IN THE EMPLOYMENT COURT
AUCKLAND

AC 19/09
AEC 93/97
AEC69/98

IN THE MATTER OF	a claim for damages for breach of employment contract
BETWEEN	CHRISTOPHER JOHN GILBERT Plaintiff
AND	THE ATTORNEY-GENERAL IN RESPECT OF THE CHIEF EXECUTIVE OF THE DEPARTMENT OF CORRECTIONS Defendant

Hearing: 6 & 7 November and 12,14 & 21 December 2006
(Heard at Auckland)

Appearances: David Neutze and Benn Andrews, Counsel for Plaintiff
Roanna Chan, Counsel for Defendant

Judgment: 28 April 2009

JUDGMENT OF CHIEF JUDGE GL COLGAN

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[1] This case is back before the Court because Mr Gilbert applied for a direction that the Court recall its judgment (or part of it) on remedies and costs delivered on 4 December 2003 (AC 63/03) because of a slip or omission. That application was determined by a judgment issued on 10 March 2006 ([2006] ERNZ 1). In respect of some matters I found there was neither slip nor omission, but on others I accepted that the interests of justice required not only that the judgment be recalled in part but that there could be further actuarial evidence and submissions on those issues.

[2] The judgment delivered on 4 December 2003 provided a framework for calculating the damages due to the plaintiff but also left blank some areas where

amounts were to be confirmed after discussions between the parties and, in particular, between their actuarial experts. That has been successful only in very small part so the Court must now do so.

[3] The plaintiff has asked the Court to resolve four issues. Three of these four are:

- What deduction from future lost earnings should be made for contingencies?

- The effect of a probation officer's salary overtaking the "grandfathered" salary of a unit manager;

- Tax calculations including the appropriate method of "grossing up" awards to take account of tax.

[4] Deductions for interest, which was a fourth claim of the plaintiff, have now been agreed and I am not called on to determine these. For the figure of 1 percent in paragraph [107](b) of the judgment of 4 December 2003, the figure of 3 percent is to be substituted.

[5] Although the parties could not agree on the amounts of several of the remedies provided in the Court's 2003 decision, the defendant nevertheless paid Mr Gilbert the sum of $922,148, but less tax, on 13 September 2005. This sum did not withhold from Mr Gilbert the whole of any amount that was and remains in dispute. Rather, it represented the defendant's calculation of what it was obliged to pay and was so accepted by the plaintiff on the without prejudice basis that now sees the parties before the Court in an attempt by the plaintiff to have fixed and thereby increase the sums due.

[6] For a hearing to correct slips and to clarify uncertainties in three areas of a judgment, it was remarkable that this occupied 5 sitting days. That may be explained in part by what was revealed to me in the course of the hearing about the serious professional dispute between the two actuaries that has severely compromised their ability to meet to discuss and resolve their differences of expert opinion and led to

the intervention of their professional body. I have to say, also, that at times the actuaries took over conduct of the case from the lawyers and, during adjournments, produced additional written material in an attempt to augment what sometimes seemed to be their advocacy of particular actuarial methodologies and to criticise their opponent's. In the case of the defendant's actuary, this extended to the expression of views about what the law should be. The hearing produced a lengthy and dense transcript that I have read and re-read to prepare this judgment.

[7] On a number of occasions the actuaries in particular focused upon their different interpretations of what I had written and intended in my December 2003 judgment on remedies. I was not assisted by this extensive second-guessing by the actuaries. Although I have reviewed thoroughly the lengthy and difficult transcript and the numerous documentary exhibits produced, I propose to focus only on the three questions for which leave was granted to reopen the judgment or to settle previously undecided questions.

Deduction for contingencies

[8] At paragraph [78] of the judgment of 4 December 2003 I found that Mr Gilbert had a 40 percent likelihood of working until age 65. At paragraphs [78] and [107](c) I equated this with a 60 percent deduction from the plaintiff's prospective salary. The employer has treated this as a simple deduction of 60 percent. The plaintiff says, however, that this is inconsistent with the likelihood of retirement increasing with age. The plaintiff says that the defendant has miscalculated the deduction by, in effect, making two deductions, the first of 5 percent and the second of 60 percent, contending that is more than I intended. Mr Neutze for the plaintiff pointed out that at paragraph [76] of my judgment of 4 December 2003 I recognised the chance of Mr Gilbert not continuing to work for the Department of Corrections increased with age. I found:

> *The level of contingency deduction also takes account of my assessment of the substantial likelihood that Mr Gilbert would have continued to work for the department until at least that date and that the chances of his ending his employment before the age of 65 years lay predominantly in the latter part of that 14 or 15 year period from the date of dismissal in 1996, that is after October 2002.*

[9] The plaintiff submits that to give proper effect to my primary finding of a 40 percent likelihood of the plaintiff working until age 65, the deduction for contingency needs to be applied year by year with probabilities of death and early retirement rising each year. The plaintiff's actuary has calculated the sums due to Mr Gilbert using this increasing probability methodology, although from starting points that are themselves challenged by the defendant and are dealt with later in this judgment.

