went on to cite a statement made as to remoteness of damage in the context of an employment contract in *Malik v Bank of Credit and Commerce International (SA) (in liq)*,[164] where Lord Nicholls said that if it was reasonably foreseeable that a particular type of loss was a serious possibility, and loss of this type was sustained in consequence of a breach, then in principle damages in respect of the loss should be recoverable.

[381] In January 2011, Mrs Cronin-Lampe had made it clear to Mr Hamill that the couple possessed an investment property and that their financial security and any possibility of job-sharing would be linked to the sale of that asset. He was aware at least of this aspect of their asset base. Viewed objectively, a serious breach of contract which affected their ability to work and thus service indebtedness, was reasonably foreseeable.

[382] I turn next to quantum. Mr Cronin-Lampe said that no registered valuation was obtained at the time. He was unaware of the market circumstances as to value, and he did not consider fair value because he and Mrs Cronin-Lampe needed to sell the property urgently and a family member was in a position to purchase it. This would ensure that their mortgage liability was reduced. Mrs Cronin-Lampe said that after the transaction, her mother moved so as to reside with her and her husband, as her health had begun to deteriorate.

[383] For her part, Ms Cronin-Taylor said she thought she and her husband had looked into the market value at the time and paid what it was worth.

[384] Mr Lyne proceeded on the basis that the sale price was "approximately $200,000". He noted that this was below the capital value which, as at September 2012, was $255,000. The rateable market value, as at November 2022, was $610,000. He subtracted the sale price from that figure, to produce a lost capital gain of $410,000.

[385] Mr Graham critiqued this approach on the basis that there was no registered valuation for the property at either of the dates in question. He also said the market

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163 *Gilbert (CA)*, above n 3, at [96].

164 *Malik v Bank of Credit and Commerce International (SA) (in liq)* [1998] AC 20, [1997] 3 All ER 1 (HL).

had not been tested and Mr and Mrs Cronin-Lampe had sold the property at a price they were prepared to accept – it could not be said, therefore, that they were unhappy with the price or that they had suffered a loss. Moreover, the choice to sell to their daughter at an under-value was by choice and not a loss which was attributable to MHS. Finally, he said that even if there was a lost capital gain, at a minimum he would have expected that the present value of the proceeds be deducted, rather than the nominal sale value.

[386] The only data the Court has as to actual value is that provided by the publicly available capital or rateable valuations undertaken from time to time, as produced.

[387] The loss should be assessed as at 31 March 2019, as discussed earlier. Mr Lyne's assessment of the value of the property at that time, relying on capital value data from September 2018, was $440,000.

[388] Turning to the amount received, I accept that Mr and Mrs Cronin-Lampe decided to accept a sale price which is only known in approximate terms, there being no available information as to the specifics of the transaction except the date of sale. Accordingly, the fairest approach, on the basis of the information before the Court, is to start by taking the value of the property at the time of sale, which I estimate to be $291,944 (obtained by prorating the publicly available capital value figures between September 2012 and September 2015). The value of that sum, as at the date of the assessment, 31 March 2019, via the Reserve Bank CPI calculator, is $307,305. I fix the lost capital gain as being the difference between $440,000 and $307,305, being $132,695 as the appropriate figure, subject to contribution.

[389] I would have reached the same conclusion had the assessment been carried out under s 123(1)(c)(ii) of the Act.

[390] Interest is also payable as per Schedules 1 and 2.

Claim for lost net rental income

[391] Associated with the investment property is the issue of rental income which it may have provided. I find that any losses in this regard were foreseeable for the same reasons as pertained to the investment property itself.

[392] Mr Lyne stated that it was his understanding that if Mr and Mrs Cronin-Lampe had continued to own the property beyond April 2014 (by which time Mrs Cronin-Lampe's mother had ceased occupying it), they would have rented to a third party at arm's length market rental. I find that this would have occurred because Mrs Cronin-Lampe's mother moved to reside with the couple at about the time of sale. This was due to her ill-health. For the purposes of the counterfactual, this fact should also be assumed.

[393] Mr Lyne accordingly calculated a lost rental income claim on a net basis. His calculation ran from 1 April 2014 to 31 December 2022.

