IN THE HUMAN RIGHTS REVIEW TRIBUNAL [2017] NZHRRT 14

	Reference No. HRRT 033/2005
UNDER	THE HUMAN RIGHTS ACT 1993
BETWEEN	MARGARET SPENCER
	PLAINTIFF
AND	MINISTRY OF HEALTH
	DEFENDANT

AT WELLINGTON

BEFORE:
Mr RPG Haines QC, Chairperson
Ms GJ Goodwin, Member
Dr SJ Hickey MNZM, Member

REPRESENTATION:
JA Farmer QC, SL Robertson, PMC Gibbs & TJ O'Brien for plaintiff
PT Rishworth QC, MGC Coleman & MJ McKillop for defendant
AS Butler, JS Hancock & EM Watt for Human Rights Commission as intervenor

DATE OF DECISION: 28 April 2017

DECISION OF TRIBUNAL[1]

[1] The claim by Margaret Spencer against the Ministry of Health in HRRT033/2005 was referred to the High Court by the Tribunal on 4 July 2014 because a remedy sought by Mrs Spencer in the proceedings was outside the monetary limit imposed by s 92Q of the Human Rights Act 1993 (HRA 1993).

[2] Mrs Spencer's claim was heard by the High Court on 15-19 February 2016 and originally determined by Keane J, Mr BK Neeson and Pastor R Musuku on 20 July 2016 (*Spencer v Ministry of Health* [2016] NZHC 1650 **attached**).

[3] Mrs Spencer filed an application for recall of that 20 July 2016 decision.

[1] [This decision is to be cited as: *Spencer v Ministry of Health (Orders)* [2017] NZHRRT 14.]

[4] After the hearing of the application for recall on 7 February 2017 the claim was finally determined by Peters J, Mr BK Neeson and Pastor R Musuku on 9 March 2017. They recalled and reissued the decision, substituting the schedule containing the interest calculation (*Spencer v Ministry of Health* [2017] NZHC 391 **attached**).

[5] The decision of the High Court under s 92T(5) HRA 1993 has been referred to the Human Rights Review Tribunal for inclusion in its determination in this case pursuant to s 92U(1) HRA 1993.

[6] The Human Rights Review Tribunal now makes the following determination and orders:

> **[6.1]** The Tribunal is satisfied on the balance of probabilities that the defendant has committed a breach of Part 1A of the Human Rights Act 1993.
>
> **[6.2]** The defendant is to pay Mrs Spencer $233,091.08 for pecuniary loss under s 92M(1)(a) of the Human Rights Act 1993.
>
> **[6.3]** The defendant is required to educate its officers on the human rights of disabled persons and their caregivers under s 92I(3)(f) of the Human Rights Act 1993.
>
> **[6.4]** The defendant is to pay costs to Mrs Spencer according to scale 3C and disbursements as set out in the **attached** schedule of costs and agreed between the parties.

.....	.....	.....
Mr RPG Haines QC **Chairperson**	**Ms GJ Goodwin** **Member**	**Dr SJ Hickey MNZM** **Member**

Margaret Spencer v Ministry of Health

Costs calculation for the proceeding to date - 3C costs

Step	Description of steps taken	Allocated days: C	Daily recovery rate: category 3	Total
	Commencement			
1	Commencement of proceeding by plaintiff	4	$2,940	$11,760
	Case management			
10	Preparation for first case management conference	1	$2,940	$2,940
11	Filing memorandum for first case management conference: *Memorandum of counsel for plaintiff in relation to case management conference dated 10 July 2014*	1	$2,940	$2,940
11	Filing memorandum for first case management conference: *Memoranda of counsel for plaintiff in relation to case management conference dated 10 July 2014 and 23 July 2014*	1	$2,940	$2,940
13	Appearance at first case management conference 29 July 2014	0.7	$2,940	$2,058
11	Filing memorandum for subsequent case management conference: *Memorandum for His Honour Justice Fogarty regarding recusal application by defendant dated 19 November 2014*	1	$2,940	$2,940
13	Appearance at subsequent case management teleconference 26 November 2014	0.7	$2,940	$2,058
11	Filing memorandum for subsequent case management conference: *Memorandum of counsel for the plaintiff in relation to hearing date dated 5 February 2015*	1	$2,940	$2,940
13	Appearance at subsequent case management teleconference dated 11 February 2015	0.7	$2,940	$2,058
11	Filing memorandum for subsequent case management conference: *Joint memorandum of counsel in relation to hearing date dated 30 June 2015*	1	$2,940	$2,940
11	Filing memorandum for subsequent case management conference: *Joint memorandum of counsel dated 3 September 2015 in relation to hearing on 22 September 2015*	1	$3,300	$3,300
15	Appearance at pre-trial teleconference on 3 December 2015	1	$3,300	$3,300
11	Filing memorandum for subsequent case management conference: *Memorandum of counsel for the plaintiff in relation to defendant's further briefs of evidence, and cross-examination of witnesses dated 16 December 2015*	1	$3,300	$3,300
	Interrogatories, discovery and inspection			
20	List of documents on discovery	7	$3,300	$23,100
21	Inspection of documents	6	$3,300	$19,800
	Trial preparation and appearance			
30	Plaintiff's preparation of briefs and affidavits	5	$3,300	$16,500
33	Preparation for hearing	5	$3,300	$16,500
34	Appearance at hearing for sole or principal counsel	5	$3,300	$16,500
Total				**$137,874**
	Disbursements			
	Invoice for expert accountant			$13,732.15
Total				**$13,732.15**
Total				**$151,606.15**

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2014-404-1667
[2016] NZHC 1650

UNDER THE	Human Rights Act 1993
IN THE MATTER OF	A reference by the Human Rights Review Tribunal
BETWEEN	MARGARET SPENCER Plaintiff
AND	MINISTRY OF HEALTH Defendant

Hearing:	15 - 19 February 2016
Appearances:	J A Farmer QC, S L Robertson, P M C Gibbs & T J O'Brien for Plaintiff P T Rishworth QC, M G C Coleman & M J McKillop for Defendant A S Butler, J S Hancock & E M Watt for Human Rights Commissioner as Intervenor
Judgment:	20 July 2016

JUDGMENT OF KEANE J
MR B K NEESON AND PASTOR R MUSUKU

This judgment was delivered by me on 20 July 2016 at 2pm pursuant to r 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Solicitors:
Chapman Tripp, Auckland
Crown Law Office, Wellington
Russell McVeagh, Auckland

[1] Paul Spencer, now aged 48, suffers from Down syndrome. He has never been able to live independently. Nor has he ever been able to care for himself unassisted and unsupervised. Throughout his life he has been in the care of his mother, Margaret Spencer, whose case this is.

[2] Since 1990, when Mrs Spencer and her husband separated and she ceased working in their business, she has devoted herself to Paul's care. She and Paul have been dependent on social welfare benefits and in more recent years she has been a superannuitant. Since August 2014 she has also been paid by the Ministry of Health under its funded family care policy, at the minimum wage, for 29.5 hours personal care and household management services for Paul each week.

[3] The policy under which the Ministry now pays Mrs Spencer was authorised by the New Zealand Public Health and Disability Amendment Act 2013; and her case, which still lies before the Human Rights Review Tribunal under the Human Rights Act 1993, now concerns only the extent to which, if at all, she is entitled to be paid retrospectively since January 2001 under the New Zealand Public Health and Disability Act 2000, before the amendment.

[4] On 4 July 2014 the Tribunal held to the civil standard that between January 2001 – May 2013 the Ministry unjustifiably discriminated against Mrs Spencer, and Paul, under its home based support services policy or practice. It declined to pay her for her qualifying services for Paul solely because her status as his mother disqualified her. To the extent that it did then recognise that Paul was entitled to such services it elected to pay an external provider.

[5] As the Tribunal said in its July 2014 reference, Mrs Spencer's then damages claim lay beyond its jurisdiction. The Tribunal is able to award damages up to $200,000.[1] Her claim for pecuniary loss alone, in which she contends that after January 2001 she provided Paul with 70 hours qualifying support services each week, then exceeded $700,000. (It now stands at $858,589 and interest, $246,782, in all $1,105,372.) She also claimed $100,000 damages for humiliation, loss of dignity and injury to feelings.

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1 Human Rights Act 1993, s 29Q.

[6] Consequently, as the Tribunal then said, it had under the HRA to refer the issue of remedy to this Court; a reference under which this Court must decide what remedy, if any, Mrs Spencer is entitled to - a remedy which then becomes part of the Tribunal's full determination of Mrs Spencer's claim.

Case in outline

[7] The logic on which Mrs Spencer advances her claim is simple. It is that but for the care that she provided Paul in the years in issue, the Ministry would have had to fund Paul's full residential care under the PHDA. Instead, in those years, she bore the full burden. She wants now to be paid for her qualifying services to Paul at the rate the Ministry was then willing to pay external providers.

[8] The Ministry contends however, that Mrs Spencer's claim is not for qualifying services, which it ever funded under its home based support services policy or practice before the 2013 amendment. Nor is it for the qualifying services for which she is paid now. Her claim is for a carers' wage for Paul's full residential care; a distinct form of support, under a different policy, catering for disabled persons whose families are unable to or will not support them, lying beyond the Tribunal's liability finding and this reference.

[9] The Ministry puts in issue whether the Tribunal ever had the jurisdiction to receive and resolve Mrs Spencer's claim. On an application it makes under the HRA, it also contends that Mrs Spencer ought to be denied damages. She now benefits under the funded family care policy the 2013 amendment authorises. Moreover, her claim is not for discrimination she alone suffered. She seeks a remedy for generic discrimination. There are other actual and potential claimants. Her claim has wide implications, especially fiscally. Finally, the Ministry puts in issue her pecuniary loss calculation and denies she has any claim for aggravated damages.

[10] This appears to be the first time that the Tribunal has referred the issue of remedy to this Court. It is certainly the first time that the Tribunal, and this Court, have ever had to consider what remedy, if any, should be given for generic discrimination under a departmental policy or practice governing the grant of benefits, and payments made, under a statute to assist disabled persons.

[11] The Tribunal's remedy reference to this Court, furthermore, does not rest on its own assessment of liability in Mrs Spencer's case. The Tribunal's liability finding rests on its decision in an earlier case, the *Atkinson* case, and related decisions of this Court and the Court of Appeal in that case and then in this case. We begin there.

Atkinson and Spencer cases

[12] In 2002 the Ministry of Health began, under its home based support services policy or practice under the PHDA, to fund 1.5 hours home support services for Paul each week from an external provider, which it increased to three hours in 2004. In 2002 the Ministry also began to fund between 25 – 52 carer support days each year for Mrs Spencer, to give her respite, during which Paul was cared for by others.

[13] Throughout those years the Ministry never paid Mrs Spencer for her support of Paul. In its policy or practice the Ministry assumed that, as Paul's mother, she would naturally support him to the extent she did. Its responsibility under the PHDA, it considered, was confined to funding those support services to which Paul was entitled, which Mrs Spencer could not, or would not provide him. Its obligation was to meet only his unmet needs.

Human Rights Commission

[14] Mrs Spencer, in a letter she wrote to the Prime Minister on 22 December 2001, contended that she ought to be recompensed for supporting Paul as completely as she then did. She did not, however, take up this present issue under the PHDA until 26 September 2007 when she complained to an officer of the Human Rights Commission, a senior mediator, that WINZ had been unjustifiably discriminatory in denying her funding.

[15] The senior mediator saw Mrs Spencer's complaint as lying against the Ministry of Health and, as she then said, the Ministry had not proved willing to mediate such claims in the past. That being so, she said, the Commission was unable to help Mrs Spencer, whom she referred to the Director of Human Rights Proceedings, Robert Hesketh. It was he who alerted Mrs Spencer to the claim then before the Tribunal brought by the nine *Atkinson* claimants, seven parents of disabled

children and two disabled children; a claim, he said, that it was then too late for her to join.

Declaration and amendment

[16] On 8 January 2010 the Tribunal upheld the *Atkinson* claim.[2] It held that the Ministry's policy or practice of paying external providers to supply support services to disabled persons in their family homes, and declining to pay family members willing to supply those services, was unjustifiably discriminatory under the New Zealand Bill of Rights Act 1990.

[17] The Tribunal made a consistent declaration but otherwise reserved the issue of remedy. This decision was twice affirmed on appeal.[3] Then there was a further development. The Government elected not to appeal to the Supreme Court the Court of Appeal's *Atkinson* decision, dated 14 May 2012. Instead on 20 May 2013 the legislature amended the PHDA as from the following day.

