IN THE EMPLOYMENT COURT
CHRISTCHURCH

[2010] NZEMPC 128
CRC 34/10

IN THE MATTER OF	a referral of a question of law from the Employment Relations Authority
BETWEEN	JANE JOYCE MCKENDRY Plaintiff
AND	JANINE JANSEN AND COLIN PROUTING Defendants

Hearing:	by memoranda of submissions filed on 30 August and 13 and 15 September 2010
Court:	Chief Judge G L Colgan Judge B S Travis Judge A D Ford
Appearances:	Robert Gillanders, Advocate for Plaintiff Jarrod Lovely, Counsel for Defendants Jane Latimer, Counsel as Amica Curiae
Judgment:	24 September 2010

JUDGMENT OF THE FULL COURT

---

[1] The question of law removed by the Employment Relations Authority for decision by this Court to enable a determination of the remedies for Jane McKendry's unjustified dismissal by Janine Jansen and Colin Prouting, is:

> Does s.123(1)(c) or s.123(1)(c)(ii) of the Employment Relations Act 2000 permit the Authority to order the respondents to pay compensation to the applicant for the loss of her entitlement to paid parental leave under the Parental Leave and Employment Protection Act 1987?

[2] We assume the reference to s 123(1)(c) should be to s 123(1)(b) of the Employment Relations Act 2000 (the ERA). This is a question of law on which Employment Relations Authority Members disagree in their determinations and which the Authority wishes to have clarified. With respect to them, we have not been assisted greatly by the submissions made on behalf of the parties. They focused on the particular facts of the case and, for the defendants, attacked the Authority's factual findings inviting us to reach different factual conclusions. Our task, however, is to answer a question of law posed by the Authority on facts found by it. If parties are dissatisfied with the Authority's factual findings, then they have rights of challenge but these are exercisable at the conclusion of the case in the Authority.

[3] We are grateful to Ms Latimer for her submissions as amica curiae which, together with research undertaken for us, has allowed us to determine this disputed question of legislative interpretation and application.

The Authority's factual findings

[4] The relevant facts stated by the Authority are that Ms McKendry was dismissed unjustifiably on 15 April 2009 while pregnant. Ms McKendry's child was born in August 2009. The Authority concluded that if Ms McKendry had not been dismissed unjustifiably, she would probably have continued to work for the defendants until beginning a period of parental leave in about August 2009, taken in accordance with her rights to do so under the Parental Leave and Employment Protection Act 1987 (the PLEPA). The Authority found that Ms McKendry would probably have applied for, and received, a parental leave payment under Part 7A of that Act. It determined that in these circumstances she would probably not have claimed or received a parental tax credit in respect of her child. The Authority concluded that Ms McKendry's loss of entitlement to paid parental leave resulted from her personal grievance, her unjustified dismissal.

The legislation

[5] Section 123 of the ERA addresses the remedies that the Authority (or the Court) may provide "in settling" a personal grievance. They may be one or more of the following remedies under subs (1) and we have highlighted the provisions in issue in this case:

> **Remedies**
>
> (1) Where the Authority or the Court determines that an employee has a personal grievance, it may, in settling the grievance, provide for any 1 or more of the following remedies:
>
> (a) reinstatement of the employee in the employee's former position or the placement of the employee in a position no less advantageous to the employee:
>
> (b) the reimbursement to the employee of a sum equal to the whole or any part of the wages or other money lost by the employee as a result of the grievance:
>
> (c) the payment to the employee of compensation by the employee's employer, including compensation for—
>
> (i) humiliation, loss of dignity, and injury to the feelings of the employee; and
>
> (ii) loss of any benefit, whether or not of a monetary kind, which the employee might reasonably have been expected to obtain if the personal grievance had not arisen:
>
> (ca) if the Authority or the Court finds that any workplace conduct or practices are a significant factor in the personal grievance, recommendations to the employer concerning the action the employer should take to prevent similar employment relationship problems occurring:
>
> (d) if the Authority or the Court finds an employee to have been sexually or racially harassed in his or her employment, recommendations to the employer—
>
> (i) concerning the action the employer should take in respect of the person who made the request or was guilty of the harassing behaviour, which action may include the transfer of that person, the taking of disciplinary action against that person, or the taking of rehabilitative action in respect of that person:
>
> (ii) about any other action that it is necessary for the employer to take to prevent further harassment of the employee concerned or any other employee.
>
> (2) When making an order under subsection (1)(b) or (c), the Authority or the Court may order payment to the employee by instalments, but only if the financial position of the employer requires it.