[10] While I did determine that, absent the employer's breaches, Mr Gilbert would not have worked beyond 65 years of age, I also concluded that there was a 40 percent chance that he would work until his 65th birthday but not beyond that date. Those are findings that I made and affirm.

[11] I erred, however, in the next step of calculating the deduction for contingencies based upon that finding. I accept that, again absent the breaches, the longer Mr Gilbert worked as a probation officer, the greater became the chances of ceasing to do so as a result of a number of circumstances. Although I accept, as was the plaintiff's case, that these included death and early retirement, such contingencies must also include redundancy (a minimal consideration in the circumstances of this case) and total permanent disablement. Except for the redundancy contingency that is really negligible in the circumstances of these parties, the likelihood of all other contingencies would have increased with age.

[12] A deduction for contingencies using this increasing probability methodology requires that the range between 100 and 40 percent be averaged over the plaintiff's remaining working life, although calculated from October 2002 to take account of the separate award made for the period to that date. Rounded up to a single decimal point, the period is 7.4 years (14 October 2002 to 5 March 2010).

[13] Because the various tables prepared by the actuaries depend upon the correctness of their constituent figures from which an increasing probability deduction for contingencies was made, I cannot give a figure for post-2002 remuneration lost using this methodology unless the constituent figures, and the salary starting point figure in particular, are correct. As a result of what I decide

later in this judgment on the issue of "grandfathering", I have concluded that the starting salary used in this calculation is not necessarily one of those relied upon by the actuaries. I was not given in evidence the methodology by which to calculate a final figure using an increasing probability method myself. So I can do no more than leave this final calculation to the actuaries with as much guidance as I am able to provide from the cases presented to me. For the avoidance of doubt, I accept that the application of the methodology advanced by the plaintiff's actuary, Mr Eriksen, is that to be followed although, as I have noted, additional contingencies as recommended by the defendant's actuary, Mr Higgins, must be factored in as well. The rough figure of $117,000 mentioned in my 2003 judgment will not now be correct, relying as it did on what I accept was an erroneous method of deducting the 60 percent contingency factor.

[14] The same methodology must be applied to the other deduction for contingencies in the judgment. This was the much lower figure of 5 percent for contingencies to be deducted from the compensation for lost remuneration from the cessation of the plaintiff's work in 1996 to the hearing on 14 October 2002. The 5 percent assessment applies similarly to the position at the end of that period and the potential decrements that it reflects would also have been progressive. In this instance Mr Eriksen's evidence was that the average probability over that period was 2.52 percent so that the deduction for contingencies referred to at paragraph [106](d) of the judgment of 4 December 2003 should read 2.52 percent rather than 5 percent.

Salaries and "grandfathering"

[15] The plaintiff asserts that I have recognised that the judgment of 4 December 2003 does not deal with what would have happened when the "grandfathering" salary arrangement ceased to benefit those employees who would have continued to work as probation officers although on unit manager salaries, as I found Mr Gilbert probably would have done: see paragraph [51] of the judgment delivered on 10 March 2006.

[16] Although probation officer salaries were set by collective contracts or agreements, they were subject to increases for "competencies" attained. The

plaintiff relies on the PSA Collective Agreement 1 August 2001 – 31 May 2003 providing that all staff were expected to participate in the competency system referred to in that collective agreement. Indeed, the plaintiff says that it provides that as from 1 August 2001 employees were entitled to spend one hour per week during work time on administrative aspects of achieving a competency. To 30 September 2001 an additional hour per week was to be allocated. There was to be a review process for employees who were dissatisfied with the manner in which their managers assessed their competencies. The collective agreement provided an allowance or cross-crediting of competencies completed under the previous competency system and for probation officers employed at 30 November 2000 (which the plaintiff says would have included him), progression to step 4 of the salary scale was not to be subject to the minimum timeframe.