[18] Part 4A, which the amendment introduced, governs funded family care. It affirms that family members are not generally entitled to payment for supporting their disabled family members.[4] It validates the Ministry's then home based support services policy or practice, which the *Atkinson* cases had held to be discriminatory, and others analogous. But it also authorises qualifying family caregivers to be paid for their services;[5] the funded family care policy from which Mrs Spencer now benefits.

[19] The 2013 PHDA amendment precluded the Tribunal and any Court from hearing, or continuing to hear or to decide, any civil proceeding on any complaint of unjustifiable discrimination made after 15 May 2013.[6] However, it permitted the *Atkinson* claim, then awaiting a remedy hearing, to be resolved by the Tribunal. It

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2 *Atkinson v Ministry of Health* [2010] NZHRRT 1; (2010) 8 HRNZ 902.
3 *Atkinson v Ministry of Health* HC Auckland CIV-2010-404-287, 17 December 2010; (2010) 9 HRNZ 47; *Ministry of Health v Atkinson* [2012] NZCA 184; [2012] 3 NZLR 456.
4 New Zealand Public Health and Disability Act 2000, s 70C.
5 Section 70D.
6 Section 70E.

also permitted this Court to hear Mrs Spencer's then extant application for judicial review, on the basis of her pleadings as they were before 16 May 2013.[7]

Spencer proceedings

[20] Mrs Spencer had brought that review application in 2012 after she found that she could not obtain any benefit from the Tribunal's decision in the *Atkinson* case.

[21] In March – May 2010, when the Tribunal's decision was already under appeal, she had written unavailing letters to Mr Hesketh, to the Governor-General and to the Minister of Health. The most that she had then achieved was that on 19 May 2010 Mr Hesketh had reassured her that she and Paul should benefit eventually from the *Atkinson* case. He had also told her this:

> The *Atkinson* case revealed that in around 270 cases, family members looking after disabled relatives under the Ministry of Health umbrella received some payment.

[22] As a result, on 8 August 2011 Mrs Spencer had again written to the Minister of Health, who in his reply on 9 September 2011 had disclosed to her that the average yearly cost of residential care for a disabled person was $52,557.24. She had also pursued a parallel claim before the Social Security Appeal Authority. On 15 May 2012 the Authority had declined her appeal and stated:[8]

> The cost for which assistance is sought, namely the cost of care and supervision is in effect a health and disability service.

[23] Then on 8 June 2012 Paul's general practitioner, Dr Peter Clemo, had requested the Taikura Trust, which assesses for the Ministry the qualifying needs of those claiming support under the PHDA, to reassess Paul's level of need and to recommend to the Ministry that Mrs Spencer be paid for her qualifying services. He had then said that Mrs Spencer provided Paul with total care. That too had proved unsuccessful.

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7 Section 70G.

8 *Re Paul Spencer* [2012] NZSSAA 45 at [29].

[24] The Trust had replied that Mrs Spencer was ineligible for funding under the Ministry's disability funding policies. Then on 20 July 2012 the Ministry had confirmed that to be so and advised Mrs Spencer that she could not rely on the Tribunal's *Atkinson* declaration. The Tribunal had made an order by consent on 3 June 2010 suspending that declaration to give the Ministry time to devise a policy response; the result of which was the 2013 amendment.

[25] As at 16 May 2013, the cut off date specified in the amendment,[9] Mrs Spencer had only challenged the validity of the Tribunal's order, then still extant, suspending its *Atkinson* declaration. Then, when the Ministry also contended that the 2013 amendment retrospectively ruled out her right to pursue her damages claim before the Tribunal, she also applied for declaratory relief. She succeeded in both sets of proceedings.

[26] On 3 October 2013 this Court set aside the Tribunal's suspension order, and directed the Ministry to consider Mrs Spencer's funding application within its existing policy without regard to those elements, which the Tribunal in *Atkinson* had declared to be unjustifiably discriminatory.[10] It held that the 2013 amendment did not retrospectively nullify any claim brought before 15 May 2013. Also that Mrs Spencer was entitled to join, and to take the benefit of, the *Atkinson* proceeding. That decision was affirmed on appeal.[11]

[27] In the event, the *Atkinson* claimants settled their damages claims at a mediation authorised by the Tribunal, and arranged by the Commission. On 17 March 2014 they were removed by consent from the proceeding before the Tribunal.[12] That left Mrs Spencer, who had been joined by consent in 2013, the sole plaintiff.[13]

[28] When, therefore, on 23 June 2014, the Tribunal was advised that Mrs Spencer's damages claim had not settled at mediation; and that her claim lay beyond

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9 New Zealand Public Health and Disability Act 2000, s 70G.

10 *Spencer v Attorney-General* [2013] NZHC 2580, [2014] 2 NZLR 780 (HC).

11 *Attorney-General v Spencer* [2015] NZCA 143; [2015] 3 NZLR 449; (2015) 10 HRNZ 338 (CA).

12 *Atkinson v Ministry of Health (removal of original plaintiffs)* [2014] NZHRRT 12.

13 *Atkinson v Ministry of Health (joinder of Spencer)* [2013] NZHRRT 42.

the Tribunal's jurisdiction, and that the Ministry did not consent to jurisdiction being enlarged, the Tribunal made its 4 July 2014 remedy reference to this Court.

Five resulting primary issues

[29] Against that background the Tribunal's reference to this Court, we consider, gives rise to five primary issues; and an evidential question as to the second of those issues.

[30] The *first issue* is as to this Court's jurisdiction in two respects, the former of which is this. The Ministry contends that this Court lacks jurisdiction on the reference because the Tribunal itself lacked jurisdiction to receive and determine Mrs Spencer's claim. The Tribunal's jurisdiction depended on Mrs Spencer having first made a qualifying complaint to the Commission; and, the Ministry contends, she never did so.

[31] The Ministry then contends that this Court lacks jurisdiction on the reference because Mrs Spencer's damages claim does not rest on *Atkinson* discrimination under the Ministry's home based support services policy. It relies on the Ministry's quite distinct residential care policy, which was never in issue in *Atkinson.*

[32] The *second issue* arises on the Ministry's own application under the HRA inviting this Court to deny Mrs Spencer damages, in principle, on the basis that her claim, which rests on generic discrimination under the home based support services policy, has already been met by the *Atkinson* declaration, which resulted in the 2013 amendment under which she is now paid for her qualifying services.

[33] Mrs Spencer's claim for damages is a retrospective remedy, the Ministry contends, which has to be unjustifiable when set against the nine mandatory factors relevant to its application. They require the significance of her loss or harm to be set against such considerations as whether the discrimination on which she relies and the remedy she claims is novel; whether the Ministry acted in good faith; and what the social and financial implications of a damages award are likely to be, having regard to the public interest, most especially the requirements of fair public administration and the Government's duty to balance competing fiscal demands.

[34] As to this second issue, the Ministry tenders evidence to establish that during the years in issue it could have devised and funded a non-discriminatory home based support services policy under which Mrs Spencer might have received nothing, or significantly less than she claims. She contends that this evidence is inadmissible. It is not sufficiently probative to begin to be relevant. It is inconsistent with that already given in *Atkinson* as to the then inchoate state of the Ministry's disability policies. It is simply speculative opinion.

[35] The Ministry also tenders evidence to establish the funded family care policy now embodied in the 2013 amendment gave Mrs Spencer the only remedy to which she was entitled on her generic discrimination claim; the right to be paid for her services in the future. She contends that this evidence too is inadmissible. It is after the event and irrelevant.

[36] The *third issue*, should we hold that Mrs Spencer is entitled to damages for pecuniary loss, is as to their scope. Should such an award extend back, as she contends, to 22 December 2001, when her cause of action accrued under Part 1A of the HRA? Should it assume that, as from that date, she provided Paul 70 hours of qualifying services each week? Is the hourly rate to which she should have been entitled that paid to external providers? Should she receive, as a head of damage, five per cent interest on what she was entitled to receive?

[37] The *fourth issue* is whether, quite distinctly, and as she claims, Mrs Spencer is entitled to an award of $100,000 for humiliation, loss of dignity and injury to feelings as a result of the unjustifiable discrimination she suffered under the Ministry's home based support services policy or practice.

[38] The *fifth issue* is whether, as the Commission seeks as intervener, the Ministry should be directed to educate its staff as to the central significance of the human rights of those disabled persons and their carers, who are entitled to assistance under the Ministry's PHDA policies and practices.

JURISDICTION

[39] Jurisdiction is, we accept, fundamental. For the reasons we are about to give, however, we are satisfied that the Tribunal was entitled to receive and determine Mrs Spencer's claim and also that this Court has jurisdiction on the remedy reference. We are equally satisfied that we have jurisdiction to consider her claim as she has advanced it.

Threshold jurisdiction

[40] We accept, to begin with, and as the Ministry contends, that the Tribunal would have been incapable under the HRA of referring the question of remedy to this Court in the absence of jurisdiction. Jurisdiction is not a technicality which either the Tribunal, or this Court on this reference, may set to one side when deciding Mrs Spencer's claim in substance.[14]

[41] We accept also that before the Tribunal became entitled to receive and determine Mrs Spencer's claim, a complaint by way of civil proceeding under s 92B(1)(a) of the HRA for a breach of Part 1A, she had first to complain to the Commission under s 76(2)(a). That is what s 92B(1)(a) says; and s 76(2)(a), equally plainly, requires the Commission to receive and assess every Part 1A complaint; and to resolve it under s 76(1)(b), if it is able, "in the most efficient, informal, and cost-effective manner possible". The Tribunal is intended to be a final resort.

[42] The first difficulty the Ministry faces in protesting jurisdiction now, we consider however, is that Mrs Spencer did complain to the Commission in September 2007 when she spoke to the senior mediator. Her focus then may have been on WINZ. But her complaint was against the Ministry, as the senior mediator appreciated. Mrs Spencer then said that she was the best person to care for Paul and that, had he been in IHC care, it would have been paid. She invoked the UN Charter.

[43] Mrs Spencer's complaint, we are equally satisfied, then lay fallow not as a result of any default of hers, but because the *Atkinson* claim was contested and twice appealed, and her own proceedings were also contested and appealed. As it is, and

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[14] Section 105(1).

as the Tribunal recognised when it made its liability finding and referred the issue of remedy to this Court, her right to pursue her claim carried the imprimatur of those decisions.

[44] The second difficulty the Ministry faces is that, as we have set out already, the Ministry did not make this protest to jurisdiction to the Tribunal itself. It consented to Mrs Spencer's joinder to the *Atkinson* claim in 2013, and to the removal of the *Atkinson* claimants in 2014 after their claims had been settled at mediation, leaving only her claim extant. On 28 March 2014 the Ministry responded conventionally by statement of reply to her statement of claim.

[45] The Ministry now says that in consenting to joinder, and in responding conventionally, it wished only to ensure that Mrs Spencer's claim could be settled at mediation as a civil proceeding under the HRA. But the Ministry could not consent for some purposes and not others. Nor, once Mrs Spencer was joined to the *Atkinson* claim, could she be denied her right to pursue her own claim before the Tribunal, if mediation failed.

[46] Thirdly, and decisively, the Tribunal did assume jurisdiction and held, as a result of the decisions on which it relies, that Mrs Spencer had suffered *Atkinson* discrimination and was entitled to pursue a remedy. Then, on this reference, the Ministry became entitled to be heard and to tender evidence. But it could not "challenge the finding of the Tribunal" as to its liability.[15] That apart, our own duty has to be decisive. Section 92T(5) says:

> The High Court must decide, on the basis of the Tribunal's finding that the defendant has committed a breach of Part 1A … , whether 1 or more of the remedies set out in section 92I or the remedy set out in section 92J is to be granted.

[47] Finally, and simply to be complete, we mention that under s 92U our decision on remedy takes effect as part of the Tribunal's own determination of Mrs Spencer's claim, and the Tribunal's then complete determination is subject to a right of appeal to this Court.[16]

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15 Section 92T(3), (4).
16 Section 92U(2)(b).

Reference jurisdiction

[48] As to the reference itself, we accept that we only have jurisdiction to decide what remedy Mrs Spencer may be entitled to on the basis on which the Tribunal found that the Ministry had unlawfully discriminated against her; the form of discrimination suffered by the *Atkinson* claimants.

[49] We do not accept the Ministry's further contention that we are without jurisdiction to confer a remedy on Mrs Spencer, if we conclude that the award she seeks extends beyond that open on an *Atkinson* claim, unless her claim assumes discrimination on an altogether different basis. We do not consider that it does.

[50] Mrs Spencer's claim is an *Atkinson* claim. She contends that the Ministry discriminated against her in the payments that it was willing to make for services to which Paul was entitled under its home based support services policy or practice. In quantifying her claim, she does rely on an assessment made using a measure devised to assess those entering residential care. The hourly rate she claims primarily was that paid to residential carers. But neither is fatal.

