ATTENTION IS DRAWN TO NON-PUBLICATION ORDERS MADE AT PARAGRAPH [93].

IN THE EMPLOYMENT COURT OF NEW ZEALAND
CHRISTCHURCH

I TE KŌTI TAKE MAHI O AOTEAROA
ŌTAUTAHI

[2020] NZEmpC 46
EMPC 314/2018

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	JCE Plaintiff
AND	THE CHIEF EXECUTIVE OF THE DEPARTMENT OF CORRECTIONS Defendant

Hearing:	3 September 2019 (Heard at Christchurch)
Appearances:	A Toohey and R Boulton, counsel for plaintiff A Shaw and H Martin, counsel for defendant
Judgment:	17 April 2020

JUDGMENT OF JUDGE K G SMITH

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[1] In June 2012 the plaintiff was seriously assaulted while working for the Chief Executive of the Department of Corrections as a corrections officer at the Otago Corrections Facility. As a consequence of this assault the employment relationship deteriorated over time to the point where the plaintiff and the department agreed that it should end. The cessation of the employment was described as a medical retirement. The employment ended on 5 October 2015.

[2] Eventually, the plaintiff was diagnosed as suffering from post-traumatic stress disorder (PTSD) and a depressive illness caused by the assault. He lodged a proceeding in the Employment Relations Authority alleging personal grievances for an unjustified action causing disadvantage in his employment, unjustified dismissal, and breach of contract for failing to provide a safe workplace. In response the department maintained it had acted as a fair and reasonable employer and denied the claims.

[3] The Authority held that the department breached contractual and statutory duties owed to the plaintiff and acted in an unjustified way causing him disadvantage in his employment by failing to take reasonably practicable steps to protect him from the foreseeable risk of harm at work.[1] The claim for unjustified dismissal was unsuccessful because the employment ended by agreement.

[4] The department was ordered to pay compensation. The sum of $30,000 was awarded to the plaintiff under s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act) for humiliation, loss of dignity and injury to his feelings for the disadvantage grievance. There was no separate award for damages for breach of contract. He was awarded $26,061.54 (gross) for lost remuneration pursuant to ss 123(1)(b) and 128 of the Act.

The challenge

[5] The plaintiff was dissatisfied with the remedies awarded to him and challenged the Authority's determination, seeking to increase them. He did so in a limited way, by claiming that the Authority had made errors of fact and law in reaching its conclusions about the remedies and in rejecting his claim for special damages for legal fees incurred in relation to his medical retirement.[2]

[6] The challenge to the amounts awarded by the Authority was in two broad parts. First, it was said to have erred by not awarding the plaintiff damages for breach of

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1 *JCE v The Chief Executive of the Department of Corrections* [2018] NZERA Christchurch 130 (Member van Kuelen).

2 Pursuant to s 179(4) of the Act; commonly called a non-de novo challenge.

contract or, alternatively, that the compensation awarded under s 123(1)(c)(i) of the Act was inadequate.

[7] The second part was about the method used by the Authority to calculate lost remuneration. The Authority took into account payments to the plaintiff for earnings-related compensation under the Accident Compensation Act 2001 (AC Act) and reduced the award because of them. The plaintiff's case was that his AC Act entitlements should not have been treated that way and he sought full reimbursement of his lost salary.

[8] The department accepted the Authority's determination and the conclusions that it breached the employment agreement and had caused a personal grievance giving rise to an unjustified disadvantage. It did not accept that the Authority made any errors of fact or law in assessing compensation and rejecting the claim for special damages. It opposed any increase in the amounts it has to pay.

[9] A brief description of what happened is necessary to place this proceeding into context. The challenge was conducted using a statement of agreed facts supplemented by evidence admitted by consent.

Employment begins

[10] In 2004 the plaintiff was employed as a corrections officer. In September 2009 he began working at the Otago Corrections Facility. At all relevant times his work was covered by a collective agreement between the department and the Corrections Association of New Zealand and he belonged to that union.

The assault

[11] On 12 June 2012 the plaintiff was assaulted by a prisoner in the high security unit of the prison. Prisoners were placed in the unit because of their behaviour while in prison rather than because of the offending for which they were convicted and sentenced. In 2012 this unit housed approximately 50 prisoners. On the day of the assault the prisoners had been divided into two groups of 25 and two corrections officers were assigned to each group. About half of the group to which the plaintiff

was assigned were outside the unit, with another corrections officer, and the rest were inside with him.

[12] While the plaintiff was seated he was punched from behind by one of the prisoners he was supervising. The punch was unexpected and he had no opportunity to attempt to defend himself from it. The punch was so forceful he was knocked unconscious before being struck by the same prisoner at least a further 20 times. When he regained consciousness, he was lying on the floor several metres away from where he had been sitting before being punched.