[394] Mr Graham criticised this approach on the basis that it was not known what rental had been paid when Mrs Cronin-Lampe's mother was living in the house, or what might have been possible if the property had been retained. He considered the figures in the assessment to be hypothetical and based on an increasing capital value that may not necessarily reflect the rent which could have been obtained from a third party.

[395] Mr Lyne said that he did not accept the criticism. He noted that his key assumptions were a rental yield of 3.8 per cent, expenses of 30 per cent of gross rental, interest applied on civil debt rates, and a tax rate of 25 per cent.

[396] Again, it is necessary to assess whether the various assumptions made are reasonable in all the circumstances. Whilst it would have been desirable to have the assistance of market rental rates and registered valuations of the property at the relevant points in time, the Court takes notice of the fact that Mr Lyne's figures relied on available rateable values; these represent the value of property at the given dates based on properties sold about the time of those dates. It is not unreasonable to

have undertaken this analysis on the basis of that information. The remaining elements of the assessment are not controversial, except for tax.

[397] Mr Lyne deducted tax for each of the individual years of his assessment. The authorities are clear that in a contract case, damages may be awarded for loss related to a promised benefit; if there are taxation consequences, these are not the concern of the employer.[165] Thus, tax should not be deducted and the assessment should be undertaken on a gross basis. I conclude that the correct calculations under this head are as shown in Schedules 1 and 2, subject to contribution.

[398] The same outcome results from a consideration of this head of claim under s 123(1)(c)(ii) of the Act.

[399] The figure is subject to my later assessment as to contribution. Interest is payable from each annual period when the entitlement arose to the notional date of judgment, 31 March 2019, as per Schedules 1 and 2.

Claim for interest as damages

[400] A claim was advanced for additional interest. The essence of this claim was that had the breaches not occurred, Mr and Mrs Cronin-Lampe would have been able to pay down their borrowings more quickly than occurred. The contention was the couple had incurred more interest on their borrowings than would have otherwise been the case.

[401] The claim which Mr Lyne calculated – for $22,081 – amounted to being a claim for interest as damages.

[402] The availability of a claim of this kind was discussed by the Court of Appeal in *Clarkson v Whangamata Metal Supplies Ltd*.[166] The Court found that in principle, recovery of interest as damages could be made under the classic remoteness case of

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165 See *North Island Wholesale Groceries Ltd v Hewin*, above n 157; as cited in *Gilbert (CA) 2010*, above n 153, at [86]. Although these observations were made in the context of lost remuneration, I see no reason why the principles cannot be said to apply to other lost income sources, such as here, lost rental income.

166 *Clarkson v Whangamata Metal Supplies Ltd* [2007] NZCA 590, [2008] 3 NZLR 31.

Hadley v Baxendale.[167] However, such a loss would need to be pleaded and then proved. In the particular case before it, there had been no relevant pleading and the evidence had not established loss.

[403] Similar problems apply here. There is a pleaded claim for interest on awards, but no particularised claim for interest as damages.

[404] Mr Cronin-Lampe gave some evidence as to the structure of income arrangements as between himself and his wife to the effect that a substantial proportion of his income would be devoted to reduction of debt. But there is no evidence that these circumstances were known to Mr Hamill, any member of senior management of the school or the Board itself. Nor was the issue put in cross-examination to any relevant MHS witnesses. I am not persuaded this claim is shown to be a foreseeable loss.

[405] For these reasons, this particular claim is dismissed.

Expenses and costs arising

[406] Mr Lyne tabulated details of dental costs Mrs Cronin-Lampe had incurred from late April 2012 until 31 December 2022. The sum totalled $26,377.

[407] Mr Lyne said he had been advised that significant dentistry had resulted from stress.

[408] The difficulty with this claim is that there is no direct evidence to that effect. All Mrs Cronin-Lampe said in her own evidence was that she was making the claim, but not the reasons for it. Nor is there a dental opinion to support the claim. In the absence of the necessary supporting proof, the claim is disallowed.

[409] The second element of the expenses claim was based on Mr Lyne's estimate of fees which Mr and Mrs Cronin-Lampe would likely incur for psychological treatment.

