IN THE COURT OF APPEAL OF NEW ZEALAND

CA309/2009
[2010] NZCA 421

	BETWEEN	CHRISTOPHER JOHN GILBERT Appellant
	AND	THE ATTORNEY-GENERAL IN RESPECT OF THE CHIEF EXECUTIVE OF THE DEPARTMENT OF CORRECTIONS Respondent

Hearing: 16 June 2010

Court: Hammond, O'Regan and Randerson JJ

Counsel: Appellant in person
R B Chan and T M Bromwich for Respondent

Judgment: 16 September 2010 at 10.30a.m.

JUDGMENT OF THE COURT

A We allow the appeal in two respects only:

(i) The interest reduction of 4.7 per cent referred to in [107](d) of the first remedies judgment dated 4 December 2003 is not to be applied in calculating the appellant's salary loss after 14 October 2002.

(ii) Interest at five per cent per annum is payable by the respondent to the appellant on any unpaid balance of the sum determined to be due by the respondent to the appellant in respect of loss of salary in the period from 14 October 2002 to the end of his working life. The interest is to run from 14 October 2002 until the date of payment.

B In all other respects the appeal is dismissed.

C No order as to costs.

REASONS OF THE COURT

(Given by Randerson J)

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Introduction

[1] The appellant Mr Gilbert commenced employment as a probation officer with the Corrections Division of the then Department of Justice in 1971. Apart from a

period of approximately four years, he continued in employment as a probation officer until he was forced to leave through ill-health in 1996 when aged 51.

[2] In July 1997, Mr Gilbert commenced proceedings in the Employment Court for unjustified dismissal. It is a regrettable feature of this case that some 13 years later the litigation has still not been finally resolved. There have been three substantive decisions of the Employment Court and this is the second occasion on which the litigation has received appellate attention.

[3] This appeal raises issues relating to the calculation of Mr Gilbert's losses. Prominent amongst these are alleged errors of law in respect of the calculation of deductions for contingencies when assessing loss of income, the approach to taxation on the awards, and the assessment of superannuation losses.

[4] Since the proceedings were commenced under the Employment Contracts Act 1991, leave to appeal is not required.[1]

The first judgment in 2000 (on liability and a partial conclusion on remedies)

[5] By a decision delivered on 21 June 2000,[2] Judge Colgan found that the Department had breached express and implied terms of Mr Gilbert's employment contract and that he had been unjustifiably constructively dismissed. A central feature of the Judge's finding was that Mr Gilbert had been exposed to unnecessary and avoidable workplace stress arising from work overload, management failure as well as office and resource deficiencies. This had caused Mr Gilbert to develop a cardiac condition that was aggravated by stress. It required his hospitalisation and an extended period of sick leave in 1995. He was advised to retire on medical grounds and did so with effect from 29 March 1996.

[6] The Judge found that Mr Gilbert was entitled to the following remedies:

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1 Employment Relations Act 2000, s 247.

2 *Gilbert v Attorney-General* EC Auckland AEC 93/97, 21 June 2000.

(a) a lump sum for loss of income (which was to be the subject of actuarial evidence and a further hearing if the parties could not reach agreement);

(b) general damages of $75,000 for humiliation, anxiety and distress;

(c) medical expenses of approximately $14,000;

(d) compensatory damages of $50,000 for loss of career, loss of employment status, employability and future marketability; and

(e) exemplary damages of $50,000.

[7] The liability finding was upheld by this Court on appeal[3] but the heads of damage identified as (d) and (e) above were quashed.

The first remedies judgment in 2003

[8] The parties were unable to reach agreement on the calculation of Mr Gilbert's loss of income from 1996 to the end of his notional working life (the period until his 65th birthday on 5 March 2010). An issue also arose about the proper method of calculating Mr Gilbert's superannuation losses after his notional retirement date.

[9] Judge Colgan heard extensive evidence over a five day period in late 2002 and early 2003 including expert medical and actuarial evidence. Although there were areas of agreement between the experts, there were also substantial areas of disagreement. The key findings made by the Judge in his decision delivered 4 December 2003[4] were:

(a) But for the breaches of the Department's duty towards him, Mr Gilbert would very likely have survived to age 65. Although in the late 1980's and early 1990's he had experienced some chest pain, this was stress related and not cardiac in nature. It was generally able to be managed.

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3 *Gilbert v Attorney-General* CA141/00, 14 March 2002.

4 *Gilbert v Attorney*-General EC Auckland AEC 93/97, 4 December 2003.

(b) The presence of work stresses other than those involved in the Department's breach did not substantially increase his risk of coronary artery disease.

(c) In the absence of the Department's breaches, the chances of Mr Gilbert surviving beyond age 65 were less than those of "average" New Zealand males of the same age as a result of his general state of health and his prolonged and intensive cigarette smoking.