[13] The plaintiff was taken to hospital by ambulance. Later that day he was discharged. His physical injuries were two black eyes, a sore hand, and significant bruising. After a brief period away from work he provided a medical certificate to the department and returned to work on 21 June 2012. He went back to work in the same unit where he had been assaulted, with the same inmates who knew about or had witnessed the assault. At that time he was not diagnosed as suffering from any mental injury.

Problems emerge

[14] Before the assault JCE had a good work record. He had received two letters of commendation for his work performance. Until the assault he described enjoying his job and maintaining good working relationships with his colleagues and superiors. He considered his employment to be a career and had planned a long-term stay with the department. After the assault his working life changed dramatically.

[15] Over time, problems began to emerge in the employment relationship that had not existed previously. On his return to work in 2012 he felt stressed and anxious. He began to take a lot of time off, particularly in 2013. Much of this leave was unplanned and was unusual for him compared to his work before the assault. Despite thinking the feelings of stress and anxiety would abate over time, that did not happen. He had to take time off whenever there was a violent incident in the prison, because it caused him to relive the assault. There was one incident that did not involve him but caused him to take three days off work.

[16] The plaintiff described his life deteriorating in every respect after the assault and he had significant difficulty maintaining personal and professional relationships because he drove people away. He perceived comments by other corrections officers as meaning the assault was his own fault.

[17] He had trouble sleeping and developed an unfamiliar urge to cry at the slightest thing. He described himself as being exhausted, irritable and easily frustrated, intolerant, angry and fearful and that these feelings probably manifested themselves at work. He described throwing things, yelling and swearing while at work which he said was unlike any behaviour of his before the assault. One incident stood out after his return to work in the high security unit. Two prisoners were involved in aggressive posturing that looked likely to escalate. He attempted to calm down the situation but, while doing so, realised he was not able to cope. He became overwhelmed with nausea because he was afraid. Another corrections officer had to take over and the plaintiff went to a guard room where he felt physically sick, anxious and fearful. He had to go on leave.

[18] In September 2013 the plaintiff requested a transfer to what he thought might be an easier unit to work in and would involve less stress, better hours and shifts. However, instead he was transferred to a unit known for having the worst rosters at the prison. After being told about this transfer he left work and did not return for his rostered shifts on three consecutive days. The plaintiff subsequently discovered that this transfer was to the only unit in the prison willing to have him at the time. He transferred to the new unit and worked there from September to October 2013. That was followed by a transfer to another unit in October 2013. This new unit was where prisoners would go for basic education, rehabilitation and therapy. Unfortunately, in this unit he was dealing with the same prisoners who had been in the secure unit when he was assaulted and that led to taunts from them hinting that he might be assaulted again.

[19] It was not until September 2013, a little over a year after the assault, that the department referred the plaintiff to counselling. That step was taken because of the amount of time he was having away from work. This counselling led to a referral to

a doctor for further assessment and treatment for a mental-health condition. The plaintiff had a month's sick leave after the referral.

[20] Despite moving units in the prison and beginning counselling, the plaintiff's situation did not improve and the problems at work continued. In December 2014 he was called to a meeting and advised that he would no longer be able to attend the prison health unit because of a complaint by nursing staff there about his behaviour. He was not aware of these complaints before this meeting.

[21] At about the same time, one of the managers interviewed the plaintiff's colleagues about his behaviour and showed him the notes of those meetings. He was distraught at what was reported and had to be taken home after the meeting.

[22] In January 2015 the plaintiff had a particularly bad day at work and asked for permission to go home which was granted. The same day he was placed on leave for medical reasons and, later that month, received a letter from the department confirming that he was to attend a medical assessment to determine whether he could return to work. This decision was taken without prior consultation with him. It left him believing that the department was exploring whether he could be dismissed and he felt betrayed.

[23] Matters came to a head when the plaintiff's AC Act claim for compensation for PTSD was assessed and declined. In April 2015 his doctor had issued a medical certificate for PTSD that was sent to the department's claims manager for consideration, following which an independent medical assessment was requested. The claim for AC Act entitlements was reopened to determine if his mental health concerns were caused by PTSD and, if so, whether that was caused by the assault. He saw a psychiatrist and knew her report would determine the outcome of the decision about AC Act cover for PTSD.

[24] In July 2015 the psychiatrist provided a report which led to the claims manager recommending cover for PTSD be declined. This decision was delivered to the plaintiff by two department employees who visited him at his home to tell him the outcome of his application. The plaintiff is now aware, although he was probably not

aware at the time, that the psychiatrist he was examined by had been asked by the claims manager to revisit her opinion on two occasions before the decision was made.

[25] Receiving this news led to an extremely distressing episode for the plaintiff. He ordered the department's employees from his house and began to smash things. What followed was the first of four attempts at suicide. The police were called and that led to a month-long compulsory detention for a mental health assessment at Wakari hospital.