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[167] At [49]; citing *Hadley v Baxendale*, above n 110.

He said that this cost had been assessed by assuming 48 weekly sessions for a year at $220 per hour, totalling $10,560 for both Mr and Mrs Cronin-Lampe.

[410] The Court is readily able to assess this claim. The calculations are, in my view, realistic. This foreseeable cost is recoverable as a result of the established breaches. I allow the claim for psychological fees, subject to an assessment of contribution.

Mitigation

[411] MHS pleads that in or about November 2011, Mr and Mrs Cronin-Lampe received advice from Ms Arcus, a clinical psychologist, that they needed professional intervention in order to process their past experiences and explore their future directions. It is asserted that they failed to adequately seek or obtain professional intervention, as recommended, and that had they done so, any losses they might have suffered would have been reduced.

[412] It is also alleged that, had such a step been taken, each of Mr and Mrs Cronin-Lampe could have increased their volume of work so as to improve their financial position.

[413] I have touched on this issue already, but now elaborate. Evidence was given that although Ms Arcus started to provide some treatment so as to assist Mr and Mrs Cronin-Lampe to understand what was happening, she then advised that no formal debriefing should be undertaken until the Court process was finished, since it was too traumatising. Similarly, they should not make any major decisions or changes in life until that point was reached.

[414] Mrs Cronin-Lampe said, of the advice received from Ms Arcus, that she was one of the most well thought of psychologists in Hamilton and, in those circumstances, when she was told to stop the treatment in 2012, she did so.

[415] As noted earlier, Dr Barry-Walsh said, of the advice that was given to postpone treatment until after the litigation process was complete, that he was unsure he would

have given quite the same advice, but he could understand the concerns that a therapist would have.

[416] In *Xtreme Dining Ltd v Dewar*, a full Court reviewed the principles which apply to a mitigation of loss assessment.[168] The Court said that, when considering all the evidence, the issue of fact must be assessed on the basis that the employee is the victim of a wrong. The Authority or Court could not be too stringent in its expectations of a person who is no longer employed by the employer. Further, what has to be proved by the employer is that the employee acted unreasonably. The employee does not have to show that what he did was reasonable.[169]

[417] These legal propositions were expressed as applying to claims brought under the Act. The position at common law is similar, save that it is expressed as a duty to take all reasonable steps to mitigate the loss consequent on the breach,[170] rather than a duty to avoid acting unreasonably as was held in *Xtreme*. However, it has been acknowledged the standard of reasonableness ought not be set too high.[171]

[418] MHS has not shown that it was unreasonable for Mr and Mrs Cronin-Lampe to have relied on the professional advice they received. Even under the common law test, I find that it was reasonable for them to do so.

[419] With regard to the second assertion as to mitigation, I have also reviewed the decisions Mr and Mrs Cronin-Lampe made in the period 2012 to 2019 as to whether they would undertake work. Given the extent of their disabilities in that period, I consider that the decisions made were reasonable, and that MHS has not proved otherwise.

[420] The affirmative defence is not established as pleaded for any cause of action.

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168 *Xtreme Dining Ltd v Dewar* [2016] NZEmpC 136, [2016] ERNZ 628 at [89]–[104].

169 At [103].

170 *British Westinghouse Electric & Mfg Co Ltd v Underground Electric Railways Co of London Ltd* (No 2) [1912] AC 673 (HL) at 689; and *Sullivan v Darkin* [1986] 1 NZLR 214 (CA).

171 See *Banco de Portugal v Waterlow and Sons Ltd* [1932] AC 452 (HL) at 506: "the measures which he [the sufferer of a breach] may be driven to adopt in order to extricate himself ought not to be weighed in nice scales at the instance of the party whose breach of contract has occasioned the difficulty."

Contribution

[421] MHS asserts that both Mr and Mrs Cronin-Lampe were experienced counsellors and supervisors, that they should have known of the demands they faced at all relevant times, and that they were in a position to inform MHS if their workloads were excessive and/or they were at risk of suffering harm. This is supported by the fact that there were regular meetings with the school's Principal, and that reassurances were given that there were no problems. Reference is made to the report to the Board as prepared in March 2011, where an assurance was given that there were no problems with workload or any other issues in Guidance. No report was ever made to the effect that there were workplace issues. Attempts by MHS to clarify employment arrangements in 2011 were resisted.