[51] If we find Mrs Spencer's claim is excessive in either way, when set against her *Atkinson* discrimination, that does not deny us jurisdiction. It simply means that we must trim her claim to size. And so we must begin by establishing what *Atkinson* discrimination she suffered, set against the Ministry's then range of PHDA policies and practices.

Disability support services

[52] At the date on which the *Atkinson* claim was made the Ministry of Health was assisting disabled persons in six principal, and sometimes interrelated, ways; and in *Atkinson* the services in issue were primarily the very specific home based support services the Ministry offered to disabled persons in their family homes: household management support services and personal care services.

[53] Household management services then included, as they do still, but were not limited to, help in preparing meals, washing, drying or folding clothes and essential

house cleaning, vacuuming and tidying up. Personal care services then included, as they do still, but were not limited to, help with eating or drinking, getting dressed or undressed, getting up in the morning or getting ready for bed, showering, going to the toilet, night support and getting round the house.

[54] Those needs were then established, as they still are, under a needs assessment and service co-ordination process independent of the Ministry (NASC), in this instance conducted by the Taikura Trust. The qualifying needs of disabled persons were identified, as they are still, set against the support they had from their families, friends and the community. The Ministry then funded only those support services which the disabled person did not already receive by way of "natural support".

[55] The last aspect of this policy was found to be discriminatory because it deemed families, to the extent that they were willing and able to care for their disabled members, to be willing to do so long term and unpaid as "natural support".

[56] Under a second policy the Ministry offered individualised funding to enable disabled persons to decide from whom they should receive care; a mechanism not a service. Quite distinctly, family members were also offered respite care and support. The Ministry had also three other policies to assist disabled persons, living beyond the care of their families, two of which were referred to in *Atkinson.*

[57] Under the first, contract board, the Ministry funded those who no longer wanted to, or who were unable to, continue living with their families, but still needed or wanted to live in a home environment. There, too, their needs were assessed and supported as if they were with their own families. Under the second the Ministry supported with equivalent services those living independently, and assisted them to acquire new skills.

[58] The third, residential care, was never in issue in *Atkinson.* Under that policy the Ministry funded those who could not live with their families or independently, because they lacked family support or because of the extent of their needs. They were cared for, and supported, typically in residences housing clusters of four, and

supported more intensively than if they had been able to live in their own homes, but at a level less than hospital or rest home care.

[59] Individual residential care was exceptional. The Ministry only supported that form of care where disabled persons could not live in a group home setting, because they put others, and sometimes themselves, at significant risk; and because they needed a high level of support.

Atkinson claims

[60] The *Atkinson* claimants, who were represented before the Tribunal by the Director of Human Rights Proceedings, claimed in their third statement of claim, dated 14 August 2008, that they had been discriminated against by virtue of their family status, as parents caring in their homes for their disabled children, and in two cases as disabled children looking to their families for such care.

[61] They confined their claims to four of the Ministry's six disability practices or policies: home based support services, supported independent living, contract board and individualised funding. Under those policies, they contended, the Ministry denied them funding for the qualifying services they provided solely on the basis that they were supposed to supply unpaid natural family support.

[62] Thus, they contended, those policies were unlawfully discriminatory in two ways. The policies excluded otherwise available and willing carers from being paid for their qualifying services for their disabled family members and, conversely, denied such disabled persons the ability to choose their family members as funded sources of support.

[63] The focus of their claim was on the Ministry's home based support services policy or practice. They only included the other three policies or practices because the two disabled claimants might in the past have resorted to those forms of support, might have wished to do so in the future. Those three policies or practices remained peripheral.

Tribunal decision

[64] In its decision, dated 8 January 2010,[17] the Tribunal made a general declaration that "the defendant's practice and/or policy of excluding specified family members from payment for the provision of funded disability support services", on the basis of family status, was inconsistent with s 19 NZBORA. Family status, it held, was not a justified limitation under s 5.[18]

[65] In its decision the Tribunal confined itself to the four forms of policy or practice the *Atkinson* claimants put in issue.[19] When, for example, the Tribunal referred to the 272 exceptional cases where family members had been funded for caring for their disabled members in their homes, it did not begin to assess for what services they were funded or on what basis.[20]

[66] The claimants, the Tribunal recorded equally, did not plead that they were discriminated against when compared with families caring for their disabled members under the ACC regime. It did remark that the ACC strategy put in issue how supportable the Ministry's policy position was, but went no further.[21]

[67] Ultimately the Tribunal found that the Ministry's home based support services policy or practice was unjustifiably discriminatory because it assumed that families would give "natural support" to their disabled members, long term and without funding; and that the Ministry's duty to fund qualifying services only arose to the extent that families were unwilling or unable to provide such support.

High Court decision

[68] On the appeal to this Court Asher J and two lay members, in their decision dated 17 December 2010, were in no doubt as to the scope of the *Atkinson* claim, or as to the scope of the Tribunal's resulting declaration. This Court said at the outset:[22]

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17 *Atkinson v Ministry of Health*, above n 2.
18 At [232].
19 At [56].
20 At [88] – [92].
21 At [93] – [103].
22 *Atkinson v Ministry of* Health, above n 3, at [4].

> The claim did not relate to general carers' allowances, wages or benefits. Nor was it a claim by family members for the amount of the costs of care for a person in residential care. Rather, the claim related to specific support services which the Ministry makes available for disabled persons.

[69] This Court also said that the claim concerned those policies as they applied to parents and children.[23] The case was "not about what the disability support system should provide"; that was a "matter for Parliament".[24] Then, when it identified the four disability policies or practices in issue, it said:[25]

> All of the parent respondents would like to be paid from one of the four services at issue, but are not able to receive payment because they are family members of the disabled person.

[70] In then identifying with whom the parent claimants should be compared to decide whether they had been discriminated against under the Ministry's home based support services policy principally if not exclusively, the Court did not accept, as the Ministry had contended before the Tribunal, that:[26]

> ... the proper comparator is someone who is employed to meet gaps in support that families and other natural supports are not able to meet, and is able to give families a break from care.

[71] In this the Court rejected the Ministry's assumption that parents were obliged to provide unpaid long term support for their children under a social contract; and then said:[27]

> Defining the comparator as someone who is employed to meet gaps in support that families and other natural supports are not able to meet, and is able to give families a break from the care, is to build into the comparator highly artificial qualifications that incorporate the Ministry's policy decision as to why support should not be made available. It makes the value judgment that family members meet the needs of their disabled family members without payment.

[72] The Court held, consequently, that the concept of unmet needs was "a concept invented by the Ministry" and that the comparative exercise proposed by the Ministry was circular.[28] It meant that "there is no work for the comparator to do.

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23 At [7].
24 At [9].
25 At [22].
26 At [83].
27 At [90].
28 At [91].

Once the Ministry's assumptions are built in, the answer is inevitable".[29] It concluded that true comparator had to be "all persons who are able and willing to provide disability support services to the Ministry".[30]

[73] In concluding that the policy was discriminatory the Court said:[31]

> We have found that the essence of discrimination lies in the treating of persons in comparable circumstances differently. We have found that those who are in comparable circumstances to the parent plaintiffs are persons who are able and willing to provide any of the four disability support services. The respondent parents fall within this group. They are persons who are able and willing to provide support services to disabled persons.

[74] The Court then identified why the policy discriminated against the parent claimants:[32]

> ... they are not treated in the same way as those other persons. When they apply to be contracted to provide home support services, they find they are not eligible to be contracted. The reason for this is a prohibited ground of discrimination. It is their family relationship with the disabled persons. More specifically, it is because they are the parents of disabled children. If they did not have this family relationship, they would be eligible. We have no doubt that they would have shown themselves to be able and willing to do the work.

[75] The policy discriminated against the two disabled claimants, the Court held correlatively, because:[33]

> They have a more limited range of choice of carer than others in comparable circumstances. This is because of their family status, namely their relationship with their parents.

[76] This discrimination, the Court held, was most clearly evident in the home based support services policy, and the supported independent living policy, and the supported family living policy. It was not so evidently discriminatory as to individualised funding, which was not a service. Nor as to contract board beyond the family.[34]

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29 At [92].
30 At [97].
31 At [127].
32 At [127].
33 At [130].
34 At [132] – [135].

[77] Then, after concluding that the discriminatory home based support services policy was to the claimants' disadvantage, the Court turned to the larger issue on this reference, whether that discrimination constituted a justifiable limitation under s 5 NZBORA.

[78] The Court held that, on the appeal, it was not entitled to substitute its own judgment for that of the legislature or Government. It was not entitled to decide "what is an ideal system and then check whether the Ministry's system meets that expectation". It had to be both cautious and restrained when appraising matters of policy.[35]

[79] The extent to which the Court needed to be deferential, it then said, however, depended on how "considered and refined", any relevant policy was. A policy endorsed by Parliament or Cabinet after a considered process deserved high deference. But, the Court said:[36]

> If it is not the clearly articulated consequence of a considered process, but is rather a practice where the Government body itself has not reached a firm policy conclusion, or indeed has doubts about the practice itself, there may be less deference.

[80] At that point the Court reviewed the policy debate between 2001 – 2013 within the Ministry, and government wide, which had resulted from the decision of the Complaints Review Tribunal in *Hill v IHC NZ Inc*, a decision Mrs Spencer invoked implicitly when she made her 2007 complaint to the Commission.[37]

[81] In that case the parents of an intellectually and physically disabled son had brought a complaint before the Tribunal against the IHC, which had cared for him by way of contract board since 1981. IHC had declined to employ them as their son's caregivers when his caregivers moved away. The Tribunal held that IHC's decision was not made under a government policy and was not exempt from review, and was discriminatory on the basis of family status.

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35 At [144].
36 At [147].
37 *Hill v IHC NZ Inc* (2001) 6 HRNZ 449 (Complaints Review Tribunal); see also *Hill v IHC NZ* (2000) 6 HRNZ 213 (Complaints Review Tribunal).

[82] We need not recapitulate the Court's then extensive review in *Atkinson*, under s 5 NZBORA, of the policy debate as it evolved. We need only refer to those aspects of the Court's decision which are relevant to this reference. But we do so on the basis that the Tribunal accepted the Court's entire reasoning when it found the Ministry liable in this present case; and we must respond consistently on this remedy reference. It is not for us to revisit *Atkinson* at the remedy phase.

[83] Essentially, the Court found that by the time the Tribunal heard *Atkinson* the Ministry had still not decided on a clear and coherent policy response to *Hill*. It found also, however, that this was because the Ministry had found it difficult to reconcile the nine overlapping policy purposes, listed in the Ministry's submissions on the appeal, which reflected a 2002 Ministry draft paper. They were these:[38]

> 1 To reflect and support the social contract between families and the state, under which the primary responsibility for providing care to family members rests with families;
>
> 2 To promote equality of outcomes for disabled people;
>
> 3 To encourage the independence of disabled people;
>
> 4 To avoid the risk that families will become financially reliant on the income;
>
> 5 To support the development of family relationships in the same way as they develop for non-disabled people;
>
> 6 To avoid professionalising or commercialising those relationships;
>
> 7 To ensure that the delivery and quality of publicly funded support services can be monitored;
>
> 8 To avoid imposing unsustainable care burdens on family members; and
>
> 9 To be fiscally sustainable.

[84] The Court assessed each of these factors to establish whether, singly or together, they might justify the Ministry's discriminatory policy as a reasonable limitation under s 5 NZBORA. And it held that, with the exception of the first two, the concept of the social contract and the equality of outcomes concept, the

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[38] *Atkinson v Ministry of* Health, above n 3, at [201].

remainder were "important and credible".[39] The Court was concerned especially about the fiscal impact of upholding the Tribunal's declaration, leaving aside any further remedy; and, in assessing that, accepted that:[40]

> balancing competing demands for social and economic resources within the context of limited available funds, by allocating those resources in a manner that optimises the benefits and outcomes of a social program, is a requirement of good government.

[85] The Court also then accepted that:[41]

> ... governments must make distinctions between people if they are to govern effectively. Governments must be free to target social programs so that those whom they consider should benefit from them do so, and delineate boundaries between those who will benefit and those who will not.

[86] The Court thus held that the Ministry's home based support services policy was not a "capricious policy"[42]; and, in deciding whether the policy more than minimally impaired the claimants' right to be free of discrimination, deferred to the Ministry's expertise. However it then found[43] that there was "uncertainty in the ambit of the policy, a lack of endorsement at the highest level, and doubts within the Ministry"; and that this indicated that "a rigid policy of not permitting any family members to apply is more than is required".