Medical retirement

[26] In July 2015 a message was relayed to the plaintiff, through his union, that the department thought he had two choices. He was to either go on a 12-month sabbatical or to accept medical retirement as provided for in the collective agreement. He had already completed an assessment about his fitness to return to work that had concluded he was not able to do so. From the time the plaintiff had left work in January 2015 he had used up a combination of short-term special paid leave, annual leave and sick leave but his entitlements were running out. He had left Otago and returned to Christchurch, where he was living with his parents, but had financial commitments to meet and needed to be able to access money for them. He considered himself as having no realistic option other than to accept the offer of medical retirement.

[27] The proposal for medical retirement was accepted and his employment ended by agreement, for that reason, on 5 October 2015. Under the collective agreement the plaintiff received a payment from the department based on his medical retirement.

The AC Act claim reviewed

[28] In September 2015 the plaintiff applied for a review of the decision made in July that year to decline AC Act cover for PTSD. He provided a new psychiatrist's report to support the claim. The claim was accepted in January 2016 and weekly compensation was reinstated and back-paid. He continued to receive compensation under the AC Act until it ceased when he began new employment in January 2018.

The consequences

[29] In the years after the assault the plaintiff's mental health has not improved. He constantly relives what happened to him, and described himself as emotional and erratic, as well as aggressive and irritable. He is sad all the time. When examined in late 2017 his psychiatrist's diagnosis was that his medical condition remained unchanged and he continued to suffer from PTSD and depression. There has been no change since then and his life continues to be dominated by his illness.

[30] There was no dispute about the detailed description the plaintiff gave of the circumstances that led to his assault or what he said happened to him afterwards. There is no doubt that the assault has led to severe, life-altering, consequences for him.

[31] There is no prospect of him ever being able to return to work as a corrections officer. He now earns a living as a labourer. He has suffered significant personality changes describing himself as two persons: the one who existed before the assault and the one who exists now. Having completely lost the former version of himself he described feeling like he is living a nightmare; having gone from a functional, contented man, happy in his job with good professional and personal relationships and financial independence to a person who has lost all of those things. He described himself as "…a man broken into a thousand pieces".

The determination

[32] The Authority analysed the plaintiff's claims in the following way:

> [8] The first two claims are based on the unjustified action causing disadvantage grievance and the breaches of the implied and statutory duties – these are essentially the same claim. At its simplest the issues are:
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> (a) Did Corrections fail to provide a safe work place for JCE in respect of the assault, and if so, was this a breach of any duty or obligation owed to JCE;
>
> (b) Did Corrections fail to provide a safe work place for JCE in respect of his return to work, and if so, was this a breach of any duty or obligation owed to JCE?
>
> [9] The third claim is the unjustified dismissal grievance. The issue for this claim is, if there was any failure by Corrections, did that failure lead to JCE's resignation such that it amounts to an unjustified dismissal.

(Footnotes omitted)

[33] The Authority recorded the alleged breaches of contractual and statutory duties as being of:[3]

(a) clause 1.6.1 of the collective agreement;

(b) section 56 of the State Sector Act 1988;

(c) section 6 of the Health and Safety in Employment Act 1992; and

(d) the implied contractual duty to provide a safe workplace.

[34] Clause 1.6.1 of the collective agreement required the department to act as a good employer in accordance with the State Sector Act 1988.

[35] The Authority's approach to the alleged breach of contract was:

> [22] To succeed in his claims relating to the assault and his return to work JCE will need to show that, on the balance of probabilities, Corrections breached its contractual duties, both implied and actual. That is, that Corrections failed to take reasonably practical steps, in the circumstances, to protect JCE from a foreseeable risk of harm.

[36] The Authority concluded that the risk of assault on a corrections officer by a prisoner was foreseeable. That conclusion was not disputed.[4] It held that the department did not meet its own staffing ratios in the unit where the plaintiff was working at the time he was assaulted and, therefore, failed to take practical steps to keep him safe from a foreseeable risk of harm.[5]

[37] The department's shortcomings were summarised as:[6]

(a) There was no debriefing of the plaintiff on his return to work.

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3 *JCE*, above n 1, at [14]. The Health and Safety in Employment Act 1992 was in force at the time of the assault but was repealed and replaced by the Health and Safety at Work Act 2015.
4 At [30].
5 At [68].
6 At [79].

(b) There was no return to work plan.

(c) No counselling was offered to him, which was a failure to comply with the department's policies.

(d) If properly applied, the policies would have resulted in an assessment and recommendation for counselling which would have been intensive and ongoing (initially daily, followed by weekly and monthly counselling sessions).

(e) When the plaintiff returned from leave in June 2012 there was no follow-up with him.

[38] The breach of contract and personal grievance claims were said to have arisen from the same cause; the assault and subsequent action or inaction by the department. They were treated together after the Authority had first recognised them as separate claims. Compensation and reimbursement of lost remuneration were dealt with by awarding them for the successful personal grievance.