[17] The plaintiff points out that in her evidence in 2002, the Department's Ms Clark accepted that Mr Gilbert's salary would have increased to $44,500 per annum on the completion of 10 competencies, moving to $45,000 on 1 July 2002 and $47,500 on completion of a further three competencies ($48,000 as at 1 July 2002).

[18] The plaintiff says that even ignoring the mandatory nature of participation in the competency scheme, Mr Gilbert's extensive experience as a probation officer and his educational background would have seen him complete 13 competencies to ensure he received sought-after salary increases. Mr Gilbert emphasises his evidence that it would have been better for him to have completed them even if only for the resulting salary increase.

[19] The plaintiff says that by 14 October 2002 and probably between August 2001 and July 2002, he would have completed any necessary competencies under the new framework to take him to the 13 required to attain the $48,000 per annum salary band. Mr Gilbert points out the time allowed for this purpose and his ability to do so. He reminds me that at paragraph [60] of my judgment of 4 December 2003 I acknowledged the incentive for him to maximise his earnings over the last 5 years of his working life to enhance his level of superannuation.

[20] So the plaintiff says that the notional starting salary point from 14 October 2002 should be 65 percent of $48,000 per annum plus 35 percent of a service manager's salary.

[21] The defendant's evidence about the competencies regime and how longstanding probation officers, such as Mr Gilbert was, attained these competencies as reflected in their salaries, persuades me that the plaintiff would probably have attained no more than 10 of the potentially maximum 13 competencies by the time his salary is fixed for future lost compensation purposes. That is not to detract either from Mr Gilbert's ability as a senior probation officer nor from what I earlier concluded was the very real incentive for him to increase his salary, if only for superannuation purposes. Rather, the defendant's evidence on this issue persuades me of the practical impossibility of someone in the plaintiff's position having attained the 13 competencies he asserts he would have at the relevant time.

[22] Although the plaintiff's actuary Mr Eriksen calculated that this overtaking would have occurred on 1 July 2002 when a probation officer's salary at step 5 (reflected in 13 competencies) would have been $48,000, that may not necessarily be the timing of the overtaking in Mr Gilbert's case given that I have concluded that he would have achieved no more than 10 competencies before October 2002.

[23] So, as at 14 October 2002 when the compensation for future remuneration loss was fixed, and assuming that his "grandfathered" notional salary of a combined unit manager's and service manager's salary had by then been exceeded by a probation officer's salary, it is the latter, including allowances for 10 competencies, that is to apply. The precise figure can be ascertained by comparing the grandfathered unit manager's/service manager's salary with the relevant salary (including 10 competencies) from the then current collective employment contract or collective agreement that was a "*paid rate*" document. At that point, assuming it was before 14 October 2002, the notional salary rate would cease to include reference to percentages of unit and service managers' salaries and be referable to the relevant salary of a probation officer.

[24] I summarise my decision on the "grandfathering" issue as follows. As summarised in paragraph [107](a) of the December 2003 judgment, the notional starting salary for the period beginning 14 October 2002 was $42,447 per annum plus 35 percent of the difference between $42,447 and a service manager's annual salary. If that notional salary, "grandfathered" as it would have been for someone in Mr Gilbert's position, had been exceeded before 14 October 2002 by the annual salary for a probation officer with 10 competencies, then that latter salary is to apply to the calculations for remuneration loss for the balance of Mr Gilbert's working life. The evidence did not identify the date where that cross-over would have occurred but it ought to be readily ascertainable by reference to the relevant collective agreements for probation officers which set their actual salaries and allowances for competencies.

Taxation calculations

[25] The plaintiff disputes that the sums paid to him by the defendant are correct. It is said that this is because the calculation method of "grossing up" sums due under the judgment is wrong. The plaintiff points out that at paragraph [110] of the remedies judgment I directed that if awards of compensation were to be taxed in the year of their receipt by the plaintiff, there was to be a grossing up of the sums to equate to their receipt by the plaintiff in the relevant tax years. This was necessary to put the plaintiff in the same position in which he would have been had the injuries not been sustained.

[26] The plaintiff says that in calculating the sum the defendant asserts to be the amount payable under the judgment, he has taken the gross amounts of lost remuneration awarded by the Court and added an amount for income tax payable, resulting in an amount for tax being added at 25.7 percent for pre-hearing lost salary and 31.9 percent for post-hearing lost salary. The plaintiff complains that the defendant has then added awards for interest and costs before deducting income tax of $302,834, which is the equivalent of an income tax deduction at the rate of 46.2 percent.