[87] In this the Court discounted the Ministry's contention that the Tribunal's declaration, if endorsed, could increase the cost of its home based support services policy by $10.4M - $258.1M, or even $17 – 593M,[44] depending on whether 10-90% of disabled persons took up funded family caregivers.[45] The Court, like the Tribunal, found those figures speculative. It held that the take-up might be modest, and concluded that any extra cost was likely to lie at the lower end of the Ministry's range.

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39 At [218].
40 At [228].
41 At [233].
42 At [238].
43 At [253].
44 At [279].
45 At [271].

[88] Funded family care, the Court held, could be made an exceptional form of support. Families could be required to pass a training threshold and to accept monitoring. Allocations could be capped.[46] Thus, the Court held, the Ministry's assessment while relevant, could not conclusive. It had to be related to "the importance of the right, the importance and rational connection of the objectives" as one factor amongst others.[47]

[89] The Court ended by saying this:[48]

> We do not consider that the Ministry has acted in bad faith. Given that the formulation of a policy and the administration of it are formidable challenges, the Ministry must be given time to prepare a new policy informed, we hope, by the five year process of participating in these proceedings, and the decade of consideration that has already taken place.

Court of Appeal decision

[90] On 14 May 2012 the Court of Appeal upheld that decision[49] assuming that the four policies or practices in issue were those we have identified. Also that in issue, principally, was the Ministry's home based support services policy or practice.

[91] In then agreeing that the Ministry's comparator was circular and the answer inevitable the Court of Appeal was sceptical about the Ministry's remaining argument that this Court's comparator could not be correct "because interposing the payment of family members on the NASC scheme means the scheme will not be able to continue in its present form".[50]

[92] In this, the Court was unconvinced by the Ministry's argument that it would be obliged to alter its home based support services policy fundamentally from one catering only for unmet essential needs to one under which it would have to fund all the support needs of disabled persons in their homes, relative to "the severity or level of (their) disability". It was equally unconvinced that this would be inequitable.[51]

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46 At [274].
47 At [280].
48 At [292].
49 *Ministry of Health v Atkinson*, above n 3.
50 At [70].
51 At [71].

[93] The Ministry's concerns, the Court held, could be met by assessing what a family could reasonably provide unpaid. But, that apart, the Ministry's policy was artificial; and, despite the fact that some parents had been funded to provide home care, that had not made the policy unworkable.[52] Thus, the Court agreed that the correct comparator was those persons "willing and able to provide disability support services to the Ministry".[53]

[94] On its proportionality analysis under s 5 NZBORA the Court also endorsed this Court's conclusion that, in the absence of more solid evidence, the fiscal impact of the Tribunal's declaration that the Ministry's home based support services policy was discriminatory was likely to be at the bottom of the Ministry's $17 - $593M range over the four services. It, too, said that much would depend on how many disabled persons wished their families to be their funded caregivers.[54]

[95] As to the Ministry's policy work in response to *Hill*, the Court made two pertinent comments. One was that the Ministry's carers' strategy, as at the date of the appeal, had not resulted in the *Atkinson* claims being resolved. The other was that, while that work demonstrated that family funding was a difficult issue, the Ministry's policy focus had shifted from objecting to funded family care in principle to devising such a policy.[55]

[96] Thus, the Court said, this Court was entitled to hold that the Ministry's policy, in this crucial respect, was still inchoate and could not be given great weight. That simply reflected "the practical reality of the situation".[56]

Qualifying discrimination

[97] As this survey shows, the unlawful discrimination the *Atkinson* claimants suffered lay only in the Ministry's refusal to accept that they were entitled to be funded carers under its home based support services policy. The policy itself was

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52 At [71] – [73].
53 At [74].
54 At [170] – [171].
55 At [175].
56 At [179].

not held to be discriminatory as to the range of services it offered, or as to how a disabled person's need for those services was assessed.

[98] Thus, we conclude, and Mrs Spencer has not suggested otherwise, the remedy to which she is entitled must be one responding to that exact form of discrimination. To the extent that her damages claim exceeds those parameters, it must be trimmed to size.

DAMAGES IN PRINCIPLE

[99] The next issue we must next resolve, however, is whether Mrs Spencer is entitled to any award for pecuniary loss, which on the Ministry's own application entails two issues: whether she has had her remedy in the *Atkinson* declaration and the 2013 amendment, and whether damages are unjustifiable in principle. Both must be set against the factors which s 92P of the HRA makes mandatory.

[100] Here too, as we have said, we must resolve Mrs Spencer's application to have the Ministry's evidence ruled inadmissible. (The evidence that she could have received little or nothing under a non-discriminatory policy; that the 2013 amendment was a complete and considered response to the Tribunal's *Atkinson* declaration, and that the fiscal consequences of a damages award were likely to be dire.)

[101] We do not intend to traverse Mrs Spencer's application in any detail. On this reference we must, we consider, take into account the Ministry's evidence on these issues, subject always to the rules as to admissibility where they truly bite, if only to decide its application. In the *Atkinson* cases, indeed, it was assumed that the evidence as to those issues then would be enlarged and refined during the remedy phase; and that is the phase with which we are concerned on this reference.

[102] In this we have not ignored the concession to this Court, which Mrs Spencer attributes to the Ministry's counsel on the *Atkinson* appeal, when the issue was whether the appeal should proceed before the remedy phase, as the Ministry wished, or should be adjourned until afterwards, as the claimants wished.

[103] The claimants contended that the two phases had a level of commonality and that relevant evidence would be given at the remedy phase, which would be relevant to the liability appeal. According to Ellis J, the Ministry's then counsel "did not accept that social and financial implications (for example) were relevant to the question of whether damages should be awarded"; the apparent concession on which Mrs Spencer relies.

[104] We do not consider that any such concession can bind the Ministry. Its point was advanced tactically to preserve its appeal fixture and Ellis J did not rely on it when she refused the adjournment. She added that the Crown's position was "of a rather more fundamental constitutional kind".[57] We ourselves set it to one side.

HRA Remedy regime

[105] Under s 92I of the HRA, to which we now turn, the Tribunal has the ability, which it exercised in the *Atkinson* case, to grant a declaration that the Ministry is accountable for a breach of Part 1A; and, on this reference, this Court has the further ability to grant Mrs Spencer damages.

[106] Where a statute is in breach of Part 1A, the Tribunal cannot declare a statute to be void ab initio to the extent that it is in breach, or add in whatever may be required to make it valid. In contrast to other jurisdictions to which we will refer, the Tribunal may only make a declaration of inconsistency, which does not:[58]

> (a) affect the validity, application, or enforcement of the enactment in respect of which it is given; or
>
> (b) prevent the continuation of the act, omission, policy or activity that was the subject of the complaint.

Then the Minister responsible must report to Parliament setting out the government's response (assuming that the decision has not been overturned on appeal or the time for appealing has expired).[59]

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57 *Ministry of Health v Atkinson & Ors* HC Auckland CIV-2010-404-287, 30 June 2010 at [12] – [13].

58 Sections 92J, 92K(1).

59 Section 92K(2).

[107] In contrast to other jurisdictions also, the Tribunal's ability to make a damages award, which we share on this reference, is conferred not merely expressly but concretely. An award may be made under s 92M(1) for:

> (a) pecuniary loss suffered as a result of, and expenses reasonably incurred by the claimant … for the purpose of, the transaction or activity out of which the breach arose:
>
> (b) loss of any benefit, whether or not of a monetary kind, that the claimant … might reasonably have expected to obtain but for the breach:
>
> (c) humiliation, loss of dignity, and injury to the feelings of the claimant …

[108] As against that, and again in contrast to other jurisdictions, the Tribunal and this Court on a reference may, under s 92O(2), on an application made under s 92O(1), in this instance by the Ministry, refuse, modify or defer any remedy, and may:[60]

> (a) instead of, or as well as, awarding damages or granting any other remedy,—
>
> (i) … specify a period during which the defendant must remedy the breach; and
>
> (ii) … adjourn the proceedings to a specified date to enable further consideration of the remedies or further remedies (if any) to be granted:
>
> (b) … refuse to grant any remedy that has retrospective effect:
>
> (c) … refuse to grant any remedy in respect of an act or omission that occurred before the bringing of proceedings or the date of the determination of the Tribunal or any other date specified by the Tribunal:
>
> (d) … provide that any remedy granted has effect only prospectively or only from a date specified by the Tribunal:
>
> (e) … provide that the retrospective effect of any remedy is limited in a way specified by the Tribunal.

[109] Then, in deciding any s 92O application, the Tribunal or this Court on a reference must take into account the factors set out in s 92P, the first seven of which under s 92P(1) apply to any breach of the HRA. It says this:

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[60] Section 92O(2).

In determining whether to take 1 or more of the actions referred to in section 92O, the Tribunal must take account of the following matters:

(a) whether or not the defendant in the proceedings has acted in good faith:

(b) whether or not the interests of any person or body not represented in the proceedings would be adversely affected if 1 or more of the actions referred to in section 92O is, or is not, taken:

(c) whether or not the proceedings involve a significant issue that has not previously been considered by the Tribunal:

(d) the social and financial implications of granting any remedy sought by the plaintiff:

(e) the significance of the loss or harm suffered by any person as a result of the breach of Part 1A or Part 2 …

(f) the public interest generally:

(g) any other matter that the Tribunal considers relevant.

[110] Where, as here, the breach established lies under Part 1A of the HRA the Tribunal, and this Court, must also under s 92O(2) take into account two further factors:

(a) the requirements of fair public administration; and

(b) the obligation of the Government to balance competing demands for the expenditure of public money.

[111] Section 92O does not set these nine factors in any order of priority. It simply lists them. Nor does it ascribe to any one of them any weighting. It does not deem any one to be primary or paramount. As long as the Tribunal, and we ourselves on this reference, sufficiently consider each of these factors to the extent that they are relevant, that will suffice.

[112] The Ministry, as we have said, contends that such of the factors as apply are consistent only with the conclusion that Mrs Spencer is entitled to the declaration from which she has benefited and preclude any award. But we begin from this premise. If Mrs Spencer is able to establish her pecuniary loss to the balance of probabilities, she is entitled to an award unless the Ministry can affirmatively establish that one or more of the s 92P factors require us to decline her claim.

Declaration and damages

[113] That, we consider, is consistent with the remedies given since 1994 under the NZBORA, which in contrast to the HRA is not as expressly remedial. As *Baigent's* case then so notably held, even though the NZBORA does not expressly give a right to damages an award may be called for in addition to a declaration.[61]

[114] In *Taunoa v Attorney-General* the Supreme Court affirmed that to be so.[62] As Blanchard J said, and he was not alone, while a declaration may vindicate a right, an award may be needed to compensate for the wrong suffered:[63]

> For some breaches ... unless there is a monetary award there will be insufficient vindication and the victim will rightly be left with a feeling of injustice. In such cases the Court may exercise its discretion to direct payment of a sum of monetary compensation which will further mark the breach and provide a degree of solace to the victim which would not be achieved by a declaration or other remedy alone.

[115] In *Taunoa*, moreover, Tipping J noted that, in contrast to the NZBORA, s 92M of the HRA gives the express power to award damages;[64] and said that there had to be "some conceptual analogy between this statutory power and the power of the courts to award monetary relief as a component of an effective remedy for breaches of the Bill of Rights Act". He pointed out the need for consistency.

[116] In principle that has to be so. But the NZBORA claim in that case concerned a limited class of prison inmates. In this, while Mrs Spencer's entitlement to relief is individually hers, it rests on generic discrimination under a government policy or practice involving a potentially much larger claimant class. The fiscal implications may be very significantly greater.

Canadian and Irish cases

[117] In Canada, as in New Zealand, those who suffer from a breach of their rights are entitled to a responsive and effective remedy primarily, but not exclusively, under the Canadian Charter of Rights and Freedoms.

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61 *Simpson v Attorney-General (Baigent's Case)* [1994] 3 NZLR 667 at 699.
62 *Taunoa v Attorney-General* [2007] NZSC 70,, [2008] 1 NZLR 429 (SC).
63 At [255]; see also Elias CJ at [111] and Tipping J at [317] – [318], [322] – [332].
64 At [322].

[118] In *Doucet-Boudreau v Nova Scotia (Minister of Education)* the Supreme Court of Canada, by a majority, affirmed that the ability under the Charter to give an individual remedy, which is "appropriate and just in the circumstances", must be given effect generously and expansively,[65] to give vitality to the ancient maxim, "where there is a right there must be a remedy":

> A purposive approach to remedies requires at least two things. First, the purpose of the right being protected must be promoted: Courts must craft responsive remedies. Secondly, the purpose of the remedies provision must be promoted: Courts must craft effective remedies.