[6] Ms McKendry's claim to compensation for loss of statutory parental leave payment most logically falls under either s 123(1)(b) or s 123(1)(c)(ii) set out above. The statutory payment may either be "other money lost by the employee as a result of the grievance" under s 123(1)(b) or the "loss of any benefit, whether or not of a monetary kind, which the employee might reasonably have been expected to obtain if the personal grievance had not arisen" under s 123(1)(c)(ii).

[7] The statutory remedies for personal grievances have their genesis in, but are not the same as or constrained by, the common law remedies of damages for breach of contract. Hence, an analysis of the relevant rules about damages for breach of contract generally, and of employment agreements in particular, is relevant in determining whether Parliament intended a loss such as that suffered by Ms McKendry was to be compensable under s 123.

Paid parental leave

[8] The nature of the payment that Ms McKendry lost is important in determining whether it is encompassed in the class of losses defined in s 123. Section 71A, defining the purpose of Part 7A of the PLEPA, states that it "is to entitle certain employees and self-employed persons to up to 14 weeks of parental leave payments out of public money when they take parental leave."

[9] The *Laws of New Zealand*[1] states, in its overview of the statute, that "[t]he Act sets out the rights and benefits concerning parental leave that apply as a minimum standard to all employees."

[10] Section 71D of the PLEPA provides that an employee is entitled to a parental leave payment if the employee:

> (a) has given written notice to his or her employer of his or her wish to take parental leave …; and
>
> (b) takes parental leave from his or her employment in respect of a child; and
>
> (c) is an eligible employee.

[1] Employment at [145].

[11] An "eligible employee" includes "a female employee who meets the criteria for maternity leave …".[2] Section 7 provides that, as a general rule, every female employee who becomes pregnant is entitled to parental leave provided that, by the expected date of delivery, she will have been working in the employment of the same employer for the preceding six months for at least an average of 10 hours per week during that period.

[12] Section 31 deals with notice requirements and provides that an employee who wishes to take parental leave must give written notice to the employer which states the proposed date the employee wishes to commence leave and the proposed duration of that leave. This notice must be given at least three months before the expected date of delivery and must be accompanied by a certificate confirming that the employee is pregnant and stating the expected date of delivery. Despite these requirements, the PLEPA does provide a second chance for the giving of notice if s 31 is not complied with.[3] In addition, s 68 gives the Employment Relations Authority the power to waive errors in defective notices, to extend times for notification, or to set aside defective notices if it considers it is just to do so.

[13] An employee is not entitled to claim both parental leave payments and a parental tax credit. Section 71G(2) provides that receiving both parental leave payments and a parental tax credit will result in the forfeiture of the parental leave payments.

[14] Section 71G, which was alluded to by the Authority in its findings of fact, deals with "parental tax credit" and provides:

> **71G Parental tax credit**
>
> (1) The purpose of this section is to ensure that an employee or a self-employed person does not receive both a parental leave payment under this Part and a parental tax credit (within the meaning of the Income Tax Act 1994) in respect of the same child.
>
> (2) An employee or self-employed person loses his or her entitlement to a parental leave payment under this Part if the employee or self-employed person, or his or her spouse or partner, or both of them, has received any payment of parental tax credit in respect of the child.

---

[2] Section 71CA(1)(a).

[3] Section 35.

[15] In the submissions made to us, counsel for the defendant asserts that the plaintiff claimed a parental tax credit, thus cancelling her entitlement to receive parental leave payments. This is not disputed by the plaintiff and, indeed, her claim in the Authority was for the difference between the parental tax credit and what she would have received by way of parental leave payments. That is, in effect, a mitigation of loss by the plaintiff and, although a matter for the Authority to determine, does not appear to us to negate the question posed by it.

[16] Under s 71I(1) an employee is not entitled to a parental leave payment unless he or she makes an application for it. Such an application must be made before the employee returns to work or the parental leave otherwise ends, and must be made in a manner prescribed in the Parental Leave and Employment Protection Regulations 2002.

[17] The 1987 Parental Leave and Employment Protection Act was amended from 1 July 2002 to provide for a (now) 14 week period of government-funded paid parental leave for eligible employees and (now) self-employed persons. Although that Act also provides for periods of unpaid parental leave, these are not in issue in this case.

[18] A parental leave payment is payable for one continuous period for up to 14 weeks and begins on the date of the commencement of the employee's parental leave from the employer's employment.

[19] Section 71M provides that the rate of parental leave payment payable to an employee is the lesser of:

- a fixed weekly amount; or
- the greater of 100% of the employee's ordinary weekly pay before the commencement of the parental leave; or
- 100% of the employee's average weekly earnings.

[20] Pursuant to s 71N and adjusted annually by Order in Council as at 1 July 2010, the fixed weekly amount of parental leave payment is $325.