[27] The plaintiff reminds me that at paragraph [85] of the judgment, when considering the taxable sums awarded, I directed that they would have to be grossed up to the extent that Mr Gilbert receives net of tax what he would have received had the remuneration been received in the years it was earned. Mr Gilbert says that contrary to the judgment, the defendant's approach does not result in the plaintiff receiving net of tax what he would have received had the remuneration been received in the years it was earned. The plaintiff says that by whichever of two alternative methodologies he has advanced through expert evidence, the gross amount will be taxed at an effective rate of 39 percent which would be appropriate.

[28] In the December 2003 judgment, I addressed the judgment of the Court of Appeal in *North Island Wholesale Grocers Ltd v Hewin* [1982] 2 NZLR 176 and a subsequent judgment of the same Court in *Horsburgh v NZ Meat Processors IUOW* [1988] 1 NZLR 698. These are authorities for the proposition that gross remuneration must be the basis for any compensatory award. I then noted, however:

> *… the manner in which the Commissioner of Inland Revenue may tax the remuneration elements of the judgment sums paid out to a successful plaintiff such as Mr Gilbert, may cause that compensation to be less than is truly compensable of the losses.*

[29] At the conclusion of paragraph [85] where the foregoing remarks appear, I added:

> *If, therefore, upon indication from the Commissioner that tax will be levied on the taxable sums at the appropriate rates in the tax year of receipt of the monies, they will have to be grossed up to the extent that Mr Gilbert receives net of tax what he would have received had the remuneration been received in the years it was earned.*

[30] This issue was also dealt with in paragraph [110] of that judgment with the following direction:

> *If these [remuneration compensation awards] are to be taxed in the year of their receipt, a grossing up of these sums to equate to their receipt by the plaintiff in the relevant tax years, as the parties may agree upon or the Court directs.*

[31] The parties have not agreed upon the methodology of, and therefore any final figures as a result of, this exercise so that it needs to be determined now.

[32] Mrs Chan for the defendant, however, submitted even more fundamentally that the grossing up exercise to take account of taxation contingencies is beyond the proper scope of the Court's inquiries. Relying on the judgment of the Court of Appeal in *Hewin*, Mrs Chan submitted that the Court should not engage in any exercise about the taxation status of Mr Gilbert's income for the purpose of determining what will be the rates at which income tax is imposed upon the awards.

[33] That is a powerful argument when one considers the reasoning of the majority of the Judges (Woodhouse P and Richardson J) in *Hewin*. On the other hand, it remains as I concluded in 2003, a powerful argument also that without a grossing up exercise, Mr Gilbert may be liable to pay significantly more tax on his compensation for income lost than if the breaches had not occurred and he had earned this income in the usual way. So, for example, and depending for a precise answer upon any other income earned by him, when the lump sum remuneration compensation awards were paid to Mr Gilbert in 2005, the vast majority of this award would have been taxed at the then marginal rate of income tax, 39 cents in the dollar. The evidence is that if Mr Gilbert had earned this income year by year, his average rate of income tax was approximately 25 cents in the dollar, certainly when the marginal rate was 39 cents in the dollar. That would have been because of the progressive scales under which lower rates of tax were paid for lower levels of a taxpayer's income. The difference between the two figures is 14 cents in the dollar. Looked at another way, up to 14 percent more tax may arguably have been paid by Mr Gilbert on the majority of his earnings related compensation than if a grossing up/netting down exercise had been conducted. Nevertheless, this Court is bound by what the Court of Appeal has decided on this issue irrespective of the unfairness of this approach in any particular case.

[34] *Hewin* was a wrongful dismissal case. The part of the judgment dealing with tax issues begins at p189 of the report. The first question dealt with, among those affecting tax, was whether, following the judgment of the House of Lords in *British Transport Commission v Gourley* [1956] AC 185, the Court should deduct an amount from gross remuneration to reflect the true net loss to the former employee. *Gourley* was a personal injuries case. At p190, lines 27 and following of *Hewin*, the Court of Appeal concluded that there was *"considerable force"* in some of the

criticisms directed at *Gourley* relying on a judgment of the Supreme Court of Canada, *R (in Right of the Province of Ontario) v Jennings* (1966) 57 DLR (2d) 664.