[422] It is also asserted in each instance that Mr and Mrs Cronin-Lampe worked in private practice, providing relevant services, in addition to MHS, thereby exposing themselves to additional stressors and workload, of which the school was unaware. Moreover, in about 1997, each knew, or should have known, that their health was deteriorating, yet never took any steps to address these issues.

[423] Mr Braun addressed the Court as to the applicable contribution principles under the Act, as described in s 124, relying on the discussion of that section by the then Chief Judge in *Harris v Warehouse Ltd*.[172]

[424] Not discussed by either counsel was the position as to contribution in respect of the contractual causes of action. The position is not straightforward. The issue was touched on in *French v Chief Executive of the Department of Corrections*, where the Court considered whether certain sections of the Contributory Negligence Act 1947 (the CN Act) could be considered in a breach of contract action.[173] The Court's discussion focused on dicta in the High Court and Court of Appeal as to whether the CN Act could apply to a breach of a contractual duty of care, as well as to a tortious breach.

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172 *Harris v Warehouse Ltd* [2014] NZEmpC 188, [2014] ERNZ 480.
173 *French v Chief Executive of the Department of Corrections* [2002] 1 ERNZ 325 (EmpC).

[425] In *Mouat v Clark Boyce*,[174] when referring to the jurisdiction to apportion blame for the purposes of a contractual cause of action, Cooke P took a broad view of the CN Act to avoid what would otherwise result in a remedy that was "blunt and inefficient". He observed that apportionment in accordance with true responsibilities would always be available when required by the justice of the case. It would not depend solely on the provisions of the CN Act, although that Act could be used as an analogy in developing case law in fields not covered by it.[175]

[426] But in other dicta referred to in *French v Chief Executive of the Department of Corrections*, there was a contrary view that for the CN Act to be applied to a contractual claim, there should always be concurrent duties in contract and in tort.[176]

[427] In *French v Chief Executive of the Department of Corrections*, the latter view was preferred. Because the sole cause of action had been in contract and not in tort, it was not possible to say whether there would, or even may, have been liability in tort, because that proposition had simply not been tested.[177]

[428] That was the position as at 2002. I must now review the issue as at 2023. Given the 2021 Supreme Court dicta in *FMV v TZB*,[178] an employee may not bring a concurrent claim in contract and in tort on the same facts, if each claim relates to an employment relationship problem.

[429] The Court has no jurisdiction in tort, and neither would the High Court if the pleaded problem was in essence an employment relationship problem, since such a claim would need to be brought either as a personal grievance or a breach of contract action.

[430] It would be inequitable for a contribution assessment to be undertaken under s 124 of the Act for the purposes of an established personal grievance, and not for the purposes of a contractual cause of action brought on the same facts and allegations. It

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174 *Mouat v Clark Boyce* [1992] 2 NZLR 559 (CA).
175 At 566.
176 And see Stephen Todd and Matthew Barber *Burrows, Finn, and Todd on the Law of Contract in New Zealand* (7th ed, LexisNexis, Wellington, 2022) at 890.
177 *French v Chief Executive of the Department of Corrections*, above n 173, at [120].
178 *FMV v TZB* [2021] NZSC 102, [2021] 1 NZLR 466.

is unsatisfactory that the inability to reduce compensatory damages in contract for relevant contributory conduct is out of step with the statutory personal grievance scheme.[179]

[431] In my view, this problem can be resolved by the Court utilising its broad jurisdiction under s 189 of the Act, to act in equity and good conscience. It may do so by applying to a contractual cause of action the s 124 approach by analogy. Thus, damages may be reduced for contributory behaviour so as to avoid the inequity which would otherwise arise.

[432] Following that approach, I must now consider the extent to which Mr and Mrs Cronin-Lampe's actions may have contributed to the situation giving rise to either their contractual causes of action or to their personal grievances.