[10] There was a difference of opinion between the actuaries called on each side as to the likely length of Mr Gilbert's continued employment with the Department. Resolving those differences, the Judge found:

(a) In the period from the date of Mr Gilbert's resignation in 1996 until 14 October 2002 (the first day of the remedies hearing) there was a 95 per cent chance that Mr Gilbert would have continued to work for the Department. It followed that a five per cent contingency deduction would be made to the loss of earnings calculation up to that date.

(b) There was a 40 per cent chance that Mr Gilbert would have worked for the Department until age 65. For the period from 14 October 2002 until 5 March 2010 (the notional retirement date) a deduction of 60 per cent for contingencies was to be made for lost earnings during that period.

[11] Mr Gilbert held a position with the Department as a unit manager at the time of his retirement on medical grounds. That position was subsequently abolished but the new position of service manager was created. Some of the former unit managers became service managers, but not all, since there were fewer service managers than unit managers. In some instances, the remuneration of former unit managers was "grandfathered". The Judge found that Mr Gilbert had a 35 per cent chance of promotion to the position of service manager had he continued in employment with the Department. Had he not become a service manager, Mr Gilbert would have remained a probation officer but with a "grandfathered" unit manager's salary.

[12] It followed that Mr Gilbert's loss of salary calculations were to be made on the basis of including 35 per cent of the difference between a unit manager's salary in 1996 and the relevant service manager's salary for the probable duration of his continued employment.

[13] Against that background, Judge Colgan made the following awards:

For the period from March 1996 to 14 October 2002 (first day of the first remedies hearing)

(a) $297,966, representing Mr Gilbert's loss of a unit manager's salary, including loss of the chance to earn a service manager's salary;

(b) $102,974 of interest on salary loss to 14 October 2002;

(c) accumulating interest on salary loss, from 14 October 2002 to date of payment, at the rate of $61 per day; and

(d) a deduction of five per cent from the total of the above for contingencies.

For the period from 14 October 2002 until 5 March 2010 (Mr Gilbert's notional retirement date)

(a) a sum, to be calculated, representing $42,447 per annum plus 35 per cent of the difference between $42,447 and a service manager's annual salary at the date of judgment for the period from 14 October 2002 to the date of judgment, reduced by five per cent for contingencies;

(b) a sum to be calculated by adding to the annual equivalent of the total sum in (a) above a factor of one per cent[5] per annum to March 2010 and multiplying this by six years and five months;

(c) the sums at (a) and (b) above to be reduced by 60 per cent.

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[5] Later increased under the slip rule to three per cent.

(d) the sum in (c) above to be reduced by 4.7 per cent for net interest to be earned.

(e) the sum of $5,208.33 for interest on distress damages.

(f) the sum of $291,192.61 for costs and disbursements.

[14] Two findings made by the Judge are of particular relevance to the issues on appeal:

(a) The Judge's finding that the awards would need to be "grossed up" if tax were to be levied on the awards for loss of income. That would be necessary, the Judge thought, if the sums awarded were taxed in the year of receipt of the award at a higher rate than would have applied if the income had been received periodically during the course of Mr Gilbert's employment.

(b) The Judge's finding that the Department's breaches had not caused any prospective superannuation loss to Mr Gilbert because the capitalised value of his medical retirement pension would exceed the capitalised value of his ordinary pension entitlement which would have applied from his notional retirement date.

The recall judgment of 2006

[15] In December 2005, nearly two years after the first remedies judgment, Mr Gilbert applied for a recall on a number of grounds. Part of the delay in that period is explained by appeals each side made to this Court (which did not proceed in the end) and an application by the Department for several incidental slips to be corrected. In a judgment delivered on 10 March 2006[6] Judge Colgan recalled the first remedies judgment in limited respects. The Judge allowed further evidence including actuarial evidence. The recall application occupied a further five hearing days in November and December 2006. By the time of that hearing the issues had been narrowed to three:

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6 *Gilbert v Attorney-General* EC Auckland AEC 93/97, 10 March 2006.

(a) What deduction from future lost earnings should be made for contingencies?

(b) What was the effect of a probation officer's salary overtaking the "grandfathered" salary of a unit manager?

(c) How were the tax calculations required for the "grossing up" exercise to be carried out?

The second remedies judgment of 2009

[16] Judge Colgan (by now the Chief Judge of the Employment Court) delivered the second remedies judgment on 28 April 2009,[7] over two years after the conclusion of the hearing. The Judge recorded that the Department had paid Mr Gilbert the sum of $922,148 (less tax) on 13 September 2005 based on the Department's calculation of what it was obliged to pay.

[17] Briefly stated, the principal findings of the Chief Judge in the second remedies judgment were:

(a) The Judge accepted he had erred in the application of the contingency figures of five per cent and 60 per cent respectively in relation to loss of income. He accepted the evidence of Mr Gilbert's actuary that the contingency figures should not be applied uniformly across the relevant periods but should be calculated using increasing probability methodology. This required that the five per cent contingency should be reduced to an average 2.52 per cent during the relevant period and, in the case of the sixty per cent contingency, that the range between 100 and 140 per cent be averaged over Mr Gilbert's remaining working life, ie the period of 7.4 years between 14 October 2002 and 5 March 2010.