[39] The Authority correctly noted that the plaintiff's coverage under the AC Act for personal injury for PTSD meant no award could be made for his personal injury.[7] However, compensation could be awarded for non-economic losses suffered by him falling outside of the AC Act. That conclusion meant an award could be made for the on-going psychological and emotional distress caused by the department's actions (or inaction). It decided that $30,000 was an appropriate amount to order under s 123(1)(c)(i) of the Act.[8]

[40] Attention then turned to reimbursement for lost remuneration. What complicated this assessment was that the department was an accredited employer under the AC Act. In that capacity it had funded the plaintiff's AC Act entitlements. Furthermore, to comply with the collective agreement, the department had topped up

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7 At [100]; Accident Compensation Act 2001, s 317.
8 At [104]–[106].

those entitlements by paying the difference between them and what the plaintiff would have earned.

[41] The Authority said:[9]

> … [Corrections] says, as it has already paid JCE ACC earnings compensation, any subsequent order for payment of lost remuneration may only cause double recovery. In this regard Corrections has paid JCE 100% of his wage entitlement whilst he was employed and eligible for ACC compensation and 80% of his wage entitlement from 5 October 2015, the date of JCE's medical retirement until 29 January 2018, when JCE obtained new employment.

[42] Having set out these considerations the Authority decided a balance was to be struck, observing that there may be an element of double recovery in the plaintiff's claim before concluding:

> [117] Standing back from this matter and applying equity and good conscience to it, I have concluded that I can resolve this conflict by applying s 128 of the Act and calculating JCE's actual loss by taking [into] account his ACC earnings related compensation paid to him by Corrections.
>
> [118] Whilst this is not the normal approach and may conflict with case law, I do not believe there is a legal impediment on me doing this – in the words of Chief Judge Goddard in *Murray v Attorney General* I can ignore a rule of law if in equity and good conscience it is appropriate to do so. The only proviso is I should not contravene New Zealand Statute law or the terms of an employment agreement.
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> (Footnotes omitted)

[43] Lost remuneration was calculated as $26,061.54 (gross). There were no circumstances that might have warranted a deduction for contributory behaviour by the plaintiff and that amount was awarded.

[44] The plaintiff's claim for special damages for the legal fees he incurred for representation during negotiations that led to his medical retirement was rejected.[10] The Authority was not satisfied that those fees could be said to flow as damages from any breach of contract by the department.

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9 At [115].

10 At [121], relying on *Stormont v Peddle Thorp Aitken Ltd* [2017] NZEmpC 71, [2017] ERNZ 352.

The first alleged error of fact and law

[45] The amended statement of claim challenged the amount of compensation the Authority awarded by alleging errors in paragraphs [105]–[106] of the determination. Those passages are under a heading "Compensation" and read:

> [105] I have considered the comprehensive medical evidence, the evidence from JCE's mother and JCE's evidence. In summary JCE suffered significant psychological harm (even excluding the PTSD) and this manifested in many ways and caused even more harm, including ultimately the loss of his career, his independence, his confidence and his normal way of life that he enjoyed prior to the assault. The attempted suicide sums up the complete loss JCE felt (and expressed in his evidence) even before he accepted medical retirement.
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> [106] After weighing all of the evidence and separating out what I consider arises out of or is symptomatic of the PTSD I consider $30,000.00 to be the appropriate value of the compensatory sum.

[46] Ms Toohey, counsel for the plaintiff, said that these paragraphs were about compensation for the personal grievance and showed an error had been made because they did not deal with the breach of contract claim and damages arising from it. The Authority was said to have fallen into error by drawing on *FGH v RST*, which case dealt with a breach arising from failing to provide a safe workplace, but was confined to an unjustified disadvantage claim and did not address contractual damages.[11] Ms Toohey's submission was that, having found the employment agreement had been breached, damages should have been awarded but were not.

[47] Part of Ms Toohey's argument was that damages for breach of contract and compensation for a successful personal grievance do not necessarily coincide and it is an error to consider that they do. For that proposition she relied on Judge Travis' comments in *Davis v Portage Licensing Trust*.[12]

[48] Turning to the amount to award, Ms Toohey relied on three now fairly old decisions: *Whelan v Attorney-General*, *Attorney-General v Gilbert* and *Brickell v Attorney-General*.[13]

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11 *FGH v RST* [2018] NZEmpC 60, (2018) 15 NZELR 944.

12 *Davis v Portage Licensing Trust* [2006] ERNZ 268 at [169].

13 *Whelan v Attorney-General in respect of the CEO of the Children & Young Persons Service* [2006] ERNZ 1126 (EmpC); *Attorney-General v Gilbert* [2002] 2 NZLR 342, [2002] 1 ERNZ 31 (CA); and *Brickell v Attorney-General* [2000] 2 ERNZ 529 (HC).