[119] The remedies the Canadian Courts are able to give under the Charter, however, must be set against their even more fundamental ability under the Constitution Act 1952, to declare whether a statute is constitutional; a declaratory ability to hold a statute to be void ab initio. Also their ability to read into a statute what may be required to make it valid. These are powers which the HRA does not confer on the Tribunal or our courts.

[120] These constitutional powers extend indeed, as one Canadian commentator has said, beyond the conventionally declaratory.[66]

> These are quite different remedies than mere declarations as to someone's rights, and it is unfortunate that they are also sometimes called "declarations".

[121] These powers are, in their effect, legislative and that is why in Canada the Courts are careful to exercise them sparingly, and to defer to legislative intent wherever that can be identified, and to suspend declarations to enable the legislature to respond for itself. Their fundamental reach also explains why, when they are exercised, they are deemed to be the decisive remedy.

[122] That being so, the Canadian authorities on which the Ministry relies to contend that Mrs Spencer already has her remedy cannot apply in any literal sense. They do, however, still assist.

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65 *Doucet-Boudreau v Nova Scotia (Minister of Education* (2003), 232 D.L.R. (4th) 577, [2003] S.C.J. No. 63 at [25].

66 *Beaudoin & Mendes, "Canadian Charter of Rights and Freedoms", 4th edition, 1366.*

Schachter v Canada

[123] The Ministry relies principally on *Schachter v Canada* where a new father was declined 15 weeks' parental leave, a benefit enjoyed by adoptive but not natural parents. The Court at first instance granted him an individual charter remedy, declaring the statute to be discriminatory, and extending to natural parents the same right to parental leave as adoptive parents.[67]

[124] That decision was affirmed on the first appeal. Then, before the Supreme Court appeal was heard, the statute was amended to extend parental benefits to natural and adoptive parents indistinguishably, but for 10 not 15 weeks.

[125] The Supreme Court then held that, to the extent that the statute was discriminatory, it was of no force and effect under the Constitution Act 1982. But it also held that the father could not under the Charter be granted declaratory relief conferring on him and other natural parents the same parental leave rights as adoptive parents enjoyed.[68] It also held that a grant of damages would have been wrong.[69] As Lamer CJ said, with our interpolations:[70]

> An individual remedy under ... the Charter will rarely be available in conjunction with an action under ... the Constitution Act 1982. Ordinarily, where a provision is declared unconstitutional and immediately struck down ... (under that latter Act) that will be the end of the matter. No retroactive ... (individual remedy) will be available.

[126] *Schachter* does assist us, however, on this reference in two ways and firstly as to the Ministry's point that there might have been a non-discriminatory policy or practice in place in the years during which Mrs Spencer suffered discrimination, under which she might have little or no benefits, more especially given that Parliament did intervene by the 2013 amendment.

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67 *Schachter v Canada* [1992] SCR 679.
68 At 720.
69 At 725.
70 At 720.

[127] Lamer CJ said that the amendment made to the impugned statute in that case by the legislature would not have been made by the Court by way of declaration under the Constitution Act 1952:[71]

> Parliament equalised the benefits given to adoptive parents and natural parents but not on the same terms as they were originally conferred ... . The two groups now receive equal benefits for 10 weeks rather than the original 15. This situation provides a valuable illustration of the dangers associated with reading in when legislative intention with respect to budgetary issues is not clear. In this case, reading in would not necessarily further the legislative objective and it would definitely interfere with budgetary decisions in that it would mandate the expenditure of a greater sum of money than Parliament is willing or able to allocate to the program in question.

[128] *Schachter* also assists us as to whether damages should be awarded. Lamer CJ also said:[72]

> The classic doctrine of damages is that the plaintiff is to be put in the position he or she would have occupied had there been no wrong. In the present case, there are two possible positions the plaintiff could have been in had there been no wrong. The plaintiff could have received the benefit equally with the original beneficiaries, or there could have been no benefit at all, for the plaintiff or the original beneficiaries. The remedial choice under s 24 thus rests on an assumption about which position the plaintiff would have been in.

Mackin v New Brunswick

[129] The Ministry then relies on another decision of the Supreme Court, *Mackin v New Brunswick (Minister of Finance)*,[73] where a statute abolishing supernumerary Judges, and substituting a panel of retired judges paid daily, was held unconstitutional because it violated judicial independence, which was guaranteed by the Charter and the Constitution.

[130] In that case, however, the declaration was suspended for six months, except as it applied to the claimant, to allow the Courts to continue to function, and there too damages were not granted. Gonthier J, for the Court, held that damages were unwarranted in principle:[74]

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71 At 724.
72 At 725.
73 *Mackin v New Brunswick; (Minister of Finance); Rice v New Brunswick* [2002] 1 SCR 405, [2002] SSC 13.
74 At [78].

> According to a general rule of public law, absent conduct that is clearly wrong, in bad faith or an abuse of power, the Courts will not award damages for harm suffered as a result of the mere enactment or application of a law that is subsequently declared to be unconstitutional. ... In the legal sense, therefore, both public officials and legislative bodies enjoy limited immunity against actions in civil liability based on the fact that a legislative instrument is invalid.

[131] As Gonthier J then explained:[75]

> The limited immunity given to government is specifically a means of creating a balance between the protection of constitutional rights and the need for effective government. In other words, this doctrine makes it possible to determine whether a remedy is appropriate and just in the circumstances.

[132] The HRA does not confer any such limited immunity on departments of state. But we are obliged to take into account under s 92P such issues as the extent to which the Ministry acted in good faith in devising and administering its disability policy, set against the size of the classes entitled to assistance and the budgetary constraints. The Ministry must be allowed some latitude.

Ward and Wynberg

[133] The Commission contends that the Supreme Court departed from that calculus in *Vancouver (City) v Ward*,[76] recognising that an award of damages will always have a chilling effect on Government conduct, but can promote good governance. However, as the Ministry says, that case concerned the right to be free from unreasonable search and seizure. It did not involve a generic breach of any significant fiscal consequence.

[134] Finally, the Ministry relies on *Wynberg v Ontario*,[77] a decision of the Ontario Court of Appeal where the Court set aside a declaration that a publicly funded intensive service for autistic children, confined to those under six, discriminated against those over six. In that case the Court held that even where a policy is declared to be invalid, as opposed to a statute, that remedy is comprehensive.

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75 At [79].
76 *Vancouver (City) v Ward* [2010] SCC 27.
77 *Wynberg v Ontario* (2006) 269 DLR (4th) 435 (Ontario CA).

Damages will not be appropriate. The Supreme Court of Canada refused leave to appeal.[78]

Hutchinson v British Columbia

[135] Mrs Spencer and the Commission are entitled to rely by way of contrast on a decision of the Human Rights Tribunal of British Columbia, which was affirmed by the Supreme Court of that province, *Hutchinson v British Columbia (Ministry of Health).*[79] In that case the Tribunal awarded significant damages to the father of a daughter disabled by cerebral palsy, who had been her primary caregiver since she was 13.

[136] Under the disability policy there in issue the daughter was entitled to fund her own caregivers, but not to fund her father. Her contracted caregivers had proved unsatisfactory, however, and that is why he had become her primary care giver and become unable to work. The Tribunal found the policy to be discriminatory; a conclusion it said which did not require it to rule on the constitutional validity of any legislation.

[137] This decision was given well after *Schachter* but preceded *Mackin* and may not readily reconcile with *Wynberg*. However, it is a useful illustration, we consider, of the form of calculation possible where a conventional award of damages is able to be made for pecuniary loss, as is the case under the HRA on this reference.

[138] We also note that, while the Tribunal awarded the father lost wages, it made two discounts from his claim. First it discounted his wage calculation by 10 per cent to recognise that he had lost the opportunity to work, not work itself. Secondly, it made a 30 per cent discount to recognise that he did have a duty as a parent to look after his daughter. He did receive interest.

[139] As well, the Tribunal awarded $8,500 damages to the claimant's daughter and $4,000 to him for injury to their dignity, feelings and self respect. It also directed the

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78 *Wynberg v Ontario* (2007) Carswell Ont 2148.

79 *Hutchinson v British Columbia (Ministry of Health)* [2001] BC HRT 28; *R v Hutchinson* 261 D.L.R. (4th) 171.

administering department to cease and desist from discriminating in that way in the future.

Murphy v Attorney-General

[140] Finally, we mention a decision of the Irish Supreme Court, *Murphy v Attorney-General*,[80] on which both the Ministry and the Commission rely, which we consider does assist us in the balance we are obliged to strike between Mrs Spencer's claim for pecuniary loss and the public dimensions of her claim which s 92P(2) make mandatory.

[141] There a tax statute was held to be void under the Irish Constitution because it deemed married couples to be a single economic unit, entitled to a single set of tax free allowances, but allowed non married couples each to claim their own allowances individually.

[142] In that case, in contrast to the equivalent Canadian cases, the Court did confer a remedy, but not for all the tax years during which the couple, whose appeal it was, had suffered this discrimination. The Court held that:[81]

> While it is central to the due administration of justice in an ordered society that one of the primary concerns of the Courts should be to see that prejudice suffered at the hands of those who act without legal justification, where legal justification is required, shall not stand beyond the reach of corrective legal proceedings, the Court has to recognise that there may be transcendent considerations which make such a course undesirable, impractical, or impossible.

[143] The law, as the majority pointed out, had in a variety of ways always held that those, who might otherwise have been entitled to a remedy, be debarred where that was called for as a matter of public policy. In the case in issue the appellants had paid tax without objection in each relevant year; and the state relying in good faith on its laws being valid had budgeted accordingly.[82]

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80 *Murphy v Attorney-General* [1982] IR 241 (SC).
81 At 314.
82 At 318.

[144] As a result the couple were allowed relief only in respect of one financial year, the year in which in which they began their case. The Court also noted that no other taxpayer had commenced a case with the result that the only taxpayers entitled to claim were the appellants. There was no wider fiscal impact.[83]

Award proper

[145] As a result of our review of the Ministry's evidence, set against the s 92P principles, and these cases, we have decided to grant the Ministry's application in part. Mrs Spencer is, we find, entitled to an award for pecuniary loss but not as from 22 December 2001, when her cause of action accrued. Her award should run from 20 October 2005, when the *Atkinson* claimants filed their first statement of claim. Our reasons are these.

Conventionally quantifiable loss

[146] The award to which Mrs Spencer is entitled, we consider, is quantifiable on the straight forward premise that during the years in issue she assisted Paul with services to which he was entitled under the Ministry's home based support services policy, under which external providers received or could have received payment.

[147] That loss is tangible, as her expert witness, Mr Goodall, who prepared her calculation, said. As a result of being denied such payments by the Ministry, she had either to borrow money and incur interest or was denied the ability to save and earn interest. The *Atkinson* declaration from which she has now benefited, as a result of the 2013 amendment, could not compensate her.

[148] In this we set to one side the Ministry's submission, founded on *Schachter*, that such a calculation cannot begin to be made because, during those years, the Ministry might have had a non-discriminatory policy under which Mrs Spencer received nothing or significantly less than she now claims. Notionally that is true but, in contrast to *Schachter*, here that is an implausible abstraction.

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[83] At 324.

[149] In their opinion evidence for the Ministry, Dr Scott and Dr Yeabsley, relying on the brief of Donald Gray, formerly the Ministry' Deputy Director General, Policy, who died in 2015, take the issue no further. Both say that the Ministry's policy was in such flux during the years in issue that they are unable to say what policy the Ministry might then have adopted.

[150] The purport of their evidence may well be that Mrs Spencer cannot therefore assert that during the years in issue there would have been a non-discriminatory policy under which she was entitled to funding of the order she claims. But the converse inference is more plausible on the evidence reviewed and accepted in *Atkinson*.

[151] There this Court held that, during the years in issue, the Ministry's discriminatory home based support services practice was not government policy. Also that the policy review *Hill* engendered remained inchoate even at the date of that first appeal. The Court of Appeal also remarked that, while the policy debate had begun by assuming that funded family care was wrong in principle, that assumption had begun to change; and that was well before the 2013 amendment.

[152] Thus, we conclude, Mrs Spencer is entitled in principle to an award calculated by reference to the Ministry's own then discriminatory home based support services practice, and the rates it was then prepared to pay external care providers.

Good faith and related considerations

[153] In reaching that conclusion, we wish to be clear, we accept, as did the Courts in *Atkinson*, that the Ministry acted throughout in good faith,[84] and that the question of funded family care was a significant and complex issue.[85] But it was not novel. It was the very issue with which the Ministry had been wrestling since *Hill*; and, despite that, the Ministry persevered in its discriminatory practice.

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84 Section 92P(1)(a).
85 Section 92P(1)(c).