(b) The Judge summarised the "grandfathering" issue as follows:

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[7] AEC 93/97, AEC 69/98, Judgment Number AC 19/09.

> … 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.[8]

(c) The Judge accepted that he was bound by the judgment of this Court in *North Island Wholesale Grocers Ltd v Hewin*[9] with the result that the Court was bound, in making an award for lost income, to allow the gross or pre-tax figure. The Chief Judge accepted that the Court could not inquire into the incidence of tax on the amounts awarded and could not undertake a grossing-up or netting-down exercise.

Issues on appeal

[18] The notice of appeal raised a number of issues which the Department's counsel have helpfully distilled into the following five issues:

(a) Did the Employment Court err in its findings and approach as to Mr Gilbert's likely date of retirement, absent the breaches?

(b) Did the Employment Court err in its findings and approach as to Mr Gilbert's likely salary, absent the breaches?

(c) Did the Employment Court err in finding that Mr Gilbert has not suffered any loss of superannuation entitlements?

(d) Did the Employment Court err in finding that the tax consequences of the damages award are not to be taken into account?

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8 At [24].

9 *North Island Wholesale Grocers Ltd v Hewin* [1982] 2 NZLR 176.

(e) Did the Employment Court err in its approach to interest on the awards?

[19] The issues challenge findings made in both the first and second remedies decisions. The parties have agreed that the time for appeal against the first remedies decision should not run until after the second remedies decision which resulted from the recall of the first. There is therefore no impediment on timing grounds to this Court considering the issues raised. As Mr Gilbert acknowledged, however, this Court's jurisdiction is limited to consideration of questions of law.[10]

First issue: did the Employment Court err in its findings and approach to Mr Gilbert's likely date of retirement, absent the breaches?

[20] Under this heading, Mr Gilbert raised nine issues in his notice of appeal under the heading "Deductions for Contingencies". He abandoned the eighth and ninth issues. The remaining issues all sought to challenge in various ways the deduction which the Judge allowed for contingencies in relation to losses before and after 14 October 2002. It is convenient to repeat that the first remedies judgment fixed the contingencies deduction at five per cent for losses up to 14 October 2002 and 60 per cent for losses after that date. The second remedies judgment, applying the methodology suggested by Mr Gilbert's advisers, reduced the contingencies deduction.

[21] Mr Gilbert submitted that the deductions were excessive and were based on errors of legal principle. The Judge had misapprehended the evidence, made contradictory findings and was influenced by evidence and assumptions by the actuaries as to his prior health condition which were inadmissible or should have been disregarded as being in direct conflict with the Court's findings. He also submitted that the Judge had ignored a serious issue as to the credibility of the Department's actuary, maintaining that his evidence had ventured into areas which were for the Court to determine.

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[10] Employment Contract Act 1991, s 135 which continues to apply by virtue of s 247 of the Employment Relations Act 2000.

[22] Mr Gilbert further submitted that the finding by the Judge that he had only a 40 per cent chance of working to age 65 was speculative because it was based on a view reached by the Judge that he (Mr Gilbert) would have been unlikely to have worked until age 65 through disinclination, for which Mr Gilbert submitted there was no evidence.

[23] With one exception which we mention below, we accept the Department's submission that the issues raised by Mr Gilbert under this heading are all questions of fact and are therefore outside the jurisdiction of this Court on appeal.

[24] The first and second issues challenged findings made by the Judge on Mr Gilbert's pre-existing morbidity. The Judge found, favourably to Mr Gilbert, that his non-cardiac chest pain and his predisposition to coronary artery disease would probably not have adversely affected his ability to continue to work to age 65. Despite that, the Judge found there were contingencies to be taken into account.

[25] The resolution of this issue depended on the Judge's assessment of the expert medical evidence called on both sides. The Judge noted that the medical experts both had high standing in the medical community. It was not a matter of accepting the evidence of one and thereby rejecting that of the other. Rather, it was a matter of assessing degrees of probability of factors with the combined benefit of the expertise of both witnesses. The Judge described the areas of agreement between the medical experts including their joint expectation that Mr Gilbert would live to at least aged 65 and that his smoking history was a risk factor in that he had an approximately two-fold increased risk of heart attack or death from coronary heart disease compared to an average New Zealander of his age. The real issue the Judge found was the extent of any reduction in Mr Gilbert's life expectancy as a result of these factors. The Judge concluded that the "NZ Life Tables 1995 – 97 plus 5" were appropriate for determining, statistically, the probabilities of Mr Gilbert's mortality (a matter which the Judge noted was eventually agreed by the experts as the appropriate starting point for assessing the probabilities of Mr Gilbert's mortality absent the breaches).