[49] In *Whelan*, an award of $60,000 was made to a former employee who had suffered significant stress and clinical depression arising from her employer's breach of contract. In that case the plaintiff developed panic attacks, became depressed, lost her sense of humour, suffered personality changes which led to social and emotional withdrawal, had visibly aged and had difficulty sleeping. The Court noted that the effects of the employee's injuries were apparent in her professional and personal life. Had she not developed coping techniques to enable her to remain in gainful employment the award for non-economic loss would have been higher.[14]

[50] In *Gilbert*, the Court awarded $75,000 for humiliation, anxiety and distress and that was not disturbed in the subsequent appeal. In that case the employee had been a probation officer exposed to unnecessary and avoidable workplace stress over many years, arising from work overload, management failure and office and resource deficiencies.[15] He had suffered a severe impact on his health as a result of the breaches and was found to be significantly disabled because of the employer's actions.

[51] In *Brickell*, which was an action in tort, the High Court awarded damages of $75,000 to a police video producer who developed a stress disorder after prolonged exposure to generally horrific material. In the course of his duties he filmed scenes of violent crime and, later, edited those images for use by the police in their investigations.[16]

[52] By comparison with those cases Ms Toohey submitted that the amount to award the plaintiff for damages for non-economic loss for breach of contract was $75,000. That sum was to be treated globally so that it would not be in addition to the $30,000 compensation already awarded under s 123(1)(c)(i) of the Act.

[53] An alternative submission was that the determination was in error because it did not adopt the approach to assessments of compensation under s 123(1)(c)(i) in *Richora Group Ltd v Cheng*.[17] In *Richora*, this Court developed a five-step process

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14 *Whelan*, above n 13, at [71]–[72].
15 *Gilbert*, above n 13, at [51].
16 *Brickell*, above n 13, at [147].
17 *Richora Group Ltd v Cheng* [2018] NZEmpC 113, [2018] ERNZ 337.

for assessing compensation for humiliation, loss of dignity and injury to feelings.[18] Using those steps Ms Toohey argued that an uplift in compensation would be appropriate. While no precise figure was proposed an amount above $40,000 was requested.

[54] Mr Shaw, for the department, reiterated its acceptance of the Authority's determination, including the findings of fault that were made and the remedies that had been awarded. He submitted that an increase in remedies would be inappropriate and tantamount to penalising the department for what had happened rather than providing compensation. He also cautioned against any assessment of compensation for events giving rise to the grievance occurring after the working relationship ended.[19]

[55] Mr Shaw accepted that the Authority found a breach of contract to have existed but argued that it made a conscious decision to concentrate the remedies under the Act rather than for breach of contract. He said that did not mean an error had been made.

[56] These submissions were critical of the arguments put forward on JCE's behalf in two significant respects. First, Mr Shaw submitted that a relevant consideration to be gleaned from the medical reports available to the Authority, and produced by consent in the Court, indicated JCE had an underlying medical condition the existence of which was relevant to retaining the compensation at the amount awarded by the Authority. He argued that the Authority's award took into account that condition and it would be wrong now to discount it. The second point was that cases involving compensatory awards for physiological and emotional trauma are rare and attract moderate compensatory sums. This submission was intended to support an argument that the amount awarded by the Authority under s 123(1)(c)(i) of the Act was reasonable. One case used as an example was *L v Robinson*.[20] In that case the award was $50,000 because of the trauma suffered by a psychiatrist's former patient, caused by his misconduct in entering into a sexual relationship with her.

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18 At [41]–[70].

19 Relying on *Wellington Area Health Board v Wellington Hotel IUOW* [1992] 3 NZLR 658, [1992] 2 ERNZ 466 (CA); *Northern Distribution Union v Sherildee Holdings Ltd (T/A New World Titirangi)* [1991] 2 ERNZ 675 (EmpC); and distinguishing *Nelson v Katavich* [2016] NZEmpC 48, (2016) 15 NZELR 123.

20 *L v Robinson* [2000] 3 NZLR 499 (HC).

[57] There are problems with both of those propositions. I am not persuaded that there was any evidence of a relevant underlying medical condition. Mr Shaw referred to some comments in JCE's psychiatrist's reports, but they do not support the conclusion argued for. Mr Shaw's submissions cherry picked comments without considering each report as a whole. The psychiatrist unequivocally diagnosed JCE as suffering from PTSD and depression. The psychiatrist's expert opinion was that JCE's mental state and psychiatric symptoms were a direct consequence of the assault he suffered at work and what happened subsequently. That diagnosis remained unchanged in reports written two years apart, and was not challenged by the department.

[58] Mr Shaw's submissions on this point faced further difficulties. The Authority had these reports in reaching its conclusions but did not consider they required any adjustment to be made to the compensation it was prepared to order. The Authority's findings about the department's liability and its consequences were not challenged. I am not persuaded that the present dispute opens up such an opportunity now.

[59] The next difficulty is that there is no comparison between the circumstances in *Robinson* and this case. Cases about emotional trauma are rare, but *Robinson* involved a breach of duty by the psychiatrist of a completely different sort, such that it would be difficult to see a proper comparison being gleaned from it.

[60] I also do not accept Mr Shaw's submission that, generally, successful claims for personal grievances for an unjustified disadvantage could be expected to attract lower levels of compensation compared to other personal grievances. Each case must be decided on its merits and a broad generalisation like the one proposed is misplaced.