The case law

[21] The argument against inclusion of paid parental leave entitlements in compensation originated from, and is exemplified by, the judgment of the Employment Court in *Meharry v Guardall Alarms NZ Ltd*[4] where, at p319, the Court held that the benefits that the Legislature intended to cover were contractual benefits that an employee could expect from his or her employment contract. Excluded by that judgment were such losses as compensation for the costs of applying for other positions and the loss of interest on savings used for living expenses in lieu of income. Also excluded was compensation for the loss occasioned by the necessary sale of a motor vehicle to pay for living expenses previously funded from remuneration for the job dismissed from: *Purdon v McVicar Timber Group Ltd.*[5]

[22] *Meharry* was applied by this Court in *Mackintosh v Carter Holt Harvey Ltd*[6] where state paid benefits were not included in the classes of compensable losses. In *Mackintosh* an employee dismissed unjustifiably on the grounds of redundancy claimed that his redundancy pay and sick leave compensation precluded him from qualifying for a family support payment and resulted in him having to pay a substantial sum to the Inland Revenue Department. The employee also sought compensation for having received no income during what was known as a stand down period before he qualified for an unemployment benefit following his dismissal.

[23] The Employment Relations Authority followed the judgments in *Meharry* and *Mackintosh*, in *Huntley v Maataa Waka Ki Te Tau Ihu Trust.*[7] In that case the issue was whether the grievant was entitled to compensation for the lost benefit of paid parental leave pursuant to s 123(1)(c)(ii) of the ERA. The Authority concluded that the nature of the benefit lost was indistinguishable from the non-contractual

---

[4] [1991] 3 ERNZ 305.
[5] [1992] 1 ERNZ 531.
[6] AC2A/01, 11 July 2001.
[7] CA74B/08, 22 September 2008.

losses determined to be non-compensable in *Meharry* and *Mackintosh*. This reasoning has also been applied in other Authority determinations including *Melrose v Weka Group Ltd t/a The Vulcan.*[8]

[24] A different view was taken by another Authority Member in *Chiu v New Deli & Café Ltd.*[9] In that case the Authority found an entitlement to a paid parental leave payment under s 123(1)(c) which it considered was not confined to hurt feelings and loss of benefit compensation but was expressed to include those heads.

[25] The original decision of this Court in *Meharry*, which has been followed as authority for refusing to allow such non-contractual compensating payments, does not analyse or otherwise describe its reasoning. The relevant passage is at p319 of the judgment and is as follows. The emphasis is ours.

> The next remedy claimed is compensation for loss of monetary benefits pursuant to s 40(1)(c)(ii). … In my view, the benefits intended by the legislation under this provision are benefits which Mr Meharry was entitled to expect as contractual benefits arising out of his contract of employment. Costs of applying for other positions and loss of interest on savings used for living expenses in lieu of income are not in my view recoverable under this provision. These claims must fail. Mr Meharry is however entitled pursuant to ss 40(1)(a) and 41(1) to a sum compensating him for the loss of his contractual income. … This includes allowances as well as wages. Tool allowance, telephone accounts etc would be eligible for consideration if they had been payable pursuant to the contract of employment.

[26] As will be seen, the Court did not, unfortunately, give reasons for its conclusion that has transpired subsequently to be an important one on which a number of other cases in this Court and in the Authority have turned.

[27] In *Mackintosh* at para [20] and subsequently, this Court followed *Meharry* in dealing with a claim for compensation for repaid family allowance and for an unemployment benefit for a period that he was excluded statutorily for claiming it. Again, there was no analysis of the statutory intention, the Court simply following *Meharry* as follows:

---

[8] AA403/08, 25 November 2008.
[9] AA394/08, 18 November 2008.

> The costs of applying for other positions and loss of interest on savings used for living expenses in lieu of income were held [in *Meharry*] not to be recoverable. … I accept Mr Lubbe's argument, based on *Meharry's* case, that s40(1)(c)(ii) contemplates benefits arising out of the employment relationship and not benefits payable by the State. Consequently I disallow this claim under s 40(1)(c)(ii).

[28] And similarly at para [26] dealing with a claim for compensation of loss of superannuation savings which the grievant had to expend on living expenses in the period immediately after his dismissal, the Judge stated:

> I accept, on the basis discussed in *Meharry*, Mr Lubbe's submission that this cannot be a loss for which the respondent is liable. As Mr Lubbe put it, the circumstances that required the appellant to utilise his savings are unfortunate but are not contemplated by s40(1)(c)(ii). The amounts ordered for reimbursement of lost salary should adequately compensate the appellant for having to use the superannuation pay out to meet his daily outgoings when he ceased to be in receipt of an income from the respondent. No award is made under this head.