[26] The actuaries both gave evidence about the probabilities of Mr Gilbert retiring early through medical or other reasons. The Department's actuary considered the probability of his working beyond the age of 62 to be negligible. Mr Gilbert's actuary accepted that as Mr Gilbert approached 65, the probability of his becoming ill through causes other than the breaches increased. Because of the availability of his pension, the monetary value of continuing to work would also decrease so that early retirement became relatively more attractive. This led Mr Gilbert's actuary to conclude that Mr Gilbert had only a 20 per cent chance of remaining at work to age 65.

[27] In reaching the five per cent discount for contingencies in the pre-hearing period, the Judge took into account that there was no significant deterioration in Mr Gilbert's health during the period 1996 to 2002. He concluded that, apart from the consequences of the normal vicissitudes of probation officer employment, Mr Gilbert would probably have continued working for the Probation Service over that period had the breaches not occurred. The chances of his not having done so were five per cent.

[28] By comparison, the Judge found that the likelihood of Mr Gilbert retiring or otherwise ending his employment between the date of hearing (2002) and his notional retiring date (2010) were much higher. It is noteworthy that the Judge concluded that there would be a 40 per cent chance of Mr Gilbert working until age 65 despite the evidence of Mr Gilbert's actuary that there was only a 20 per cent chance of his doing so. This finding was more favourable to Mr Gilbert than his own expert's opinion.

[29] We are satisfied there was sufficient evidence upon which the Judge could base his findings in relation to morbidity and mortality issues. In reaching his conclusion, the Judge thoroughly analysed both the medical and actuarial evidence on these topics. It has not been demonstrated that any error of law arose. We conclude that these issues are purely factual and do not give rise to any error of law.

[30] Mr Gilbert's next two points raised in the notice of appeal were combined in his argument that the Judge had failed to reject evidence based on assumptions of

fact Mr Gilbert submitted were wrong. He submitted, in particular, that the Court had ignored what he contended was a gross statistical error in the evidence of the actuary called by the Department. He also submitted that the Judge had confused the evidence of the medical witness called by Mr Gilbert and that the Judge's finding on the contingencies conflicted with his finding that, post the breach, Mr Gilbert's mortality risk to age 65 was average.

[31] It is apparent that, in reaching his conclusion on the appropriate contingencies reduction, the Judge did not accept the conclusion reached by the Department's actuary. Even if he had, the assumptions alleged to have been wrongly made could not amount to an error of law.

[32] Mr Gilbert's next point was that there was no basis for the Judge's conclusion that a disinclination to work was a factor to be considered in the assessment of the deduction for contingencies. This overlooks the evidence already mentioned provided by Mr Gilbert's own actuary. In any event, it was a conclusion the Judge was entitled to reach as part of the overall assessment. It does not amount to an error of law.

[33] The next issue raised by Mr Gilbert under this heading was an alleged failure by the Judge to specify how the probabilities were to be determined and failing to alter the method for calculating the loss after having adopted an increasing probability method of calculating future losses. Here we accept the Department's submission that the Judge gave sufficient guidance on this issue in the second remedies decision leaving the final calculation to the actuaries using the methodology advanced by Mr Gilbert's actuary. The Judge noted the additional contingencies recommended by the Department's actuary were to be factored in as well[11] although according to the Department's actuary we were told this might not be possible.

[34] The last issue under this heading is the only one that could potentially give rise to an issue of law. The points on appeal allege that the Judge erred by determining that the length of time the appellant would have worked, absent the

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[11] *Gilbert v Attorney-General* EC Auckland AEC 69/98, 28 April 2009 at [13].

breaches, was to be principally determined by "an assessment of his medical condition actuarially … and by an assessment of factors peculiar to the appellant".

[35] The submission made by Mr Gilbert rested on a passage in the first remedies judgment.[12] Mr Gilbert's submissions on this point suggested that the Judge had abdicated his proper judicial function by surrendering to the expert evidence. We cannot be certain precisely what the Judge meant by the passage identified, but it is evident from reading the first remedies judgment as a whole that, after considering all the medical and actuarial evidence, the Judge reached his own conclusions on the issues relevant to morbidity, mortality and the deduction for contingencies. In doing so, he relied partly on matters that were agreed by the experts and, where they were in conflict, on his own assessment of the evidence. It is plain that the Judge applied his own judgment to the assessments involved and that, in doing so, he did not blindly apply the evidence of the experts. The issues to be assessed were not susceptible of precise calculation. Rather, they involved issues of judgment based on all the evidence. No error of law is established.

Second issue: did the Employment Court err in its finding and approach as to Mr Gilbert's likely salary absent the breaches?

[36] It is not easy to discern exactly what Mr Gilbert was contending for under this heading. In his written submissions he appears to be contending that the approach taken by the Judge to the calculation of loss of income was in error because it relied on a notional "grandfathered" salary (including the promotional allowance) and that there had been an error in calculating the likely level of salary for a probation officer with ten competencies. In his oral submissions, Mr Gilbert added that the Judge had erred by not taking into account his earning capacity including his possible earnings through the undertaking of research. In this last respect, the Judge found it was most unlikely that Mr Gilbert would be called upon to do research.