[61] The first task is to decide if the Authority erred in its decision on compensation. The position is not as clear-cut as Ms Toohey's submissions suggest it might be. In the "Conclusion" section of the determination the threads of the analysis were drawn together by the Authority. The determination reads:

> [132] Corrections failed to take reasonably practical steps, in the circumstances, to protect JCE from a foreseeable risk of harm at work. Corrections has breached its contractual duties owed to JCE and it has acted in an unjustified way causing disadvantage to JCE's employment.

[133] In satisfaction of these claims Corrections must pay JCE:

(a) $30,000.00 for compensation pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000;

(b) $26,061.54 (gross) for lost remuneration pursuant to s 123(1)(b) and s 128 of the Employment Relations Act 2000.

[62] By using the words "In satisfaction of these claims…" the introductory comments in paragraph [133] indicate what was intended was a remedy encompassing both causes of action. But that is not the end of this analysis.

[63] I consider that the Authority erred by not separately assessing contractual damages and compensation for the personal grievance. An overall judgment could then have been made. That was done in *Davis* and in *Gilbert*.[21] In *Davis*, the plaintiff had been traumatised and developed PTSD after being present during three armed robberies of his employer's premises over a very short time.[22] Separate claims for a breach of contract and a personal grievance were pursued.[23] The breach of contract action succeeded and the Court awarded $45,000 for non-economic loss, reduced from $50,000 to recognise some remedial steps taken by the employer. The personal grievance also gave rise to an entitlement and to consideration of a suitable remedy. The Court would have awarded $20,000 for the personal grievance, but because the successful damages claim led to an award of more than twice that amount no further award was made.[24] The result was a decision about both causes of action with an outcome that avoided a double recovery.

[64] That conclusion leads to the need to assess what damages flow from the breach of contract the Authority concluded had occurred. This assessment is highly problematic, because of the absence of suitable cases to use as comparators. Attempting to draw comparisons from *Whelan, Brickell* and *Gilbert* presents another difficulty because of their age and the change in the value of money in the intervening years since they were decided. Apart from the age of these cases, they should not be seen as providing the upper and lower parameters of awards. Despite those limitations, they provide some assistance, especially in the observation by McGechan J in *Brickell*

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21 *Davis*, above n 12; and *Gilbert*, above n 13.
22 At [1].
23 At [2].
24 At [182]–[183] relying on *NCR (NZ) Corp Ltd v Blowes* [2005] ERNZ 932 (CA).

that the exercise should be handled cautiously, and that the test is about fairness and community expectations.[25]

[65] What is apparent is the deep emotional distress suffered by JCE as a direct and ongoing consequence of the department's failures. There have been significant changes in his personality, several attempts at self-harm, and in all likelihood there will be significant ongoing problems. In those circumstances, I consider the damages to be awarded to JCE should be higher than in *Whelan*, where the employee had been able to overcome, to some extent, the impacts of the breach on her and to re-establish something of her former life.

[66] However, it is difficult to view the plaintiff's non-economic loss in the same way as the Court did in *Gilbert* which case Ms Toohey chose as a comparator. In *Gilbert*, the Court found that the plaintiff was 90 per cent disabled by the impact of his injuries and was unlikely to return to paid employment.[26] The plaintiff in this case has suffered significantly and that situation is ongoing, but despite the difficulties he faces he has secured productive employment, though not in his chosen career.

[67] Assessing JCE's circumstances overall, the Authority would have been justified in an award falling between *Whelan* and *Gilbert*. I consider $65,000 to be just and that sum is awarded.

[68] An allowance has to be made to avoid a double recovery. Taking the approach in *Davis*, my inclination is to award damages for breach of contract of $65,000 and to acknowledge that the personal grievance arising from the same conduct would have justified $30,000, but no further award is required because that amount is effectively subsumed into the contractual damages. That means the personal grievance succeeded but no separate or further award for it is made.

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25 *Brickell*, above n 13, at [144].

26 *Gilbert*, above n 13, at [20] and [41]. It was also noted that at the time of the hearing in the Employment Court the plaintiff was 75 per cent disabled: *Gilbert v Attorney-General in respect of the Chief Executive of the Department of Corrections* [2000] 1 ERNZ 332 (EmpC) at 386.

[69] Having reached this conclusion it is not necessary to consider the alternative arguments seeking to increase the award made for the personal grievance under s 123(1)(c)(i) of the Act.

Reimbursement of lost wages

[70] The second alleged error was about the Authority's decision to award lost remuneration. The plaintiff was awarded $26,061.54 pursuant to ss 123(1)(b) and 128 of the Act. Before reaching that conclusion the Authority dealt with two issues; having to be satisfied that the lost remuneration was caused by unjustified action and to consider the impact of the plaintiff's entitlements under the AC Act.[27] There was no dispute that there were circumstances justifying awarding lost remuneration. The issue was the method by which it was calculated.