[29] It is appropriate in these circumstances to go back to the enactment of the statutory predecessor to s 123, at least its predecessor in the same form as in the current Act. Sections 123(1)(b) and 123(1)(c)(ii) are both contained within s 123 which has already been set out at para [5] of this judgment.

Legislative history

[30] Before 1970 dismissed employees could only obtain redress in common law actions for damages for wrongful dismissal in the ordinary courts. In 1970, an amendment to the Industrial Conciliation and Arbitration Act 1954 empowered the Arbitration Court to hear claims for wrongful dismissals brought by unions on behalf of their members employed by employers covered by awards.

[31] In 1973 the present notion of "unjustifiable dismissal" was introduced by s 117 of the Industrial Relations Act 1973. That remedy, however, remained available only to union members and was recoverable in the Industrial Court by unions on behalf of their members who were covered by awards. The process was ameliorated by the subsequent enactment of s 117(3A) which allowed individual union members covered by awards or registered agreements to bring proceedings in their own names where their unions had failed or refused wrongly to do so.

[32] Access to the personal grievance regime was extended to all employees by the Employment Contracts Act 1991.

[33] This historical context is bound up with the common law rule about recovery of damages for wrongful dismissal propounded in a case called *Addis v Gramophone Co Ltd.*[10] In that case the House of Lords refused to allow damages for injured feelings or stigma damages, compensation for the greater difficulty encountered by a wrongfully dismissed employee in obtaining further employment. The majority of the House of Lords in *Addis* held that the employee was not entitled to more than the salary and commission he would have earned had he been given proper or lawful notice and not dismissed summarily. No claim for damages beyond those for loss of the pecuniary benefit of the contract itself was allowed. What became known as the rule in *Addis* was then followed by the New Zealand courts for more than 70 years. Although judgments in common law claims towards the end of that period hinted at the desirability of its demise, it was legislation that provided the impetus for this in relation to compensation awards.

[34] Section 117(7) of the Industrial Relations Act 1973 provided remedies for unjustifiable dismissal including:

> (a) The reimbursement to him of a sum equal to the whole or any part of the wages lost by him:
>
> (b) His reinstatement in his former position or in a position not less advantageous to him:
>
> (c) The payment to him of compensation by his employer.

[35] Section 117(7)(c) was expanded upon in the equivalent provision of the Labour Relations Act 1987. Section 227 of that Act stated:

> Subject to sections 228 [reinstatement of a primary remedy] and 229 [reimbursement] of this Act, where a grievance committee or the Labour Court determines that a worker has a personal grievance, the committee or the Court may, in settling that grievance, provide for any one or more of the following remedies:
>
> …
>
> (c) The payment to the worker of compensation by the worker's employer, including compensation for—

[10] [1909] AC 488.

> (i) Humiliation, loss of dignity, and injury to the feelings of the worker; and
>
> (ii) Loss of any benefit, whether or not of a monetary kind, which the worker might reasonably have been expected to obtain if the personal grievance had not arisen:

[36] The words of s 227(c)(ii) of the Labour Relations Act were replicated in s 40(1)(c)(ii) of the Employment Contracts Act and, now, in s 123(1)(c)(ii) of the ERA.

[37] In the fourth edition of Mazengarb's Industrial Law the editor commented on s 227(c)(ii) of the Labour Relations Act, stating that it:

> … re-enacts s 117(7) of the Industrial Relations Act … Paragraph (c) is a statutory reversal of the *Addis* rule and recognition of the practice which has already been established by the Arbitration Court.

[38] A New Zealand Law Society seminar paper published in November 1987 on the Labour Relations Act stated, under the heading "Remedies under the Act":

> There is now an extended category of damages. Hopefully this may result in more significant monetary awards to persons whose dismissal has been found to be unjustified. Depending on the particular court presiding, monetary awards range from miserable to generous, with the emphasis being on the miserable side. It might be a disincentive to unjustified dismissal, were awards of damages to be more realistic.

[39] Report 18 of the Law Commission issued in March 1991 recommended that there be a statutory reversal of the *Addis* rule in employment cases for all employees.