[37] In response, it was submitted on behalf of the Department that the argument under this heading challenged a factual finding for which there was ample evidence

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[12] At [63].

and did not amount to an error of law. It was also submitted that, on the available evidence, the approach adopted by the Judge of including the promotional allowance in the notional "grandfathered" salary in calculating the loss from the hearing date to the end of his working life was more favourable to Mr Gilbert since his earnings as a probation officer (without the promotional allowance) were unlikely to exceed the notional grandfathered figure adopted.

[38] We are satisfied that this too is a factual issue and does not give rise to any error of law.

Third issue: did the Employment Court err in finding Mr Gilbert has not suffered any loss of superannuation entitlements?

[39] Up to the time of his retirement on medical grounds in 1996, Mr Gilbert and the Department as employer had made contributions to the Government Superannuation Fund in order to secure superannuation for Mr Gilbert upon his retirement. In terms of s 35 of the Government Superannuation Fund Act 1956, he would have been entitled, on reaching the age of 65 years, to have received an annual retiring allowance for the remainder of his life calculated on the basis of a formula set out in the section.

[40] In terms of s 36 of the Act, where a contributor retires from Government service on the ground of being medically unfit before reaching normal retirement age, he or she is entitled to receive an annual retiring allowance (computed as provided in s 35) if the relevant department consents to the retirement.

[41] Under that provision, Mr Gilbert became entitled to a retiring allowance amounting to approximately $9,000 per annum, inflation adjusted. He capitalised 16.5 per cent of the allowance which realised a lump sum of $21,459. Had he reached normal retirement age, his retiring allowance would have been higher, reflecting the further contributions which would have been made by Mr Gilbert and the Department in the intervening years and the longer period of service which would then have been applied to the calculation of the allowance.

[42] There were three matters which were common ground in the Employment Court which should be recorded:

(a) the amounts received by Mr Gilbert by way of superannuation allowance were not to be deducted from the calculation of his *loss of earnings* up to the date of his notional retirement at 65.

(b) in calculating the superannuation loss, any payments Mr Gilbert would receive *after* the age of 65 by way of retiring allowance consequent upon his medical retirement were to be taken into account.

(c) in calculating the amount of the superannuation loss, the *lump sum* which Mr Gilbert received by commuting part of his retiring allowance in 1996 was to be taken into account.

[43] What was in dispute at the time of the first remedies hearing was whether the periodic retiring allowance payments received by Mr Gilbert from the date of his retirement in 1996 until he reached the age of 65 were to be deducted from the calculation of his notional retiring allowance assuming he had continued to work until that age.

[44] In the first remedies decision, the Judge accepted[13] that the respondent's actuary (Mr Higgins) had greater expertise in relation to Government Superannuation Fund issues than Mr Gilbert's actuary (Mr Osborn). The Judge also found that Mr Higgins was largely unshaken by cross-examination on this issue.

[45] The Judge then concluded:[14]

> The evidence of the defendant's actuary Mr Higgins was that the capitalised value of Mr Gilbert's pension entitlements (assuming he had continued in employment and retired at some point between ages 51 and 65) would in all instances deliver a value less than the capitalised value of his medical retirement pension at age 51. Mr Higgins said this is so in actuarial present value terms because the pension is more valuable the earlier it is taken. Put another way, the additional amount of pension per annum generated by a further period of membership (including the attendant member

[13] At [91].
[14] At [92].

> contributions) is more than offset by the amount of pension foregone during the intervening period. Mr Higgins concluded that there was no loss of value in relation to Mr Gilbert's superannuation benefits as a result of his medical retirement at age 51. I accept Mr Higgins's evidence that the only way in which Mr Gilbert may have been able to benefit from a higher value of superannuation on a later retirement date than he took in 1996, would have been to have increased substantially his salary. Having concluded that he had only a 35 percent chance of promotion to a service manager position, the salary for which would not meet that description of a substantial increase, it follows in Mr Higgins's conclusion that, pension-wise, Mr Gilbert was and remains better off financially to have retired as and when he did. I accept, therefore, that the defendant's breaches have not caused prospective superannuation loss to Mr Gilbert in the circumstances.

[46] The point taken by Mr Gilbert on appeal is that the periodic retiring allowance payments received by him between 1996 and his notional retirement date at age 65 ought not, as a matter of law, to have been taken into account. The principal authorities on which he relied are two decisions of the House of Lords – *Parry v Cleaver*[15] and *Longden v British Coal Corporation.*[16]

[47] In the first remedies decision, the Judge referred to *Parry* in the context of his discussion of Mr Gilbert's claim for lost earnings. He did not refer to the case when dealing with the claim for superannuation losses and did not refer to *Longden*. It is not clear whether *Longden* was brought to the attention of the Judge. An analysis of both decisions is required.