[35] At p191, lines 25 and following, the Court of Appeal concluded that it was unnecessary to reconsider the application of the *Gourley* principle in personal injury cases because it related to such cases that were, by 1982, no longer decided in New Zealand. The majority added:

> *However, we are in no doubt that Gourley ought not to be extended in this country to claims for compensation for loss of office.*

[36] The Court identified four broad considerations that contributed to this view. *Gourley* was not only a decision about personal injury but a case in tort whereas damages for wrongful dismissal are in contract. As the majority noted in *Hewin*, contract damages are for the loss of the promised benefit although both situations involve the assessment of compensation for future economic loss. Contract cases turn on the terms of the contract between the parties, the employer's obligation being to pay the whole of the agreed remuneration. How this may be disposed of by the employee (including by tax payments) was considered not to be a legitimate concern of the employer, whether during the currency of the contract or afterwards. At line 45 on p191 the majority in *Hewin* noted:

> *If the employee sues for unpaid or short paid remuneration he recovers his contractually agreed amount. Not an amount arrived at after allowance for tax as such or for a tax differential to reflect changes in the incidence of tax (on a taxpayer accounting on a cash basis) between the time when the remuneration should have been paid and the time of actual payment. If the employee sues for damages for breach of contract by the employer precluding him from earning the contractually agreed remuneration he is entitled to say that the gross remuneration is the agreed base for calculating of his loss. The employer cannot argue "I have saved you travelling costs, union dues and other work related expenses by firing you and they must be deducted in ascertaining your loss". They are not his concern and to allow them to be taken into account would have the same effect as imposing a new and different contract on the parties. We find it difficult to understand why a different philosophy should prevail to allow an off set in respect of income tax.*

[37] In the second of the four broad considerations identified by the Court of Appeal, it addressed what has been confirmed for me in the extensive and complex evidence called in this case. That is the difficult, if not hopeless, task of imposing on

courts and those involved in settling compensation for loss of office, questions of a fairly quantifiable tax burden fairly attributable to lost remuneration. As the Court of Appeal noted:

> … *the nexus under our legislative scheme between particular sums which have been earned during an income year and a particular amount of tax for which the taxpayer becomes liable, at best remote, is increasingly difficult to discern in the wrongful dismissal field.*

[38] So, too, with the fourth broad considerations set out at p193 of the report of the judgment. As the Court of Appeal noted, in the absence of the Commissioner of Inland Revenue from participation in the decision, there is a potential for unfairness to one side or the other if the Commissioner is not bound by the approach which is taken if in the end the expectations of the parties as to the incidence of taxation are defeated. As the Court of Appeal noted at line 15:

> *This consideration makes it particularly inappropriate to determine what may be difficult questions of interpretation of the income tax legislation outside the objection procedures or other proceedings to which he is properly a party.*

[39] The difficulties of ascertaining the tax position in this case, even after extensive evidence including from an expert witness, illustrate well the Court of Appeal's reasoning in *Hewin.* Even after Mr Gilbert was re-called and his bank statements produced for the relevant periods, the consequences of the interest earned on the compensation paid to him remained unclear.

[40] It is regrettable that the *Hewin* prohibition upon this exercise could not have been argued and determined at an earlier stage of the case, so avoiding much evidence, time and cost. However, upon reflection I consider that this Court is bound by this judgment of the Court of Appeal. Not only must awards of compensation for lost remuneration be of the gross sums lost, but it is not for the Court to inquire into questions of tax on these sums as it would have to in the grossing up/netting down exercise. Although that may, in the circumstances, be disadvantageous, even significantly disadvantageous to Mr Gilbert, I am persuaded by Mrs Chan for the defendant that I erred in law in directing that exercise of grossing up to take account of possible or probable tax implications. It follows that paragraphs [85] and [110] of the judgment of 4 December 2003 must be corrected

accordingly. I conclude Mr Gilbert is not entitled to a grossing up of his compensatory remedies based on income tax considerations.

Miscellaneous issues

[41] Another and associated tax issue arose and was the subject of evidence at the hearing. Acting on advice from the Commissioner of Inland Revenue, income tax was deducted from Mr Gilbert's salary reimbursement compensation at the rate of 45 cents in the dollar despite the marginal income tax rate at the time being 39 cents in the dollar. This was because Mr Gilbert had not provided a tax code declaration to the Commissioner at the relevant time. The higher rate of deduction applies in such circumstances. The evidence on this issue persuades me that, if he has not done so already, Mr Gilbert has it in his power to have the Commissioner assess correctly the incidence of income tax.