[40] Case law reveals that the rule in *Addis* had not been interpreted consistently. Sometimes it was explained in terms of wishing to avoid the awarding of non-pecuniary damages or of punitive damages. It was also described in terms of remoteness of damage, that is by limiting damages to what might have been in the contemplation of the parties at the time of contracting. This latter approach is exemplified by the judgment of the House of Lords in *Herbert Clayton & Jack Waller Ltd v Oliver*[11] as follows: "The damages of those that may reasonably be

---

[11] [1930] AC 209.

supposed to have been in the contemplation of the parties at the time when the contract was made, adds the probable result of its breach."[12]

[41] The Law Commission in its paper referred to a judgment of the High Court in *Gee v Timaru Milling Co Ltd.*[13] In that case the dismissed employee had relinquished a responsible position in one city, his wife resigned from her job, they had sold their home, and their children had changed schools. A few days before the plaintiff was due to begin work with the defendant, he was told that his services would not be required. Mr Gee's claims included one for $15,000 incorporating damages for loss of career advantage, costs incurred by bank overdraft interest brought about by the lack of alternative employment, and for the time, trouble and inconvenience of seeking alternative employment. The High Court struck out the claim on the basis that it could not succeed in view of *Addis* although evincing "considerable sympathy" for the plaintiff and alluding to what the Judge called the "intransigent position" in *Addis*.

[42] These matters were addressed by the Court of Appeal in *Air New Zealand Ltd v Johnston.*[14] At p706 Cooke P, delivering the leading judgment of the unanimous Court of Appeal, wrote:

> At all stages the New Zealand legislation has authorised compensation in addition to reimbursement, if both are found appropriate. The 1973 Act was completely silent about what compensation might cover. The 1987 and 1991 Acts have specified two heads — but the word "including" shows that they are not exhaustive — namely (in short) distress and loss of prospective benefits. … One effect of this legislative pattern is that in accordance with the standards of the present day (see Report No 18 of the New Zealand Law Commission, 1991, on Aspects of Damages: Employment Contracts and the Rule in *Addis v Gramophone Co*) the legislation has excluded the rule in *Addis* [1909] AC 488 severely limiting the damages recoverable at common law for wrongful dismissal. In any event that rule, as to the basis and scope of which there has been debate, has been held by Gallen J not to be part of the law of New Zealand: *Whelan v Waitaki Meats Ltd* [1991] 1 NZLR 74.

[43] So the context in which the predecessor to s 123(1) was enacted was an expansion of remedies for wrongs in employment law and, particularly, in cases of unjustified dismissal. That imperative came from both the courts and, more latterly,

[12] At 220.
[13] HC Auckland, A387/85, 4 February 1986.
[14] [1992] 1 ERNZ 700.

the Legislature. It follows that it is unlikely that a narrow and very constrained approach to compensatory remedies was intended when the relevant predecessors to s 123(1) were enacted.

[44] At p708 Cooke P wrote, after an analysis of the position in other jurisdictions: "By comparison the New Zealand legislation has always been more open-textured and unrestrictive."

[45] Later, in *Ogilvy & Mather (New Zealand) Ltd v Turner*[15] the Court of Appeal addressed the interface between statutory personal grievances and common law actions for breach of employment contracts. Again the leading judgment of a unanimous court was delivered by Cooke P who, at pp803-804, in relation to personal grievances, said:

> Personal grievance provisions applying to dismissal and other action by the employer have been a feature of New Zealand legislation since the enactment of the Industrial Conciliation and Arbitration Amendment Act 1970. For some years they were linked to award or industrial agreement coverage and union membership in ways which it is unnecessary to trace here in detail. Basically they are designed to give workers better and more easily accessible remedies than may have been available at common law in the ordinary Courts, and to cover a wider range of conduct by the employer disadvantageous to the individual worker. The permissible statutory remedies have always included reinstatement, which is not normally available at common law. They have been of particular value to workers who at common law could be dismissed on quite short notice and whose right to damages at common law might therefore be severely limited.
> …
> Yet the statute and the common law are clearly not coincident. For example, monetary relief under personal grievance procedure is largely discretionary, and in cases of unjustifiable dismissal it is open to possible reduction for contributing fault under s 40(2) of the 1991 Act. … On the other hand, the statutory personal grievance remedies by way of monetary awards are not tied to what would have been recoverable at common law: see *Telecom South v Post Office Union* [1992] 1 ERNZ 711, 714-716, 722, 723-724; [1992] 1 NZLR 275, 278-280, 285, 287. The need for an approach wider than that traditionally or formerly taken by the common law to issues between master and servant is a major rationale of the statutory jurisdiction.

[46] The consideration of the remoteness of damage is traceable to the old case of *Hadley v Baxendale*[16] where Baron Alderson, delivering the judgment of the Court of Exchequer, said:

---

[15] [1993] 2 ERNZ 799; [1994] 1 NZLR 641.
[16] 156 ER 145; (1854) 9 Exch 341, 354.

> Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, ie according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.