[154] We also accept that as Mr Gray said in his brief, and as Katherine Brightwell, a group manager within the Ministry's business unit confirmed, the policy and legislative response the *Atkinson* declaration called for had significant complexity. But as we have said, that cannot answer her entitlement to a compensatory award.

Constitutional and fiscal concerns

[155] The Ministry's still larger concerns are that an award would trench on the requirements of fair public administration and the obligations of the Government to balance competing fiscal demands.

[156] The Ministry contends that an award in this case would set a precedent governing later claims alleging the same generic discrimination. In effect it would extend retrospectively eligibility under a social program, which had been set in place by the Ministry under a statute; and policy setting is for the executive, not for the courts.

[157] The Ministry then contends, much as it did in *Atkinson*, that if an award of damages were made, in excess of 9000 people might have an interest as potential claimants under the 2013 funded family care policy.[86] Also that, if Mrs Spencer's $1.25M claim were replicated by 50 similar claims, that could cost $62.5M. If there were 500 such claims it could be $625M.

[158] In this last respect the Ministry relies on the evidence of Nicholas Hunn, a forecasting and planning consultant, who devised the family care cost model from which the policy choices made by the 2013 amendment derive. But there is countervailing evidence, which we find telling; and it concerns the extent to which there have been claims advanced under the 2013 amendment.

[159] Toni Atkinson, the Ministry's Group Manager of Disability Support Services, confirmed that in the 2013 budget $23M was allocated to funded family care. But the take-up in that year was $2.5M. In 2014 – 2015 it was some $5.1M. In 2015 – 2016 it was anticipated to rise to $5.9M. John Marney, a principal adviser to the

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[86] Section 92P(1)(b).

New Zealand Treasury in the health sector, said that the take-up had been much lower than anticipated, and that this put in issue the accuracy of the model.

[160] According to the Commission's evidence in *Atkinson*, moreover, as at 11 March 2013 the class likely to claim as a result of the declaration was relatively small. Fifty six people had acquired or complained about the Ministry's then home based support services policy. Nine were the *Atkinson* claimants themselves. The Commission had closed 25 complaints and suspended 20 to await the outcome of *Atkinson*. There was one then still open.

[161] As at 13 November 2015, the Commission's evidence on this reference is that it had received five further complaints. The Ministry had declined to mediate three. The Commission was awaiting the Ministry's response to the fourth. It had still to notify the Ministry about the fifth. That is hardly a significant increase.

2013 amendment

[162] Finally, in assessing fiscal risk, however, we rely primarily on the 2013 amendment itself, which was carefully framed to limit any such risk in two decisive ways.

(a) It affirmed the principle that those supporting family members were not generally entitled to payment for their services and that any payment had to be permitted under a funded family care policy or expressly authorised by statute.[87]

(b) It ruled out any claim to the Commission or any proceeding before the Tribunal or any Court, founded on a complaint of discrimination, unless made before 15 May 2013.[88]

[163] Conversely, and as importantly, the legislature preserved the *Atkinson* claim. Even though the *Atkinson* claimants then had the benefit of the Tribunal's declaration and of the 2013 amendment itself, the legislature did not deny them their ability to

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87 Section 70C.
88 Section 70E(3)(4).

pursue their claim for damages.[89] The legislature also preserved Mrs Spencer's ability to pursue her then application for judicial review.[90]

[164] In preserving the *Atkinson* claim, we consider, the legislature struck a balance which is highly significant to our own s 92P(2) analysis. It suggests that the legislature accepted that in their case a damages award would not be inconsistent with the requirements of fair public administration or with the government's obligation to balance competing fiscal demands. Indeed the Ministry settled their claim at mediation.

[165] The legislature did not, we accept, assure Mrs Spencer the same right to a remedy. But it recognised her claim to the extent that it preserved her application for judicial review; and on that review, and on her related application for a declaration as to the effect of the 2013 amendment, Mrs Spencer became entitled to become an *Atkinson* claimant. The Ministry accepted that to be so. Her claim to a remedy only remained unmediated because of its scale.

Related conclusions

[166] In Mrs Spencer's case also, therefore, we conclude that the balance struck by the legislature in the 2013 amendment, under which it distinguished between the *Atkinson* claimants and any others in the same class except perhaps Mrs Spencer, must also inform the balance we strike in her case under s 92P.

[167] Mrs Spencer may not be an *Atkinson* claimant in the temporal sense. Their first statement of claim was on 20 October 2005 and she did not complain to the Commission until September 2007, but as an *Atkinson* claimant, we consider, she is entitled to damages as from the date of their statement of claim.

[168] To allow her damages as from December 2001, when her cause of action first accrued under the HRA, however, would be to allow her a scale of claim inconsistent with the 2013 amendment. It would be inconsistent with the fact that in the years preceding 2005, indeed 2007, the Ministry in good faith attempted to devise a

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89 Section 70G(1).
90 Section 70G(2).

disability policy responding to *Hill*. It would accord to her a right to recompense not accorded to those who suffered the same generic discrimination, but who have not claimed or have claimed too late. Such an award would also cut across the requirements of fair public administration and the obligation of the government to balance competing fiscal demands. It could have a significant fiscal effect.

[169] We will return later to Mrs Spencer's claim for damages for humiliation, loss of dignity, and injury to feelings. That claim, as the Ministry says, involves two issues. One is whether the discrimination she has suffered carries those consequences inherently. The other is whether, if it does, that has to be offset by the public interest factors to which we have just referred.

PAUL SPENCER'S SUPPORT NEEDS

[170] There is no issue on this reference that Paul Spencer is under a disability, or that he has needs for support which the Ministry is responsible for funding. The issue is as to the scale of his needs and, ultimately, by what measure they are to be assessed. We begin with Mrs Spencer's own evidence.

Mrs Spencer's evidence

[171] Mrs Spencer says that in the course of a single day, Paul can act like a toddler, a determined teenager and a very elderly man. He takes constant prompting and supervision and that need has become more pronounced as he has grown older and his condition, especially his patience, has deteriorated.

[172] Paul's day begins at 7 am and ends between 8.30 – 10.30 pm, depending on how he is feeling. Mrs Spencer plans Paul's day the night before, because he needs routine. He cannot make decisions and follows her around the house like a shadow. He has a short attention span and can only stay on task for five – 10 minutes. She constantly supervises and supports him.

[173] Mrs Spencer confirmed that, as long as she does so, Paul is capable of achieving a number of things during his day:

(a) He is able to shower and go to the toilet but has difficulty with the latter and sometimes needs changes of clothes. She assists him with his grooming.

(b) He is able to dress himself but has difficulty choosing clothing for the weather and she has always to ensure that his buttons, zips and laces are secure and that can take time too.

(c) He is able to undertake simple tasks like unloading the dishwasher and tidying his room and putting out the rubbish. He can help with weeding in the garden. But here too he must be constantly supervised.

(d) He can put his clothes in the laundry but is not able to use the washing machine and cannot hand wash his clothes. He can peg out clothes but can also damage them.

(e) He collects stamps and coins and Mrs Spencer encourages him to paint and to work with wood. But he once hurt his finger during woodwork and did not tell her. He was admitted to hospital for three days on intravenous antibiotics.

(f) He loves running and lifting weights and Mrs Spencer has taught him to run a set route in their neighbourhood because, while he cannot read road signs, he can recognise them. He can, however, be inattentive at crossings and there have been potentially serious incidents.

[174] Paul sometimes tells her, Mrs Spencer says, that he is getting old. She says she first began to notice this about 15 years ago. He can forget what he is meant to collect and come back with something else. He has greater difficulty understanding and following her instructions. She questions whether he may be increasingly prone to dementia. But he also has difficulty hearing and wears hearing aids.

[175] These days, she said, it takes longer than it once did for Paul to complete his tasks. But that simply means that they have to work through them together at a slower rate and get through fewer tasks. The time that she devotes to his support and supervision has remained constant.

Lenard Nel's evidence

[176] In this Mrs Spencer relies on the generally consistent evidence of Lenard Nel, a psychologist with Child and Young Persons' Psychological Services whose speciality is working with students with neuro-development disorders including Down syndrome, and who was Paul's teacher in 1983 at Somerville Special School.

[177] As a result of suffering Down syndrome, Mr Nel said, Paul suffers intellectual disability limiting his conceptual, social and practical skills. He has problems with his vision and hearing. He suffers verbal short term memory deficit. He has poor sequencing skills and a diminished ability to understand and retain what he hears. His mental processes are slow and he has difficulty expressing himself. His motor skills are poor and his attention span short.

[178] Mr Nel recalled, when he was Paul's teacher, Mrs Spencer setting Paul tasks and ensuring that he demonstrated the skills he acquired to her. Although Mr Nel has seen Paul infrequently more recently and has relied on what Mrs Spencer has told him, he considers that Paul would not have accomplished what he has been able to without her constant support and encouragement.

[179] He highlighted Paul's accomplishments. In 1991 Paul completed an Outward Bound Course. In 1993 he obtained a Duke of Edinburgh gold medal and he participated in Special Olympics at ten pin bowling and swimming. He has also skied, representing New Zealand at the Japan Games in 2005.

[180] Mr Nel also said that more recently he has seen how Paul has regressed. Paul's cognitive ability is less evident. He has less self motivation. He shows less initiative. That has been particularly so since his 40th birthday in 2008.

Dr Judson's evidence

[181] The Ministry relies on the evidence of Dr Nicholas Judson, a consultant psychiatrist one of whose specialties is intellectual disability. He gave evidence as to the nature and effects of Down syndrome and dementia, generally consistent with that given by Mr Nel. Then, though he has not assessed Paul himself, he puts in issue Mrs Spencer's evidence as to Paul's decline over 15 years set against Paul's medical records.

[182] Paul's GP records between July 1997 – June 2012 indicated, he said, that Paul had been assessed mostly for routine medical issues and hearing impairment and nothing especially out of the ordinary until 2010. Then in April 2010 his GP noted that Mrs Spencer was concerned about his behaviour, that he was "turning into an old man but also as if he is five and a rebellious teenager as well". As a result Paul was referred to the memory clinic, Auckland hospital.

[183] Paul was first assessed by Dr Richard Worrall at the Memory Clinic on 29 June 2010. Dr Worrall then recorded that Mrs Spencer was concerned about Paul's out of character behaviour at road crossings. He also noted that Mrs Spencer shared Paul's frustrations as a result of their financial constraints. He did not find any evidence of depression or psychosis.

[184] Then on 24 August 2010, after Paul had undergone a normal CT scan, Mrs Spencer told Dr Worrall that, unusually, Paul had begun faecal soiling. That and other issues led Dr Worrall to consider that Paul might be showing the early signs of Alzheimer's disease; a conclusion he confirmed when he saw Paul on 21 December 2010, 6 December 2011 and 4 December 2012. Each time he noted subtle but definite changes consistent with cognitive decline.

[185] Conversely, however, as Dr Judson also pointed out, Dr Worrall did not note any major safety issues or disruptive behaviours like sleep disturbance, wandering, agitation and aggression or unsafe behaviours. In those senses Paul's state remained relatively stable.

[186] Dr Judson considered that Mrs Spencer's evidence demonstrated that she had given Paul careful and devoted attention throughout his life. Also that she had sometimes gone to extraordinary lengths, to encourage Paul to develop his domestic and personal care skills. Dr Judson considered her description of his disability and behaviour were typical of Paul's condition.

[187] He said, however, that Mrs Spencer's evidence that she had noticed memory changes in Paul for some 15 years appeared inconsistent with his medical records and Mr Nel's evidence that the changes appeared most noticeable at about Paul's 40th birthday in late 2008.

[188] In his experience, Dr Judson said, it would be very unusual for the changes Mrs Spencer had observed to have begun 10 years before the already subtle changes that became apparent to Dr Worrall in 2010. The reference to faecal soiling appeared to him to be consistent. Thus, his evidence is that Paul's cognitive decline is unlikely to have been marked before 2010.

2003 – 2010 needs assessment

[189] The effect of Mrs Spencer's evidence set against the clinical evidence is, as we understand it, that Paul's needs have been relatively constant since at least April 2010. The issue is rather whether between 2005 – 2010 he was less dependent on Mrs Spencer than he became after 2010 and that in those years his qualifying needs were less.

[190] As to that, we have only Paul's needs assessments between 2001 – 2010 and there were six assessments made. He was assessed twice initially but not comprehensively until February 2003, then reassessed more briefly in 2005 and 2008; assessments which added little to the 2003 assessment. He was not reassessed more comprehensively until April 2010.

[191] These assessments have been reviewed by Janice White, the National Co-ordinator of Needs Assessments, who said that those between 2001 – 2010 appeared to be relatively consistent. But, she added, it would be difficult to record every relevant factor of a disabled person's life.