Parry v Cleaver

[48] In *Parry*, the issue was whether a disability pension to which an injured police officer was entitled should be taken into account in the assessment of loss of wages. By a majority of three to two, it was held that the disability payments under the pension were different in kind from a salary and should not be taken into account in calculating loss of salary. However, in the period post the notional retiring date, the amount payable under the disability pension was to be taken into account when assessing the loss which would accrue when the amount receivable under the disability pension was compared with the higher amount which would have been payable under the normal retirement pension.

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15 *Parry v Cleaver* [1970] AC 1.

16 *Longden v British Coal Corporation* [1998] AC 653.

[49] The House of Lords did not consider the point at issue in this appeal, namely whether amounts received under the medical retiring allowance prior to the notional retirement date should be taken into account when assessing superannuation losses.

[50] Nevertheless, the rationale for the decision of the majority in *Parry* is instructive. Lord Reid delivered the leading judgment for the majority. He began by citing the earlier decision of the House of Lords in *British Transport Commission v Gourley*[17] which established, amongst other things, the "universal rule that the plaintiff cannot recover more than he has lost". Lord Reid observed that prior to *Gourley* there was no universal rule as to how to treat sums which came to the plaintiff as a result of an accident. He noted that there were two categories of payments which had been disregarded when assessing losses arising from the accident. The first was the proceeds of insurance and the second was sums coming to the plaintiff by reason of benevolence. The reason for disregarding insurance payments as being that the plaintiff had purchased the contract of insurance and that it would be unjust and unreasonable to hold that the money he prudently spent on premiums and the benefit derived should enure to the benefit of the tortfeasor.[18]

[51] Lord Reid went on to conclude[19] that there was no relevant difference between the purchase by an employee of a retirement or disablement pension and any other form of insurance. He emphasised[20] the differences between a pension and wages:

> A pension is intrinsically of a different kind from wages. If one confines one's attention to the period immediately after the disablement it is easy to say that but for the accident he would have got £X, now he gets £Y, so his loss if £X-Y. But the true situation is that wages are a reward for contemporaneous work, but that a pension is the fruit, through insurance, of all the money which was set aside in the past in respect of his past work. They are different in kind.

[52] While Lord Reid was firmly of the view that the pension should not be brought into account in assessing the loss of wages claim, he accepted that it ought to be brought into account in assessing the claim for pension losses after the normal

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17 *British Transport Commission v Gourley* [1956] AC 185.
18 At 14.
19 At 14.
20 At 16.

police retiring age. His Lordship explained why the disability pension was to be brought into account from the notional retirement date onwards but not prior to that time:[21]

> … The answer is that in the earlier period we are not comparing like with like. He lost wages but he gained something different in kind, a pension. But with regard to the period after retirement we are comparing like with like. Both the ill-health pension and the full retirement pension are the products of the same insurance scheme; his loss in the later period is caused by his having been deprived of the opportunity to continue in insurance so as to swell the ultimate product of that insurance from an ill-health to a retirement pension. There is no question as regards that period of a loss of one kind and a gain of a different kind.

[53] Lord Reid accepted that the calculation of the pension loss should also take into account the plaintiff's life expectancy and should be discounted to represent the present value of a series of future payments.

[54] Lord Pearce also accepted that an employee's pension benefits were akin to insurance, affirming the general principle in that respect established by *Bradburn v Great Western Railway Co.*[22] Lord Pearce noted that *Bradburn's* case was followed in *Payne v Railway Executive*[23] in relation to pension benefits received by an injured soldier. As Lord Pearce put it:[24]

> If one starts on the basis that *Bradburn's* case (1874) L.R. 10 EX.1, decided on fairness and justice and public policy, is correct in principle, one must see whether there is some reason to except from it pensions which are derived from a man's contract with his employer. These, whether contributory or non-contributory, flow from the work which a man has done. They are part of what the employer is prepared to pay for his services. The fact that they flow from past work equates them to rights which flow from an insurance privately effected by him. He has simply paid for them by weekly work instead of weekly premiums.

[55] Lord Pearce went on to refer to Australian authorities describing the distinguishing characteristics of pension rights.[25]

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21 At 20.

22 *Bradburn v Great Western Railway Co* (1874) L.R. 10 EX.

23 *Payne v Railway Executive* [1952] 1 KB 26.

24 At 37.

25 *National Insurance Co NZ Ltd v Espagne* (1961) 105 CLR 569 at 573; and *Jones v Gleeson* (1965) 39 ALJR 258.

[56] The remaining member of the majority, Lord Wilberforce, did not favour an analogy with insurance but also saw a clear distinction between loss of wages and pension entitlements.[26]

[57] The minority in the House comprised Lord Morris and Lord Pearson. Lord Morris considered, at least where there was no discretionary element, that pension payments were "very much more akin to pay than anything else".[27] The loss ought to be measured by comparing what he used to receive under his employment contract with what he now receives.

[58] Lord Pearson considered that issues of causation and remoteness were relevant. He addressed the question: "... was the pension in the present case too remote in the sense that it was caused by something remote from an wholly collateral to the accident and its direct and natural claim of consequences."[28] He concluded that, by reason of the accident, the plaintiff's salary had ceased and his pension began. The latter was intended to take the place of salary. Both salary and pension were payable under the same contract. It would be artificial in those circumstances to exclude the receipts from the pension from the calculation of loss of salary.