[47] Notions of remoteness of loss remain applicable to awards of compensation under the ERA.

Submissions for defendants

[48] Those which assist us to determine the question of law posed by the Authority are as follows. Mr Lovely relies on the judgment of this Court in *Meharry* where Judge Finnigan found that what is now s 123(1)(c)(ii) was intended to apply to contractual benefits that an employee might have expected from his or her employment. Also relied on are the subsequent judgments in *Purdon v McVicar Timber Group Ltd*[17] and *Mackintosh*. Although Mr Lovely urges us to follow a number of determinations of the Employment Relations Authority and to distinguish one other of that body, the Authority members who have decided the cases before them in the way that the defendants urge to do, did so because of those Employment Court judgments just referred to. The divergence of Authority opinion on the question is the very reason that this case has been removed to us for decision. Rather than analysing the Authority cases, we see our task as being to reconsider whether the legal basis for them is sound including an analysis of the legislative provisions which either allow or prohibit such remedies as are in issue in this case.

[49] Mr Lovely submits that s 71G(2) of the PLEPA prohibits recovery of lost parental leave payments even if s 123(1)(c) of the ERA might otherwise permit this in law.

[50] Next, Mr Lovely submits that parental leave payments are "special damages" which are not provided for under the ERA. Counsel submits that lost benefits able to be compensated for under s 123 do not include such "special damages".

---

[17] [1992] 1 ERNZ 531.

[51] The balance of the defendants' submissions are on matters of disputed fact in the case which, as already noted, are not for decision by us under s 177 and the referral of a question of law process.

Submissions of amica curiae

[52] Ms Latimer has identified at least four judgments (other than those already mentioned) of this Court and its predecessor, the Labour Court, under the current legislation, the former Employment Contracts Act and its predecessor, the Labour Relations Act 1987, in which the Court has awarded compensation for lost non-contractual benefits. These cases include, in reverse chronological order, *Hjorth v Onesource Ltd*,[18] *Mackintosh*, *Coastline FM Ltd v Prebble*[19] and *New Zealand Educational Institute v Board of Trustees of Auckland Normal Intermediate School.*[20] Ms Latimer's research indicates that the uncertainty, which reigns in the Employment Relations Authority also, is not just about whether s 123(1)(c)(ii) (or its equivalent predecessors) applies only to loss of contractual benefits. Counsel submits that it is apparent that there is confusion also as to the extent that ss 123(1)(b), 123(1)(c) (generally) and 123(1)(c)(ii) (in particular) allow compensatory awards for loss of benefits not arising from the employment agreement or contract.

[53] Ms Latimer submits that the power to award compensation under s 123(1) is discretionary because Parliament has used the word "may". Counsel submits that the descriptions of the losses that are compensable is not exhaustive. Nor is the word "benefit" in s 123(1)(c)(ii) defined, except to the extent that it is not confined to a benefit "of a monetary kind". Parliament has, however, provided that a compensable benefit is one "which the employee might reasonably have expected to obtain if the personal grievance had not arisen".

[54] Ms Latimer drew our attention to the judgment of Richardson J in *Telecom South Ltd v Post Office Union (Inc)*[21] in relation to compensation under the material

---

[18] [2005] ERNZ 618.
[19] [1992] 3 ERNZ 294.
[20] AEC57/92, 31 July 1992.
[21] [1992] 1 ERNZ at p.711.

predecessor provision, s 227(c)(ii) of the Labour Relations Act as follows:[22]

> Paragraph (c)(ii) is directed to a benefit "which the worker might reasonably have been expected to obtain if the personal grievance had not arisen". It is a prospective benefit, one to be obtained in the future, not the continuation of an existing benefit. The provision is intended to reach potential future service related benefits and no doubt to include long service leave, superannuation, redundancy and golden handshakes in various forms for which the worker has not already qualified but which he or she might reasonably have expected to obtain with further service.

[55] Ms Latimer points out, correctly, although Richardson J did not describe such benefits as contractual, the examples provided fall within that description. Also, Ms Latimer points out, in 1992 the existing benefits under the PLEPA did not exist so that even if these may be described as service related benefits, they could not have been in the Court of Appeal's contemplation. It is arguable, as Ms Latimer points out, that a broad view of Richardson J's description of "potential future service related benefits" for which the plaintiff had "not already qualified but which he or she might reasonably have expected to obtain with further service", were it not for the unjustified dismissal, could include a parental leave payment.

[56] A narrower interpretation of Richardson J's words would, however, confine such benefits to those arising only from the contract of employment.