[433] I referred earlier to the obligations arising under s 19 of the HSE Act which provided that it was the duty of each employee to take all practicable steps to ensure their own safety whilst at work.

[434] As explained earlier, this is not one of the primary duties under the Act which fall on an employer. As discussed by a full Court of this Court in *NZ Amalgamated Engineering Printing and Manufacturing Union Inc v Air New Zealand Ltd*,[180] the section instead suggests there is a positive obligation on employees,[181] which in some instances can and should fall for consideration. This is one such case.

[435] At times the school was squarely advised by Mr and Mrs Cronin-Lampe of their health pressures and/or workplace stress. Examples of this are Mr Randell's awareness of these pressures in 1999. Health information was also provided to Mr Hamill by Mrs Cronin-Lampe in 2007. Members of senior management were also well aware of the state of Mr and Mrs Cronin-Lampe's health in late 2010.

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179 As noted in *French v Chief Executive of the Department of Corrections*, above n 173, at [119].
180 *NZ Amalgamated Engineering Printing and Manufacturing Union Inc v Air New Zealand Ltd* [2004] 1 ERNZ 614 (EmpC).
181 At [145].

[436] However, I accept that each of Mr and Mrs Cronin-Lampe could have referred to their health issues with greater specificity in 2011, which is the period when they were affected by their escalating PTSD conditions.

[437] I have referred already to the meeting with the Board which occurred on 22 March 2011, and the reference to issues which had been encountered at the outset of their employment some 15 years prior. The general tenor of both the report given to that meeting and the discussion at it, however, was positive. But Mr and Mrs Cronin-Lampe had been encouraged to present themselves in this way by Mr Hamill. I do not criticise them for having acceded to this request, given the developing tensions between them and Mr Hamill.

[438] More difficult, however, is the fact that no reference appears to have been made to the health issues that were afflicting them. By mid-2011, Mr and Mrs Cronin-Lampe's relationship with Mr Hamill had significantly deteriorated following meetings with him, so that in a document Mrs Cronin-Lampe prepared on 6 July 2011, she said she and Mr Cronin-Lampe had a "current sense of burnout and isolation", which she put down to the compromise of their advocacy role on behalf of students. From other evidence, such as from Mrs Cronin-Lampe's daughter, it is evident that they were feeling physically traumatised by the escalation of their employment-related problems. The possibility of obtaining professional help was discussed within the family, although no formal steps were taken.

[439] At this stage, I find there was an obligation to disclose the impacts of the circumstances to their employer, whether directly or via the PPTA. This did not happen. Such a step may well have led to the provision of professional assistance earlier than was obtained. The raft of events that occurred from mid-2011 onwards may have been avoided, or at least occurred against an understanding that Mr and Mrs Cronin-Lampe were unwell. To this extent, that was contributory behaviour on the part of Mr and Mrs Cronin-Lampe.

[440] Whilst MHS must be held responsible for the primary breaches and its disadvantageous actions, the awards for damages should be reduced by five per cent to reflect the contributory behaviour of Mr and Mrs Cronin-Lampe.

[441] A similar conclusion is reached by considering s 124 of the Act in connection with the personal grievance remedies I have considered.

[442] Finally, I note that in light of the many previous decided authorities under s 124 of the Act, a five per cent reduction is a relatively modest one. However, since the damages/remedies to which any percentage assessment must be applied are substantial, the figure for deduction in each instance becomes significant. Standing back, I consider five per cent to be a deduction which is fair to both parties in the circumstances.

Exemplary damages

[443] An award of exemplary damages is sought under the contractual causes of action.

[444] Such an award was made in *Gilbert v Attorney-General*[182] but was the subject of successful appeal to the Court of Appeal.[183] There, the Court of Appeal noted that a purpose of such an award is penal.[184] It noted that a failure to take reasonable care could never justify an award of exemplary damages in and of itself. The remedy would only be available where the defendant was subjectively aware of the risks to which his or her conduct exposed the plaintiff. In *Gilbert,* such a conclusion was unavailable on the facts.[185]

[445] Nor, in this case, does the evidence establish the high threshold. The Board's various failures were not deliberate or conscious, and there is no other evidence which would require the Court to consider such a possibility. There is no evidence that representatives of MHS deliberately engaged in the course of conduct that gave rise to the contractual breaches.