[59] The primary finding in *Parry* that pension entitlements should not be deducted from the compensatory award for lost salary has since been affirmed by the House of Lords in *Smoker v London Fire Authority*.[29]

Longden

[60] In the *Longden* case, the House of Lords was required to address the critical issue involved in this appeal, namely whether payments received under a disability pension prior to the notional retirement date were to be brought into account when assessing a claim for pension losses. Just as in the present case, the effect of doing so would have been to extinguish any claim for loss of pension. In a unanimous decision delivered by Lord Hope, it was decided that the payments received (or to be

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26 At 42.
27 At 32.
28 At 51.
29 *Smoker v London Fire Authority* (1991) 2 AC 502 (HL).

received) under the disability pension prior to the notional retirement date were not to be brought into account.

[61] The plaintiff had been injured in an accident while in the employ of the defendant. The employer's superannuation scheme provided for a pension on retirement from employment at or after the normal retirement age of 60 and an incapacity pension in the event of retirement before the normal age on the ground of ill-health. Following the accident, the plaintiff received an incapacity pension and claimed damages which included a claim for loss of pension after the normal retirement age. This claim included the lump sum to which he would have been entitled on normal retirement and the difference between the annual retirement pension he would have received after that date and the annual incapacity pension that he would continue to receive.

[62] The House of Lords held that incapacity and disability pensions were exceptions to the general rule that all receipts resulting from an accident had to be set off against losses due to the accident. The periodical sums received by the plaintiff during the period prior to normal retirement age were not to be deducted from his claim for loss of retirement pension. But the lump sum received by him on his resignation was to be apportioned between the periods before and after normal retirement age. The part attributable to the period after normal retirement age was to be set off against his claim since it represented the commutation of the annual payments he would otherwise have received during the same period.

[63] Lord Hope began by summarising the general principle relating to the recovery of damages for losses of the kind at issue:[30]

> There is no doubt that the plaintiff cannot recover under his claim of damages for pension loss any more than the amount of his net loss. The purpose of the award of damages is to compensate him for his loss, not to enrich him. It should leave him no worse off than he was before, nor should he be any better off. As Lord Bridge of Harwich said in *Hussain v New Taplow Paper Mills Ltd* [1988] A.C. 514, 517, the rule is that prima facie the only recoverable loss is the net loss. Financial gains which accrue to the plaintiff which he would not have received but for his accident are prima facie to be taken into account in mitigation of the losses which he has sustained. The principle is that the compensation which he receives by way

[30] At 662.

> of the payment of a sum of money as damages should as nearly as possible put him in the same position as he would have been if he had not sustained the wrong for which he is to be compensated: *per* Lord Blackburn in *Livingstone v Rawyards Coal Co.* (1880) 5 App.Cas. 25, 39. In *Hodgson v Trapp* [1989] A.C. 807, 819 Lord Bridge summarised the law in this way:
>
> > My Lords, it cannot be emphasised too often when considering the assessment of damages for negligence that they are intended to be purely compensatory. Where the damages claimed are essentially financial in character, being the measure on the one hand of the injured plaintiff's consequential loss of earnings, profits or other gains which he would have made if not injured, or on the other hand, of consequential expenses to which he has been and will be put which, if not injured, he would not have needed to incur, the basic rule is that it is the net consequential loss and expense which the court must measure. If, in consequence of the injuries sustained, the plaintiff has enjoyed receipts to which he would not otherwise have been entitled, prima facie, those receipts are to be set against the aggregate of the plaintiff's losses and expenses in arriving at the measure of his damages.

[64] Lord Hope recorded that it was accepted that *Parry* and *Smoker* established that the plaintiff's receipts by way of incapacity pension could not be set off against his claim for loss of earnings up to the normal retirement age and that, when assessing a claim for loss of pension after normal retirement age, the disability or incapacity pension received after that date must be brought into account. While noting[31] there was no suggestion in *Parry* that payments received under the ill-health pension in that case from the date of the accident up to the normal retiring date were to be brought into account, Lord Hope accepted[32] that the issue was not raised in *Parry*. It was therefore necessary to address the issue directly.

[65] Lord Hope summarised the defendant's argument:[33]

> The plaintiff's claim was for a money award, but it was in conflict with basic principle because he was seeking to put himself into a better position than he would have been in if he had not been injured. He could only be held entitled to damages for loss of pension if he could show that overall he would be worse off under the pension scheme throughout the whole of his lifetime.