[192] Ms White said that, while the earliest reports did not reliably enable Paul's needs to be assessed between 11 May 2001 – 28 January 2002, she could confirm that between January 2002 – April 2010 Paul's qualifying needs remained constant: 3.40 – 4 hours for personal care and 6.30 hours for household management. In 2010 she considered his personal care warranted 4.10 – 4.5 hours and household management 10 hours.

[193] Then in 2010, Ms White concluded from the clinical evidence, Paul's cognitive ability began to decline, and incontinence became a greater issue. He showed some signs of diminished insight, and required more time, and was more anxious and annoyed. That is why, when she reviewed the 70 hour November 2013 needs assessment on which Mrs Spencer relies, she concluded that Paul's needs had risen to 29.5 hours each week.

November 2013 needs assessment and review

[194] The 70 hour assessment on which Mrs Spencer relies was made by a Taikura Trust assessor, Alison Redwood, on 28 November 2013.

[195] Ms Redwood, who did not give evidence, spent five hours with Mrs Spencer and Paul and assessed Paul under a series of headings: his background and present living situation, his current support networks, his ability to communicate, his sensory function, his level of mobility, his recreational and social activities, his income support, his household management, his personal care, his memory, behaviour and cognition and information about his carer, his mother, and desired outcomes.

[196] As a result, in a calculation we have not seen ourselves, Ms Redwood assessed Paul's disability support needs to come to 70 hours a week and later recommended that Mrs Spencer be paid for 40 hours services and that the further 30 hours called for should be met by an external funded provider.

[197] The assessment Ms White made as National Reviewer at the request of the Chief Executive of the Taikura Trust was in part engendered by the fact that Ms Redwood had not assessed Paul's needs under the allocation guidelines applying to home based support services. Ms Redwood had assessed him using a tool Ms White

had devised to assess the needs of those entering residential care, which she said was materially different.

[198] Ms White's review begins with the allocation made for "daily living" (toileting, getting up in the morning, dressing, grooming, bathing and night support). Ms Redwood's assessment allocated 107 minutes to these services. Ms White increased that allocation to 150 minutes, adding this:

> The review recognised that Paul does not require hands on support for these activities. Paul does require prompting, supervision and encouragement, and Margaret needs to check he is completing them properly, for example toileting. The key difference is hands on support versus prompting and supervision. The review also recognises that Paul's need for prompting and direction has increased due to his cognitive decline. Paul has become more challenging for Margaret to divert and more resistant to change requiring more effort from Margaret. Paul is more reluctant to leave Margaret's side.
>
> Toileting – time added for this because it is recognised that Margaret needs to check to make sure that Paul is completing this properly. The need for Margaret to do addition laundry has been considered in the amended allocation for household management.
>
> Dressing – Paul does not require hands on support and the NASC proposal is based on a person requiring hands on help to dress. Paul can choose his clothes. These are laid out for him and Margaret will often need to check his choices are appropriate.
>
> Grooming – 30 minutes is a high allocation even for a person who requires hands on support with this task. Paul certainly requires encouragement, prompting. The guideline for this type of support is a maximum of five minutes.
>
> Bathing/showering – Paul often has 3 showers per day because of his running. Margaret provides prompting, encouraging and checking that Paul completes this properly.
>
> Night support – this support is allocated when a person has a minimum of 2 disturbances at night and/or they require turning. The needs assessment notes that Paul can sometimes be unsettled. This would not typically be sufficient to justify an allocation of support under this category. However the review has recognised that Paul requires prompting to get ready for bed so time has been allocated for this.
>
> Health – the review has recognised the support Margaret provides for GP visits under this head rather than household management.

[199] However, Ms White reduced to zero the 180 minute allocation, which Ms Redwood had made for communication and said this:

> The NASC proposal is based on guidelines for residential support. communication is not a consideration under the HCSS/FFC guidelines. In a residential setting the guidelines allow time for communication to be allocated for non-family carers, emotional support, and communication.

[200] Ms White also reduced to 102 minutes the 210 minute allocation made by Ms Redwood for household management. Her rationale was this:

> The review outcome approves a total of 12 hours per week (102 minutes per day). This allocation is to cover all daily living tasks. The review recognised that Margaret has to complete many of these after Paul is asleep because he is with her constantly during the day.
>
> This is broken down by tasks:
>
> Laundry – 2 hours per week which recognises that Paul will have extra laundry from his running and other checks Margaret does. It also recognises that Paul can offer some assistance, for example by collecting his clothes and taking them to the washing machine.
>
> Meal preparation and support – 1 hour per day. This recognises that Margaret must supervise and assist with all meals. Paul carries out these tasks with planning, prompting and supervision from Margaret.
>
> Personal shopping – 2 hours per week. This is outside the guidelines for FFC, but it is recognised that Margaret supports Paul to make choices, be involved in the planning and selection of items. Supporting Paul in this way, rather than making all the choices for him, is considered as skill development. Skill development is a consideration under residential support but not under HCSS/FFC guidelines.
>
> Similarly community integration is not allocated under HCSS guidelines because a person has chosen to remain at home. However, this has been considered because it is recognised that Margaret has suggested living away from home with Paul but he is adamant that he wants to remain at home with Margaret.
>
> Home hygiene – one hour per week. This acknowledges that Margaret has to do extra to keep the house clean but this is specific to the person and not the entire household if the person is able-bodied.

[201] Ms White also reduced to zero the 215 minute allocation Ms Redwood had made for meal support and preparation, health, evening support, personal shopping and budgeting, because they lay under household management and health was recognised elsewhere in the allocation.

Qualifying needs

[202] We rely on Ms White's then assessment that as at 28 November 2013 Paul's qualifying needs each week, for which Mrs Spencer became entitled to recompense as funded family care, came to 29.5 hours each week (even though she would now prefer to reduce it by six hours). The larger issue, we think, is whether his needs in 2010, or more particularly 2005, were significantly less.

[203] Ms White says that they were, but we are unconvinced by that aspect of her evidence. Dr Worrall's assessments between June 2010 – December 2012 provide a valuable benchmark. Over that period of two and a half years he noted that Paul suffered subtle cognitive decline, and that satisfies us that in those years Paul's state remained relatively stable.

[204] Dr Judson's derivative evidence is not inconsistent, and we have no reason from Mrs Spencer's evidence to suppose that Paul then suffered any significant decline before the November 2013 assessment. That being so, we consider that at least back until 2010 his qualifying support needs could well have stood at 29.5 hours each week.

[205] Paul's needs assessments before 2010, which we have also reviewed, do not to our mind establish reliably that his needs as they were from November 2005 onwards were significantly less. The assessments are too inexact, and we mean that in no sense critically, to found such a conclusion.

[206] We accept therefore Mrs Spencer's evidence that as from November 2005 Paul's qualifying needs are more likely than not to have been not less than 29.5 hours each week, while recognising that she would say they were considerably more.

DAMAGES AWARD

[207] Against that background we now set out the award of damages we consider to be appropriate for Mrs Spencer beginning with that claimed for pecuniary loss.

Pecuniary loss award

[208] We calculate Paul's qualifying needs since 20 October 2005 under that primary head, as we have said, at 29.5 hours each week, 4.21 hours each day. However we are also satisfied that those qualifying needs must be reduced in our calculation for two reasons.

[209] The first is that during that period Paul received three hours support services, which he still receives but which is inconsistent with Ms White's 29.5 hour assessment and is, we were told, to cease on the next review. We consider therefore that Mrs Spencer's loss since 2005 must assume she was deprived of payment for 26.5 hours each week, 3.79 hours each day.

[210] Secondly, since October 2005, and in the years before for that matter, Mrs Spencer herself also received at least 50 days carer support each year, which the Ministry funded, and during those seven weeks Paul was cared for either by his sister or by Special Olympics New Zealand. They, too, must also reduce the award to which Mrs Spencer is entitled. We reduce her daily entitlement to six days in each week.

[211] Finally, we consider that the hourly rate at which her award is to be calculated for home support cannot be the rate paid by the Ministry to support services providers, as Mr Goodall assumed in his calculation. We accept the Ministry's evidence that it included a 20 per cent overhead increment and that the hourly rates must he used must reduced accordingly.

[212] We also consider, however, that as Mr Goodall said, as a result of the Ministry denying Mrs Spencer support during those years she suffered an opportunity cost which ought to be reflected as a head of damage at five per cent, the lowest of the rates during that period set by the Judicature Act 1908.

[213] We incorporate that calculation in our total award, which we set out in an attached schedule, under which we award Mrs Spencer $207,681.84 for pecuniary loss.

Humiliation, loss of dignity and injury to feelings

[214] Mrs Spencer claims $100,000, relying essentially on the discrimination she has suffered. The Ministry contends that she suffered nothing unusual and the policy was administered in good faith, although as it happens in retrospect, in a fashion which discriminated against Paul and against her.

[215] We consider that the award she seeks cannot be reconciled with those cases where there has been an established concerted course of discriminatory conduct, sometimes with malice. Her claim relies on generic discrimination anyone benefiting under the policy might share. Her claim can only therefore be sustainable on specific evidence. Otherwise it would become an invariable increment on any generic discrimination claim and that could have an unacceptable fiscal consequence.

[216] Mrs Spencer does say that she was treated with disrespect by WINZ officers over many years; and there is a concerning email in 2001 between Ministry of Social Development officers, which could warrant an award if it were indicative of a course of conduct by the Ministry's officers in this case. However, it is not.

[217] The Commission contends that the award should focus instead on the stress Mrs Spencer has suffered during this litigation to vindicate her rights. There, however, we have to say, the scale of her claim did take it out of the ordinary and that required the Ministry to put in issue its remedial implications under the HRA. We are unable, therefore, to sustain this aspect of her claim.

Training order

[218] We see benefit, by contrast, in an order under s 92(3)(f) of the HRA requiring the Ministry needing to educate its officers in the importance of the human rights of disabled persons and their caregivers. That is a dimension, which appears to us to have gained only belated recognition in the policy debate within the Ministry following *Hill*; and then, we imagine, as a result of the Tribunal's *Atkinson* declaration. We make such an order.

Costs

[219] Mrs Spencer is entitled to an award of costs on the ordinary principle that costs follow the event. She seeks indemnity costs or a heightened award on the basis that the Ministry has responded excessively.

[220] We do not accept that the Ministry's response is excessive. The issue what damages should be awarded where a Government policy has been found to be systemically discriminatory is novel, as this case has made all too evident, and could involve large fiscal consequences. The Ministry was entitled to pursue the case as it did, and Mrs Spencer has not been fully vindicated in the award made.

[221] We award Mrs Spencer costs according to scale 3C and disbursements as fixed by the Registrar.

P.J. Keane J

B K Neeson

Pastor R Musuku

PECUNIARY LOSS AWARD

SUPPORT PAYMENTS

Period	Days	Hours	Rate	Total
20/10/2005 – 1/03/2006	135.43	513.28	13.33	6842.02
27/03/2006 – 31/01/2007	266.57	1010.30	15.00	15154.50
1/02/2007 – 31/03/2007	50.57	191.66	16.71	3202.64
1/04/2007 – 31/07/2007	104.57	396.32	16.71	6622.51
1/08/2007 – 31/03/2008	209.14	792.64	19.29	15290.04
1/04/2008 – 31/03/2009	312.86	1185.74	19.93	23631.79
1/04/2009 – 31/03/2010	312.86	1185.74	19.93	23631.79
1/04/2010 – 31/03/2011	312.86	1185.74	19.93	23631.79
1/04/2011 – 31/03/2012	312.86	1185.74	20.23	23987.51
1/04/2012 – 31/03/2013	312.86	1185.74	20.43	24224.66
1/04/2013 – 30/09/2013	156.86	594.50	20.84	12389.37

				178608.60

INTEREST

Interest	Yearly Interest	Multiplier	Total
6842.02	342.10	7.5	2565.71
18357.15	917.86	6.5	5966.09
21912.55	1095.63	5.5	6025.96
23631.79	1181.59	4.5	5317.15
23631.79	1181.59	3.5	4135.56
23631.79	1181.59	2.5	2953.97
23987.51	1199.38	1.5	1799.07
24224.66	309.73	1.0	309.73
12389.37	-	-	-

			29073.24

TOTAL AWARD **$207,681.84**

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2014-404-1667
[2017] NZHC 391

UNDER	the Human Rights Act 1993
IN THE MATTER	of a reference by the Human Rights Review Tribunal
BETWEEN	MARGARET SPENCER Plaintiff
AND	MINISTRY OF HEALTH Defendant

Hearing: 7 February 2017

Appearances: S L Robertson and PMC Gibbs for Plaintiff
MGC Coleman & M J McKillop for Defendant

Judgment: 9 March 2017

JUDGMENT OF PETERS J,
MR B K NEESON AND PASTOR R MUSUKU

This judgment was delivered by Justice Peters on 9 March 2017 at 12 pm
pursuant to r 11.5 of the High Court Rules

Registrar/Deputy Registrar

Date: .....