[446] I dismiss this claim.

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182 *Gilbert (EmpC)*, above n 15.
183 *Gilbert (CA)*, above n 3.
184 At [116]; relying on *Bottrill v A* [2001] 3 NZLR 622 (CA); and not upset in the Privy Council: *Bottrill v A* [2002] UKPC 44, [2003] 2 NZLR 721.
185 *Gilbert (CA),* above n 3, at [116]–[117].

Counterclaims

[447] Each of Mr and Mrs Cronin-Lampe is the subject of counterclaims by MHS on the basis that they breached their contractual, loyalty and fidelity obligations.

[448] It is alleged that Mrs Cronin-Lampe, as HoD, was required to manage the workload and safety of persons in her department and to report any relevant concerns to MHS. There was accordingly an implied contractual duty to inform the school of any circumstances that might be causing harm to employees in Guidance.

[449] On that basis, it is asserted Mrs Cronin-Lampe failed to tell MHS during 2010 that Mr Cronin-Lampe's health was adversely affected and that this may have been due to his employment with the school. Then it is alleged that in 2011 she failed to tell Mr Hamill about any issues with Mr Cronin-Lampe's health and/or work environment. It is also asserted that there were similar failures in the latter part of the year.

[450] As far as Mr Cronin-Lampe is concerned, it is asserted he was also under an implied contractual duty to inform MHS of any circumstance that might be causing harm to members of Guidance, and that he also owed a duty of loyalty and fidelity. In short, it is alleged that, at no time in 2010, did he advise the school that Mrs Cronin-Lampe's health was being adversely affected by employment-related issues.

[451] These claims are a repetition of the issues that have already been considered as matters of contribution, although slightly different grounds are relied on. I am not satisfied that the assertions are established. Nor would I have been satisfied that it was appropriate in the circumstances to grant relief in favour of MHS, given the nature of the breaches/disadvantage actions which have been established in respect of its employees.

[452] The counterclaims are accordingly dismissed.

Result

[453] The contractual causes of action are established.

[454] The disadvantage grievances are also established. The relevant determination is set aside.[186]

[455] I enter judgment for the plaintiffs in respect of their contractual causes of action.

[456] There is judgment for Mrs Cronin-Lampe for damages and interest as follows:[187]

Damages for non-economic loss	$123,500
Special damages	
Lost income	$457,803
Interest thereon to 20 December 2023	$121,800
Superannuation loss	$20,131
Interest thereon to 20 December 2023	$2,729
Capital loss for sale of rental investment (half)	$63,030
Interest thereon to 20 December 2023	$8,544
Rental income loss (half)	$22,174
Interest thereon to 20 December 2023	$4,628
Medical expenses (each)	$5,016

186 *Authority determination*, above n 119.
187 See Schedule 1.

[457] There is judgment for Mr Cronin-Lampe for damages and interest as follows:[188]

Damages for non-economic loss	$92,625
Special damages	
Lost income	$601,874
Interest thereon to 20 December 2023	$160,379
Superannuation loss	$4,132
Interest thereon to 20 December 2023	$560
Capital loss for sale of rental investment (half)	$63,030
Interest thereon to 20 December 2023	$8,544
Rental income loss (half)	$22,174
Interest thereon to 20 December 2023	$4,628
Medical expenses (each)	$5,016

[458] For the reasons given I award no remedies for the established personal grievances. It was not, however, unreasonable for the personal grievances to have been raised and pursued, given the very complex circumstances.

Costs

[459] I reserve costs with regard to all steps taken in this Court. If the parties cannot reach a prompt agreement on this topic, the issues will be resolved according to the timetable set out below.

[460] It may also be necessary for the Court to resolve issues of costs incurred in the Authority if prompt agreement cannot be reached between the parties. This is for two reasons. First, Mr and Mrs Cronin-Lampe have successfully established their

[188] See Schedule 2.

challenge to one of the Authority's determinations.[189] Secondly, MHS has brought a challenge to the Authority's costs determination.[190]

[461] Accordingly, if necessary, I will deal with all costs issues according to the following timetable:

(a) The plaintiffs' costs memorandum, together with relevant supporting documents, is to be filed and served by 4 pm on 15 January 2024.