[57] Ms Latimer's submissions in favour of a broader interpretation of Richardson J's definition of a benefit "which the worker might reasonably have been expected to obtain if the personal grievance had not arisen" is reinforced by reference to the judgment of Cooke P in the same decision. At pp 716-717, when discussing the discretionary nature of the award of compensation, the President said:

> I read s.227(c)(i) and (ii) and the equivalent provisions in the 1991 section as making it clear for the avoidance of doubt that compensation may include injury to feelings and loss of reasonably expected benefits of any kind, whether monetary or otherwise; …

[58] We agree that had the Court of Appeal intended such benefits to be limited by contractual origin, we do not think that the President would have expressed the

---

[22] At 720-721.

position as he did. That reinforces our conclusion that the examples given by Richardson J are just that, and not either an exhaustive categorisation of benefits or, certainly, determining by implication that they are to be contract based.

[59] Despite their apparent sequential reporting, *Telecom South* was decided by the Court of Appeal about four months before Judge Finnigan decided *Meharry.* Although, therefore, *Telecom South* was available to this Court for consideration in *Meharry*, it does not appear to have been referred to.

[60] As Ms Latimer points out, the claims in *Meharry* for compensation for the cost of applying for other positions and for loss of interest on savings were not "benefits" in any event, contractual or otherwise. They could not have fallen within Richardson J's description of "potential future service related benefits".

[61] In contrast, however, the claims considered by Judge Travis in *Mackintosh* under s 41(c)(ii) of the Employment Contracts Act were ones for "benefits". In that case the appellant's receipt of redundancy compensation and final pay affected adversely his qualification for a taxation credit, called family support, and also delayed his eligibility for an unemployment benefit. At para [20] the Judge in *Mackintosh* noted the absence of direct authority on the point but accepted the argument of counsel for the employer, following *Meharry*, that s 40(1)(c)(ii) contemplated benefits arising out of the employment relationship and not benefits payable by the State, even although the State benefits were dependent upon the employee's employment status.

[62] We agree with Ms Latimer that the benefits at issue in *Mackintosh* are more akin to the parental leave payments at issue in this case, whereas what were claimed in *Meharry* could not have qualified as benefits.

[63] The *Prebble* case, also decided by Judge Travis, but in 1992 and seven years before *Mackintosh*, dealt with parental leave entitlements. *Prebble* was an appeal from a decision of the Employment Tribunal. In that case the Court considered it to be a compensable benefit that the employee lost the right to return to her paid employment after a period of prospective unpaid maternity leave. Although this was

not a monetary benefit in the sense of a payment by the State for parental leave as in this case, it was, nevertheless, a non-contractual benefit that the Court held was compensable. In *Prebble* Judge Travis followed Richardson J in *Telecom South* saying that it was proper to consider it as a "factor" in determining the compensable lost benefit under s 40(1)(c)(ii).

[64] Ms Latimer submits that it may not now be correct to differentiate between contractual and other benefits (including State benefits) or indeed other direct losses when assessing awards under s 123(1)(c). If, following *Prebble*, the Authority or the Court may consider the effect of the PLEPA when assessing future earnings under s 123(1)(c)(ii), then it ought similarly to contemplate the effect of the grievance on Part 7A entitlements (paid parental leave provisions) under the PLEPA in determining a grievant's losses.

[65] As Ms Latimer reminds us, the interpretation of Parliament's intention in legislation must start with s 5(1) of the Interpretation Act 1999. The meaning of the legislation must be ascertained "from its text and in the light of its purpose". If the text is unambiguous then that will generally be applied. But a purposive interpretation of legislation allows it to keep pace more easily with the times in which it is to be interpreted which are often removed from and quite different from those in which it was passed.

[66] Ms Latimer submits that the purpose of s 123(1)(c) is to empower the Court and the Authority, in the exercise of their discretions, to place an unjustifiably dismissed employee in a position that he or she would have been had there been no grievance. These are the same rationale for an award of damages for breach of (employment) contract.

[67] Counsel submits that whilst generally in an employment context the word "benefits" means perquisites additional to monetary remuneration, such as the provision of a vehicle, private use of a mobile telephone, provision of health insurance, contributions to superannuation etc, the legislation has not, in its text, so restricted the benefits able to be compensated for. Such an approach would tend to point away from a narrow interpretation of "benefits" as being contractual benefits.

[68] Section 123(1)(c) does not contain any express limitation or restriction affecting this question, nor can it be implied from s 123(1)(c)(ii) that compensation is limited to any loss arising from a benefit which itself arises from the employment agreement. So it follows that lost paid parental leave is within the category of benefits contemplated by Parliament, subject to proof of causation. That means that if, but for the personal grievance (of unjustified dismissal), the employee would reasonably have expected to obtain a benefit of paid parental leave, then its value is a lost benefit for which the Authority or the Court may compensate the dismissed employee.