[71] At the time his employment ended the plaintiff was earning $56,000 per year. He was out of work for 121 weeks and the amount of the lost remuneration claimed by him was the equivalent of his salary for that time of $130,307.69. The department's case was that it satisfied all contractual and statutory liability and no further award should be made.

[72] In fixing lost remuneration the Authority took into account the plaintiff's earnings-related compensation under the AC Act, because the department was an accredited employer. In that capacity it paid the whole of the plaintiff's wage entitlement while he was employed by it and eligible for AC Act compensation, until 5 October 2015. It paid 80 per cent of his wage entitlement from 6 October 2015 until 26 January 2018, from which date he had obtained employment. The effect of the Authority's determination was that the award became a top-up payment.

[73] Ms Toohey's argument was that there is a long-standing principle that sums received by a former employee from third parties, such as from insurers or the Accident Compensation Corporation under the AC Act, must not be deducted when calculating lost remuneration. She relied on *Judea Tavern Ltd v Jesson* and the cases mentioned in that decision.[28] In *Judea Tavern*, the employee had received earnings-

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27 *JCE*, above n 1, at [108].
28 *Judea Tavern Ltd v Jesson* [2017] NZEmpC 82 at [40].

related accident compensation payments under the AC Act. The Court held that liability to pay wages, or compensation for wages, rested with the employer and payment of accident compensation did not displace that liability. The result was that the payments made under the AC Act were irrelevant to the assessment of loss. For policy reasons there was no double recovery in this approach, and any issue about repayment of the wage-related compensation the employee received was between her and the Corporation.

[74] *Judea Tavern* drew on cases that had produced a similar result; *Scissor Platforms (1997) Ltd v Brien* and *Davidson v Christchurch City Council*.[29] In *Scissor Platforms*, the Court held that the (former) Employment Tribunal was correct not to have deducted earnings-related compensation insurance payments from the assessment of lost remuneration.[30] In doing so, the Court referred with approval to two other cases; *James and Co Ltd v Hughes* and *Horsburgh v New Zealand Meat Processors Industrial Union of Workers*.[31] Both of those cases dealt with an unemployment benefit.

[75] In *Scissor Platforms*, the Court referred to the English decision of *Hopkins v Norcross plc* which was about a pension scheme.[32] *Hopkins* held that a disability pension payable to a police officer discharged from the police force for disability resulting from an accident, for which his employer was liable in tort, had to be ignored in assessing the financial loss for lost earning capacity. The principle was unsuccessfully challenged in *Smoker v London Fire and Civil Defence Authority*.[33]

[76] In *Horsburgh*, an unemployment benefit paid to the employee was taken into account, but only because the Court had received confirmation from the (then) Department of Social Welfare that it would not be seeking repayment of that benefit. That concession presented the Court with a slightly different scenario and the prospect

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29 *Scissor Platforms (1997) Ltd v Brien* [1999] 2 ERNZ 672 (EmpC) at 681–682; and *Davidson v Christchurch City Council* [1995] 1 ERNZ 172 (EmpC) at 204.

30 Accident Rehabilitation and Compensation Insurance Act 1992 (repealed).

31 *James and Co Ltd v Hughes* [1995] 2 ERNZ 432 (EmpC); *Horsburgh v New Zealand Meat Processors Industrial Union of Workers* [1988] 1 NZLR 698, (1988) ERNZ Sel Cas 193 (CA).

32 *Hopkins v Norcross plc* [1993] 1 All ER 565 (QB). The source of the English jurisprudence is *Parry v Cleaver* [1970] AC 1 (HL).

33 *Smoker v London Fire and Civil Defence Authority* [1991] 2 WLR 422 (QB); see the discussion in *Gilbert v Attorney-General* [2010] NZCA 421, (2010) 8 NZELR 72 at [39] and following.

that, without taking the payment into account, a double recovery may have been received by the plaintiff.

[77] In the present case the error attributed to the Authority was of failing to apply the principle discussed in *Judea Tavern*, so that it should not have deducted from the calculation of lost remuneration the value of payments made to the plaintiff under the AC Act. Any issue about repaying the Corporation was, consequently, a matter between it and the plaintiff but was otherwise irrelevant. As to the potential for repayment being demanded, Ms Toohey relied on ss 248 and 251 of the AC Act. Those sections confer statutory powers on the Corporation to recover overpayments and payments made in error.

[78] I do not accept Ms Toohey's submissions that the Authority made an error as pleaded. The policy underlying *Judea Tavern*, and the cases it referred to, is to ensure that the liable party satisfies its liability. That would not be the case if third-party payments were taken into account. In that situation the liable party would get what amounted to a subsidy or, potentially, the damaged party might get less than he or she is entitled to receive. This case is different. The department paid all of the plaintiff's AC Act wage-related entitlements in its capacity as an accredited employer. They were paid by the department because it had entered into an accredited employer agreement with the Corporation to pay them. The money paid did not come from funds administered by the Corporation.