(b) The defendant's memorandum, together with any relevant supporting documents, is to be filed and served by 4 pm on 12 February 2024.

(c) The plaintiff's response, together with any necessary supporting documents, is to be filed and served by 4 pm on 4 March 2024

B A Corkill
Judge

Judgment signed at 3 pm on 5 December 2023

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189 *Authority determination*, above n 119.

190 *Cronin-Lampe v The Board of Trustees of Melville High School*, [2013] NZERA 446 (Member Crichton).

SCHEDULE 1 Summary of Mrs Cronin-Lampe's awards						
Entitlement		**Gross**	**Balance after deduction to reflect 5% contributory fault**	**Interest under civil interest debt calculator to 20/12/2023**	**Column A**	**Total**
Non-economic loss		130,000	123,500			**123,500**
Lost income	As at 31/3/2013	49,703	47,218	19,518		
	As at 31/3/2014	81,029	76,978	27,647		
	As at 31/3/2015	80,875	76,831	23,445		
	As at 31/3/2016	82,846	78,704	20,141		
	As at 31/3/2017	64,321	61,105	13,126		
	As at 31/3/2018	56,123	53,317	9,295		
	As at 31/3/2019	67,000	63,650	8,628		
Lost income total as at 31/3/2019			**457,803**		**457,803**	**457,803**
Interest on lost income to 20/12/2023				**121,800**		**121,800**
Superannuation loss as at 31/3/2019		21,190	**20,131**		**20,131**	**20,131**
Interest on superannuation loss to 20/12/2023				**2,729**		**2,729**
Capital loss, rental property (half) as at 31/3/2019		66,348	**63,030**		**63,030**	**63,030**
Interest on capital loss (half) 31/3/2019 to 20/12/2023				**8,544**		**8,544**
Gross rental income loss (half)	As at 31/3/2015	3,857	3,664	1,118		
	As at 31/3/2016	4,323	4,107	1,051		
	As at 31/3/2017	4,256	4,043	868		
	As at 31/3/2018	5,054	4,801	837		
	As at 31/3/2019	5,852	5,559	754		
Rental income total			**22,174**		**22,174**	**22,174**
Interest on gross rental income loss				**4,628**		**4,628**
Medical expenses (half) as at 20/12/23		5,280	**5,016**		**5,016**	**5,016**

Note: Interest will be payable on the sums shown in Column A only from 21 December 2023 to date of payment as calculated according to the civil debt interest calculator (but not exceeding 5 per cent per annum). Interest on interest may not be ordered since the claim was commenced prior to 1 January 2018: Judicature Act 1908, s 87(1)(a); and cl 14 of sch 3 of the Employment Relations Act 2000 in its pre-amended form.

SCHEDULE 2 Summary of Mr Cronin-Lampe's awards						
Entitlement		**Gross**	**Balance after deduction to reflect 5% contributory fault**	**Interest under civil interest debt calculator to 20/12/2023**	**Column A**	**Total**
Non-economic loss		97,500	92,625			**92,625**
Lost income	As at 31/3/2013	46,218	43,907	18,149		
	As at 31/3/2014	77,649	73,767	26,494		
	As at 31/3/2015	177,509	168,634	51,458		
	As at 31/3/2016	91,051	86,498	22,136		
	As at 31/3/2017	99,747	94,760	20,355		
	As at 31/3/2018	97,199	92,339	16,098		
	As at 31/3/2019	44,178	41,969	5,689		
Lost income total as at 31/3/2019			**601,874**		**601,874**	**601,874**
Interest on lost income to 20/12/2023				**160,379**		**160,379**
Superannuation loss as at 31/3/2019		4,349	**4,132**		**4,132**	**4,132**
Interest on superannuation loss to 20/12/2023				**560**		**560**
Capital loss, rental property (half) as at 3/2019		66,348	**63,030**		**63,030**	**63,030**
Interest on capital loss (half) 31/3/2019 to 20/12/2023				**8,544**		**8,544**
Gross rental income loss (half)	As at 31/3/2015	3,857	3,664	1,118		
	As at 31/3/2016	4,323	4,107	1,051		
	As at 31/3/2017	4,256	4,043	868		
	As at 31/3/2018	5,054	4,801	837		
	As at 31/3/2019	5,852	5,559	754		
Rental income total			**22,174**		**22,174**	**22,174**
Interest on net rental income loss				**4,628**		**4,628**
Medical expenses (half) as at 20/12/23		5,280	**5,016**		**5,016**	**5,016**