[69] Ms Latimer also addresses the question in the context of s 123(1)(b). This allows the Authority or the Court to award, by way of compensation, "the reimbursement to the employee of a sum equal to the whole or any part of the wages or other money lost by the employee as a result of the grievance".

[70] In *Hjorth* Judge Shaw allowed compensation "for interest payments on the loan taken out by the grievant, because of financial difficulties caused by the grievance." This was said to have been an appropriate exercise of the Court's discretion "because the purpose of compensation is to put an unjustifiably dismissed employee back into the position he would have been in if there had been no legal wrong."

[71] In this regard at paras [55] and [56] Judge Shaw reasoned:

> [55] Under s123(1)(a) [sic - the Judge must have been intending to refer to s 123(1)(b)] an employee is entitled to a sum equal to money lost as a result of the grievance. The Employment Relations Act 2000 does not limit these losses to loss of contractually defined income.
>
> [56] In this case, I am satisfied that Mr Hjorth lost the money which he had to pay in interest on the loan that, but for his dismissal, he would not have had to incur. The parties are agreed on the quantum of $3,966.21 which is awarded.

[72] As Ms Latimer points out, *Hjorth* is not only authority for the proposition that compensable losses should not be restricted to contractual losses but also that such losses may be compensable under s 123(1)(b) as "other money lost". In the sense that a parental leave payment is in the nature of remuneration rather than some

other form of monetary benefit, it may fall naturally within the description of "other money lost" under s 123(1)(b).

[73] Ms Latimer points out that the Authority, at paras [37] and [38] of its referral has said that McKendry's claims to parental leave payments may also be dealt with as an award of damages for breach of the employment contract at common law. The case has not, however, been pursued as such but, rather, as a personal grievance for which remedies are provided for and limited by statute. For completeness, however, Ms Latimer invites us to consider whether, pursuant to s 162 of the ERA, the Court may consider it appropriate that the Authority be committed to determine the claim as one of contract damages.

[74] In the circumstances, however, we would prefer not to venture more broadly into causes of action that are not before the Authority. The analogy of contract damages at common law is, nevertheless, relevant to our assessment of whether Parliament intended, under s 123(1), that such losses could be recoverable. Many of the same principles are applicable to the statutory remedy.

[75] Ms Latimer invites us to conclude that, as a matter of general principle of contract law and one of common sense, it is reasonable to expect that an employer should be aware of its statutory and contractual obligations at the time of entering into its employment agreements. She submits that it is reasonably foreseeable that if an employment agreement is terminated prior to a milestone being reached, upon which a paid service benefit is triggered, the affected employee will not be entitled to that benefit as a result of the premature termination. If the entitlement to the benefit is lost as a consequence of a breach of the employment agreement (including unjustified dismissal), then the amount of the benefit is a loss that flows from that breach.

[76] In terms of this case, Ms Latimer invites the Court to find that paid parental leave under the PLEPA is a loss that was a direct and foreseeable consequence of the unjustified dismissal of Ms McKendry at the time and in the circumstances in which that took place, and is not a remote or unforeseeable consequence of an unjustified dismissal. We would add that it is a loss that would be difficult to mitigate by an

employee in the traditional way of obtaining alternative employment. Where a pregnant employee is dismissed unjustifiably, in these circumstances it would generally be unreasonable to expect that employee to obtain alternative employment to mitigate the loss of the parental leave payments. As here, however, a degree of mitigation of loss may be achieved by the parental leave tax credit.

Decision

[77] Largely for the reasons set out in Ms Latimer's submissions, summarised above, we answer the Authority's question:

> Does s.123(1)[(b)] or s.123(1)(c)(ii) of the Employment Relations Act 2000 permit the Authority to order the respondents to pay compensation to the applicant for the loss of her entitlement to paid parental leave under the Parental Leave and Employment Protection Act 1987?
>
> Yes.

[78] Compensation for loss of a parental leave payment, if necessary mitigated by a parental leave tax credit received, is "other money lost by the employee as a result of the grievance" under s 123(1)(b) and is also, but independently, the "loss of any benefit, whether or not of a monetary kind, which the employee might reasonably have been expected to obtain if the personal grievance had not arisen" under s 123(1)(c)(ii).

[79] We reserve questions of costs although indicate, in a preliminary way, that the arguably uncertain state of the law and the desirability of its verification will be likely to mean that the costs of the parties should lie where they fall and that the Court should bear the costs of the amica curiae.

GL Colgan
Chief Judge
for the full Court

Judgment signed at 9 am on Friday 24 September 2010