Solicitors:
Chapman Tripp, Auckland
Crown Law Office, Wellington

Counsel:
S L Robertson, Auckland
MGC Coleman, Wellington

[1] The Plaintiff, Mrs Spencer, applies to recall judgment given by Keane J, Mr Neeson and Pastor Musuku on 20 July 2016 ("application" and "judgment").[1]

[2] The Ministry of Health ("Ministry") opposes the application.

[3] Mrs Spencer seeks that the judgment be recalled, and amended and reissued to award interest to her from 1 October 2013 to 20 July 2016, ie the date of judgment.

[4] Mrs Spencer also seeks a response to a memorandum regarding costs that her counsel filed the day after the judgment was given. In the judgment the Court awarded Mrs Spencer costs on a 3C basis and disbursements, all to be fixed by the Registrar. Counsel seeks certification for two counsel.

[5] We propose to recall the judgment to make provision for the interest sought. We decline to certify for second counsel. Our reasons are as follows.

Jurisdiction

[6] High Court Rules, r 11.9 provides:

> **11.9 Recalling judgment**
>
> A Judge may recall a judgment given orally or in writing at any time before a formal record of it is drawn up and sealed.

[7] The principles applicable to recall are set out in the judgment of Wild J in *Horowhenua County v Nash (No 2)*:[2]

> Generally speaking, a judgment once delivered must stand for better or worse subject, of course, to appeal. Were it otherwise there would be great inconvenience and uncertainty. There are, I think, three categories of cases in which a judgment not perfected may be recalled—first, where since the hearing there has been an amendment to a relevant statute or regulation or a new judicial decision of relevance and high authority; secondly, where counsel have failed to direct the Court's attention to a legislative provision or authoritative decision of plain relevance; and thirdly, where for some other very special reason justice requires that the judgment be recalled.

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1 Application on Notice by Plaintiff for Recall of judgment of Keane J dated 20 July 2016; and *Spencer v Ministry of Health* [2016] NZHC 1650.

2 *Horowhenua County v Nash (No 2)* [1968] NZLR 632 (SC) at 633.

[8] Counsel for Mrs Spencer relies on the third ground, that is for a very special reason justice requires that the judgment be recalled.

Keane J's retirement

[9] Keane J retired on 21 July 2016, the day after judgment was given. It is common ground that this does not in itself preclude recall. Rule 11.9 provides that "A Judge" may recall, and indeed this is not the first occasion on which this situation has arisen.[3] That said, the fact that two members of the original Court continue to be available is of assistance.

Background

[10] In or about 2014, Mrs Spencer brought proceedings against the Ministry in the Human Rights Review Tribunal ("Tribunal"), pursuant to s 92B Human Rights Act 1993 ("HRA").

[11] As a result of a Ministry policy which rendered family members ineligible for payment ("policy"), Mrs Spencer had been refused payment for support services that she had provided to her son Paul, who has Down Syndrome. This policy had remained in place until 30 September 2013 ("September date") and Mrs Spencer's case was that was discriminatory. She sought damages for the sum she had lost as a result.

[12] In July 2014, the Tribunal declared itself satisfied that the Ministry had breached Part 1A HRA and it referred the issue of remedy to this Court on the basis that remedy was likely to exceed the Tribunal's jurisdictional limit of $200,000.[4] Mr Neeson and Pastor Musuku, being two members of the Tribunal's panel, were appointed to the Court as required by the HRA.[5]

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3 *Erwood v Maxted* [2015] NZSC 181; *Lewis Holdings Ltd v Steel & Tube Holdings Ltd* [2016] NZHC 42; and *The Healey Holmberg Trading Partnership v Grant* (2011) 10 NZCLC 264,833, (2011) 9 NZBLC 103,182 (HC).

4 Human Rights Act 1993, ss 92I and 92Q.

5 Section 126.

[13] At the hearing in this Court, Mrs Spencer sought damages for "pecuniary loss" and for humiliation, loss of dignity and injury to her feelings. Mrs Spencer was not awarded the latter and we say no more about it.

[14] The Ministry opposed the granting of any remedy, let alone an award of damages. However, if the latter were to be awarded, the Ministry submitted various reasons why the sum Mrs Spencer claimed should be reduced.

Judgment

[15] The Court awarded Mrs Spencer damages for "pecuniary loss" comprising support payments and interest thereon at five per cent per annum. The total awarded was $207,681.84, that sum deriving from a calculation set out in a schedule to the judgment ("schedule").

[16] The schedule quantifies the support payments due ($178,608.60) and interest on them ($29,073.24), both to the September date. It is the calculation of interest to the September date, rather than to the date of judgment, that has led to this application. Interest calculated to the date of judgment is $54,482.47 and, if allowed, would increase the total award to $233,091.08.[6]

[17] Counsel for Mrs Spencer's argument is that the Court intended to compensate Mrs Spencer for being kept out of her money but that the calculation in the schedule does not fulfil that intention. Counsel submits that this intention is evident in [212] of the judgment, in which the Court says:[7]

> [212] We also consider, however, that as Mr Goodall said [expert accountant called to give evidence by Mrs Spencer], as a result of the Ministry denying Mrs Spencer support during those years she suffered an opportunity cost which ought to be reflected as a head of damage at five per cent, the lowest of the rates during that period set by the Judicature Act 1908.
>
> [213] We incorporate that calculation in our total award, which we set out in an attached schedule, under which we award Mrs Spencer $207,681.84 for pecuniary loss.

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6 Affidavit of R Gardi sworn 19 August 2016, Exhibit "RG 1".

7 *Spencer v Ministry of Health*, above n 1.

[18] Counsel submits that the Court's reference to Mr Goodall's evidence confirms that it was intended to compensate Mrs Spencer for being kept out of her money.

[19] Mr Goodall said:[8]

> I have included interest in the calculation of Mrs Spencer's claim. I believe that if the monies had been paid during the timeframe over which [Mrs Spencer] provided the relevant support services, there would have [been] one of two results. Either it would have eliminated Mrs Spencer's need to borrow (or not repay debt) due to the fact that Mrs Spencer could not seek paid employment. Alternatively it would have increased the quantum of investments held by Mrs Spencer and thus income arising therefrom. Therefore it would have resulted in either interest not having to be paid by Mrs Spencer or additional income to Mrs Spencer from the increased investments. I do not see why Mrs Spencer should be denied compensation for this loss.

[20] For this reason counsel for Mrs Spencer submits that by adopting the schedule, the Court has awarded interest only to the September date; that the schedule does not give effect to the judgment; and that justice requires that the judgment be recalled, and the schedule corrected.

[21] Counsel for the Ministry submits that judgment should not be recalled because, by her pleading and evidence, Mrs Spencer only ever sought interest to the September date. Counsel submits that the Court has not made an error but rather has given Mrs Spencer that which she sought.

[22] We do not accept this submission for the following reasons.

[23] First, as to Mrs Spencer's pleading, counsel for the Ministry referred us to [17] and the prayer for relief.

[24] Nothing turns on [17] of the statement of claim. All Mrs Spencer alleged in [17] was that she had suffered loss as a result of the policy by the denial of support payments between December 2001 and the September date. We do not read that as a statement by Mrs Spencer that her total loss was confined to that period.

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[8] Brief of Evidence of K N Goodall dated 30 October 2015 at [17].

[25] Likewise the prayer for relief, in which Mrs Spencer sought compensation for "pecuniary loss" pursuant to ss 92(I)(3)(c) and 92M(1)(a) HRA "including interest calculated in accordance with s 87 Judicature Act 1908", and "Such other relief as the Tribunal thinks fit pursuant to [s 92I(3)(h) HRA]".

[26] The interest award the Court made was granted as a component of Mrs Spencer's "pecuniary loss". There is nothing on the face of the relevant provision of the HRA (being s 92M(1)(a)) to limit the Court to the September date.

[27] Nor is there anything in the Ministry's opening submissions that suggest it thought the claim to interest was confined to the September date. The Ministry made general submissions to the effect that it was "inappropriate" for the Court to award pre-judgment interest; that s 87 was not applicable; and that any award of pre-judgment interest would have to be made pursuant to s 92I(3)(h) HRA – to which Mrs Spencer had referred to in her prayer for relief.

[28] It follows that, on balance, we are satisfied that it is apparent from Mrs Spencer's statement of claim that she was seeking an award of pre-judgment interest; that she did not confine that claim to the September date; and there is nothing in the Ministry's opening submissions to suggest that it understood the claim to be so confined.

[29] The Ministry also referred us to Mr Goodall's evidence. Mr Goodall's evidence was an attempt to quantify Mrs Spencer's claim, to the September date, having regard to the many variables that arose as to the hours per day/days per week/hourly rate(s) that the Court might allow. Again, however, we do not consider that Mr Goodall's evidence as to Mrs Spencer's loss as at the September date could or did constitute an abandonment of any claim to interest thereafter.

[30] As we have said, we accept Mrs Spencer's submission that the Court held that she was to be compensated for her opportunity cost and that the schedule does not reflect the judgment in that respect. Together these two matters constitute a ground on which to recall the judgment.

Costs

[31] As to costs, the Court said:[9]

> [219] Mrs Spencer is entitled to an award of costs on the ordinary principle that costs follow the event. She seeks indemnity costs or a heightened award on the basis that the Ministry has responded excessively.
>
> [220] We do not accept that the Ministry's response is excessive. The issue what damages [sic] should be awarded where a Government policy has been found to be systemically discriminatory is novel, as this case has made all too evident, and could involve large fiscal consequences. The Ministry was entitled to pursue the case as it did, and Mrs Spencer has not been fully vindicated in the award made.
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> [221] We award Mrs Spencer costs according to scale 3C and disbursements as fixed by the Registrar.

[32] The reference in [219] of the judgment to an application for indemnity or increased costs derives from the closing submissions for Mrs Spencer.

[33] The day after the judgment was issued, counsel for Mrs Spencer filed a memorandum to the Court in which she sought "clarification" on the matter of second counsel. As we have said, that memorandum requires a response.

[34] Before us, counsel referred us to several authorities in which the Court has certified for two counsel, often as a matter of course when awarding costs on a 3C basis.

[35] For our part, however, we prefer the Ministry's submission that the Court addressed the submissions made to it on costs; there was no request for second counsel at the time of those submissions; and that on this particular matter Keane J's retirement puts the Ministry at a disadvantage because of his knowledge as to the conduct of the hearing.

[36] It follows that we decline to certify for second counsel.

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9 *Spencer v Ministry of Health*, above n 1.

Result

[37] We:

(a) recall the judgment in this matter dated 20 July 2016;

(b) substitute the schedule attached hereto in place of that attached to the judgment; and

(c) reissue the judgment with this amendment.

Costs

[38] Costs on this application are to lie where they fall.

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Peters J

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B K Neeson

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Pastor R Musuku

PECUNIARY LOSS AWARD

Support Payments

Period		Days	Hours	Rate	Total
20/10/2005	1/03/2006	135.43	513.28	13.33	6,842.02
27/03/2006	31/01/2007	266.57	1,010.30	15.00	15,154.50
1/02/2007	31/03/2007	50.57	191.66	16.71	3,202.64
1/04/2007	31/07/2007	104.57	396.32	16.71	6,622.51
1/08/2007	31/03/2008	209.14	792.64	19.29	15,290.04
1/04/2008	31/03/2009	312.86	1,185.74	19.93	23,631.79
1/04/2009	31/03/2010	312.86	1,185.74	19.93	23,631.79
1/04/2010	31/03/2011	312.86	1,185.74	19.93	23,631.79
1/04/2011	31/03/2012	312.86	1,185.74	20.23	23,987.51
1/04/2012	31/03/2013	312.86	1,185.74	20.43	24,224.66
1/04/2013	30/09/2013	156.86	594.50	20.84	12,389.37
					$178,608.61

Interest

Interest	Yearly Interest	Multiplier	Total
6,842.02	342.10	10.39	3,555.97
18,357.15	917.86	9.31	8,547.41
21,912.55	1,095.63	8.31	9,104.24
23,631.79	1,181.59	7.31	8,636.94
23,631.79	1,181.59	6.31	7,455.35
23,631.79	1,181.59	5.31	6,273.76
23,987.51	1,199.38	4.31	5,165.55
24,224.66	1,211.23	3.31	4,005.36
12,389.37	619.47	2.81	1,737.91
			$ 54,482.47

Total award $233,091.08