Note: Interest will be payable on the sums shown in Column A only from 21 December 2023 to date of payment as calculated according to the civil debt interest calculator (but not exceeding 5 per cent per annum). Interest on interest may not be ordered since the claim was commenced prior to 1 January 2018: Judicature Act 1908, s 87(1)(a); and cl 14 of sch 3 of the Employment Relations Act 2000 in its pre-amended form.

SCHEDULE 3
Lost superannuation claim: Mrs Cronin-Lampe

Termination date: 13 November 2012
Employee contribution: 1.5%
Employer contribution: 1.5%

Year	**Est**		**Est**		**Est**		**Est**		**Est**		**Est**		**Est**
	2013 7 months only		**2014**		**2015**		**2016**		**2017**		**2018**		**2019**
Base salary	**41,514**		**72,029**		**72,706**		**73,846**		**75,321**		**77,123**		**78,000**
But for:													
Opening balance	17,455		21,068		27,270		32,662		35,889		41,849		49,463
Employee contribution	623		1,080		1,091		1,108		1,130		1,157		1,170
Employer contribution	623		1,080		1,091		1,108		1,130		1,157		1,170
Subtotal	**18,701**		**23,228**		**29,452**		**34,878**		**38,149**		**44,163**		**51,803**
Investment return 12.7%	2,367	17.4%	4,042	10.9%	3,210	2.9%	1,011	9.7%	3,700	12%	5,300	9.1%	4,713
Closing balance	**21,068**		**27,270**		**32,662**		**35,889**		**41,849**		**49,463**		**56,517**

SCHEDULE 3 (contd)
Lost superannuation claim: Mrs Cronin-Lampe

Actual:													
Opening balance	17,455		19,672		23,095		25,612		26,355		28,911		32,380
Investment return 12.7%	2,217	17.4%	3,423	10.9%	2,517	2.9%	743	9.7%	2,556	12%	3,469	9.1%	2,947
Closing balance	**19,672**		**23,095**		**25,612**		**26,355**		**28,911**		**32,380**		**35,327**

Super Loss: 56,517
35,327
21,190

SCHEDULE 4
Lost superannuation claim: Mr Cronin-Lampe

Termination date: 13 November 2012
Employee contribution: 1.5%
Employer contribution: 1.5%

Year	**Est**		**Est**		**Est**		**Est**		**Est**		**Est**		**Est**
	2013 7 months only		**2014**		**2015**		**2016**		**2017**		**2018**		**2019**
Base salary	**37,363**		**36,014**										
But for:													
Opening balance	12,916		15,813		19,832		21,994		22,632		24,827		27,806
Employee contribution	560		540										
Employer contribution	560		540										
Subtotal	**14,036**		**16,893**										
Investment return 21.7%	1,777	17.4%	2,939	10.9%	2,162	2.9%	638	9.7%	2,195	12%	2,979	9.1%	2,530
Closing balance	**15,813**		**19,832**		**21,994**		**22,632**		**24,827**		**27,806**		**30,336**

SCHEDULE 4 (contd)
Lost superannuation claim: Mr Cronin-Lampe

Actual:													
Opening balance	12,916		14,551		17,083		18,945		19,494		21,268		23,819
Investment return 21.7%	1,635	17.4%	2,532	10.9%	1,862	2.9%	549	9.1%	1,774	12%	2,552	9.1%	2,168
Closing balance	**14,551**		**17,083**		**18,945**		**19,494**		**21,268**		**23,819**		**25,987**

Super Loss: 30,336
25,987
4,349