[42] Although, therefore, the foregoing cannot be said to have been an error on the part of the defendant, it may be said that an erroneous calculation was made in respect of the employer's deduction for the ACC levies of $1.20 per $100 of income. The deduction was apparently made at the correct rate for Mr Gilbert's occupation class, no account appears to have been taken of the statutory ceiling at which such deductions cease in all cases and irrespective of income above that ceiling. This excess is money that has been paid by the defendant to the Commissioner and should, if it has not been already, be able to be refunded by the Commissioner to Mr Gilbert. That, too, is in Mr Gilbert's hands to achieve if he has not done so already. No order of the Court is appropriate (because of *Hewin*) or necessary.

[43] In his final submissions for Mr Gilbert, I understood Mr Neutze to submit that the defendant should nevertheless pay interest on any losses incurred by Mr Gilbert as a result of erroneous assessments of PAYE tax and earners' ACC levy. Mr Neutze seemed confident that Mr Gilbert would not recover interest, on any monies overpaid to the Commissioner, from the Commissioner himself.

[44] In the case of the higher rate of income tax paid, I am not prepared to direct the defendant to pay interest on this. He deducted tax at the rate directed by the

Commissioner. He was obliged to do so. There was no suggestion that the defendant was under an obligation to ensure that Mr Gilbert made a declaration of his tax status to the Commissioner at the relevant time.

[45] As far as overpaid ACC levies are concerned, there is some possibility of fault on the part of the defendant in failing to appreciate that such payments were subject to a ceiling in individual cases which the defendant nevertheless exceeded. But in any event, the evidence does not support a finding of sole responsibility for this situation against the defendant and in these circumstances I decline to order interest to be paid to Mr Gilbert on the amount of the overpayment of ACC levies for the period until the recovery of this sum from the Commissioner.

[46] In response to the surprising assessment by the defendant's actuary Mr Higgins of its effect, I am not prepared to rule on the matter of reimbursement of the invalid's benefit paid to Mr Gilbert until he received the Court's compensatory awards. Whether, in cases like this, an invalid's benefit is repayable and, if so, with or without interest, is not a matter for decision by this Court. Just as awards of compensation for lost remuneration are not to be assessed by reference to the amount of any Social Welfare benefit received by a successful plaintiff, the awarding of gross amounts ensures that both questions of tax and benefit reimbursement are able to be left to the affected parties, in this case Mr Gilbert and the relevant Department of State responsible for the financial assistance he received up to September 2005.

[47] Although Mr Higgins in evidence and Mrs Chan in submissions spent some time arguing in principle that it is the function, indeed the responsibility, of this Court to relieve the defendant of financial reliability to the extent that Mr Gilbert may have benefited from receipt of an invalid's benefit, this was not a question for which leave was given on the recall judgment and I do not propose to address it. *Hewin* also governs this question in my view**.**

[48] Although not covered by the limited grant of leave to correct the judgment, the actuaries nevertheless introduced further questions or, perhaps, reintroduced some that had been decided previously but with which either was not happy. Another of these was the date on which the calculation of interest should begin. Mr

Eriksen supported my decision of 14 October 2002 being the date of hearing whereas Mr Higgins postulated that it should have been the day after the date of judgment, 5 December 2003, from which interest began to run. I am not prepared to revisit that question that was determined clearly, rightly or wrongly, or as a matter of the Court's discretion, in the December 2003 judgment.

Summary of judgment

[49] Deductions from notional rates of salary lost for contingencies should use an increasing probability methodology. In the case of salary loss to 14 October 2002, this is to be at an average deduction of 2.52 percent per annum. In the case of post 14 October 2002 loss, this is to be at the average rate of between 100 percent of the 14 October 2002 notional figure and 40 percent thereof, over the period of 7.4 years to take account of progressive decrements.

[50] If the notional salary of 65 percent of a unit manager's plus 35 percent of a service manager's salary was exceeded as at 14 October 2002 by a probation officer's salary, including 10 competency payments, then this latter salary is to be applied to future wage loss calculations as from 14 October 2002.

[51] No "grossing up" exercise to take account of income tax considerations is permissible in law and none should therefore be undertaken.

[52] By agreement, the figure of 3 percent is to be substituted for that of 1 percent in paragraph [107](b) of the judgment of 4 December 2003.

[53] Costs are reserved in respect of the hearings in 2006 leading to this judgment. Each party has been successful on a major issue and the defendant has achieved a limited success on the third. If either party seeks costs, application must be made by memorandum within 3 months of the date of this judgment with any respondent thereto having the period of 1 month thereafter to reply.

[54] I very much regret the long delay in issuing this judgment and apologise to the parties for the inevitable consequences of that delay.

GL Colgan
Chief Judge

Judgment signed at 3 pm on Tuesday 28 April 2009