[79] Part 6 of the AC Act provides for accredited employers and the responsibilities they assume on entering into an agreement with the Corporation.[34] In entering into such an agreement the Corporation must be satisfied that the accredited employer has appropriate experience to manage occupational health and safety issues and to meet the other statutory requirements. It must also be satisfied that the employer will be able to meet its expected financial and other obligations for work-related personal injury claims because it is solvent and financially sound.[35]

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34 Accident Compensation Act 2001, ss 181–189.
35 Section 185(1)(h).

[80] The AC Act, and the accredited employer agreement between the department and the Corporation, required the department to pay the plaintiff's entitlements from its own money.[36] The fact that payment was made by the department, and not by the Corporation, was reinforced by s 187(3) of the AC Act. The section provides that, if an accredited employer fails to perform the contract, it will be performed by the Corporation and the cost of doing so is a debt owed to the Corporation by the employer.[37]

[81] Under the agreement the department was required to provide entitlements in relation to work-related personal injuries suffered by its employees. Specifically, the agreement provided that entering into it did not make the department an agent of the Corporation. A schedule to the agreement made the department liable for entitlements and case management costs for all claims arising out of a work-related personal injury suffered by its employee during the period of the agreement. Those financial obligations were ongoing, even after the employment relationship ended.

[82] The agreement prohibited the department from entering into any insurance, re-insurance contract, or any other contract or arrangement that had the purpose or effect of removing from it financial responsibility for the AC Act liability it had assumed by contract.

[83] The agreement provided that the department could recover an overpayment directly from the employee concerned, subject to s 251 of the AC Act. That section allows the Corporation to seek repayment except in limited circumstances where the money was received in good faith or where the payment was made as a result of an error not intentionally contributed to by the recipient of the payment.[38] While that section gives the Corporation the right to recover overpayments, or payment made in error, it is not obvious that such a power can be transferred to the department by contract. It is also not clear that a person in the plaintiff's position, receiving lost remuneration by order of the Authority or Court, could properly be described as having been overpaid or erroneously paid AC Act entitlements triggering s 251.

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36 Section 182.
37 Section 187(3)(a)–(b).
38 Section 251(1)–(2).

[84] In *Judea Tavern*, there was no risk of the employee obtaining a double recovery because of her contingent liability to repay the Corporation. The result of Ms Toohey's argument would, however, create a double recovery for the same loss. That would place the department in a position where it had satisfied the plaintiff's AC Act wage-related compensation and would be required to pay him again for lost remuneration covering essentially the same time.

[85] The obvious difference between this case and *Judea Tavern* is that the AC Act and the accredited employer agreement ensured that the money paid to satisfy the plaintiff's entitlements came directly from the department not from the Corporation. Assuming it might be possible for the department to seek repayment under s 251, or that the Corporation could do so on its behalf, the end result would be the same; there would be an overpayment that could be reclaimed. No practical purpose would be served in placing the parties in a position where a payment for lost remuneration had to be made just so that it could be reclaimed.

[86] I am satisfied that the Authority did not make an error by taking into account the AC Act payments by the defendant to the plaintiff when assessing lost remuneration.

Special damages

[87] The third alleged error was how the Authority treated the plaintiff's legal expenses incurred for representing him over the medical retirement.

[88] When the medical retirement was being negotiated the department was purporting to exercise a contractual power available to it under the collective agreement. There was no finding of a breach of contract arising from that action. In the absence of a breach there can be no damages.

Outcome

[89] The Authority made an error by not separately calculating and quantifying the amount of damages for breach of contract and the personal grievance claim.

[90] The department is ordered to pay to the plaintiff damages of $65,000 for breach of contract. The Authority's determination that he be paid $30,000 pursuant to s 123(1)(c)(i) of the Act is set aside and replaced by a finding that there was a personal grievance, and that compensation of that amount was appropriate, but no order to pay that sum will be made because it is less than and is effectively subsumed into the damages award.

[91] The challenge to the award of lost remuneration is unsuccessful.

[92] Costs are reserved. There is another proceeding in which the plaintiff successfully applied to strike out a challenge, by the department, of the same determination. That decision has also led to costs being reserved and submissions have been filed. It is likely that this decision will have an impact on consideration of costs by both parties, since there was an overlap between proceedings. The parties are invited to discuss costs and to attempt to reach agreement about them. If they cannot be agreed the defendant may file submissions on costs within 20 working days. The plaintiff has a further 20 working days from receipt of those submissions to respond and the defendant has 5 working days to file any reply.

Non-publication

[93] The Authority made an order pursuant to cl 10 of sch 2 to the Act prohibiting from publication the name of the plaintiff or any information that might identify him. I am satisfied that it is appropriate for non-publication to continue and, pursuant to cl 12 of sch 3 to the Act order accordingly. For consistency this judgment used the same descriptor for the plaintiff as the Authority used for him.

K G Smith
Judge

Judgment signed at 2.15 pm on 17 April 2020