[66] Lord Hope reasoned that the issue of deductibility could not properly be answered without a clear understanding of the nature of the loss claimed. While

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31 At 665.
32 At 666.
33 At 667.

both the ordinary retirement pension and the incapacity pension had the character of being paid on a recurring basis over a period, they related to different time periods. The retiring pension would, but for the accident, be payable after normal retirement date while the disability pension was paid prior to that date. He considered that the defendant was seeking to bring into account income receipts arising in one period in assessing the loss of income arising in another period. That would seem to be in conflict with basic accounting principles and was also open to the objection that it was unfair.[34]

[67] In elaborating on the unfairness issue, Lord Hope said:[35]

> Although the incapacity pension is not an indemnity against the disabled man's wage loss, its purpose is to provide him with a source of income which he can use to support himself and his family during the period of his disability. The same may be said of the retirement pension in regard to the period after his normal retirement age. What the plaintiff is seeking in his claim for pension loss is a sum of money to recompense him for the loss of the retirement pension which would otherwise have been available to enable him to support himself and his family after his normal retirement age. It is no help to him to be told that the money to compensate him for this loss is already being paid to him and that it will continue to be paid to him during the period when he is unable to earn wages because of his disability. He cannot reasonably be expected to set aside the sums received as incapacity pension during this period in order to make good his loss of pension after his normal retirement age. I think that it would, to adopt Lord Reid's approach in *Parry v Cleaver* [1970] A.C. 1, strike the ordinary man as unjust if the plaintiff's claim for loss of pension after his normal retirement age were to be extinguished by capitalising sums paid to him before that age as an incapacity pension to assist him during his disability. On the other hand there can be no injustice in setting off the sums received by way of incapacity pension against the sums lost by way of retirement pension arising in the same period.

[68] The reasoning in *Longden* has been subject to some criticism. The learned authors of *McGregor on Damages*[36] express the view that the decision at Court of Appeal level in *Longden* rested largely on a mistaken view of what was really decided by *Parry*. The view is expressed that it is "strongly arguable" that *Parry* supports the deductibility of payments received under an ill-health or disability pension prior to normal retirement date when assessing pension losses. Despite these criticisms, it is clear that, when the case reached the House of Lords, Lord

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34 At 668 – 669.

35 At 669.

36 *McGregor on Damages* (18th ed, Sweet & Maxwell, London, 2009) at [35– 158].

Hope accepted that the point at issue had not been determined in *Parry* and decided the issue on that footing.

[69] His Lordship considered that pension payments received before the normal retirement age should not be taken into account:[37]

> … not only because they were not of the same character as the loss of wages against which the deductions were sought to be made. It was because they were receipts of such a nature that – except insofar as they fell to be set aside a loss of pension arising in the same period – they should not be considered at all in computing damages …

[70] The Canadian courts have not, as far as our research has revealed, dealt with the point at issue. However, Ms Chan for the Department drew our attention to *Peet v Babcock & Wilcox Industries Ltd,*[38] in which the Ontario Court of Appeal considered the arguably analogous situation of the loss of pension rights which would have accrued during the notice period which ought to have been given to an employee who was dismissed. Although the employee's current monthly pension was lower than it would have been if he had continued to work through the notice period, his immediate receipt of the lower amount resulted in an overall pension value which was higher than that which he would have received had he worked to the end of the notice period. The Court held that the pension received during the notice period should be taken into account when calculating pension loss on the principle that a wronged employee is only entitled to be put in as good a position as he would have been if there had been proper notice.[39] Neither *Parry* nor *Longden* are referred to in the judgment.

[71] We were not referred to any Australian case directly on point,

[72] The New Zealand courts have not considered *Longden* or the point at issue in this appeal. Although counsel for the Department conceded that the decision of the Employment Court in *Bailey v Minister of Education*[40] supported Mr Gilbert's contention, we do not regard it as being of material assistance. The Employment Court awarded a sum for lost superannuation without taking into account

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37 At 669 – 610.
38 *Peet v Babcock & Wilcox Industries Ltd* (2001) 197 DLR (4th) 633.
39 At [33].
40 *Bailey v Minister of Education* [1992] 3 ERNZ 1; aff'd [1993] 2 ERNZ 321 (CA).

superannuation payments already made. However, neither *Parry* nor *Longden* are mentioned in the judgment and, contrary to *Parry*, the superannuation payments the plaintiff was already receiving were deducted from the lost remuneration award.

Conclusion on the third issue

[73] While acknowledging the English authorities on this issue, we do not find them to be persuasive or sufficient to justify a departure from the accepted general principle that the assessment of damages is to be approached on the basis of restoring a plaintiff (as best money can do it) to the position he or she would have been in but for the wrong committed.

[74] The general principle is that a plaintiff should not be put in a better position as a result of the defendant's breach of contract than he would otherwise have been. If that principle were to be applied in the present case (using the capitalised value approach to compare the value of the retiring allowance he actually received with the value of his notional retiring allowance if he had worked to 65) Mr Gilbert was no worse off. Indeed, the Judge found he would be better off. The effect for Mr Gilbert of receiving his retiring allowance much earlier than would otherwise have been the case would mean that he had not suffered any loss despite the fact that the amount so received was lower in nominal terms than the figure he would have received at his normal retirement date of 65 years.

[75] We do not consider that the retiring allowance under the Government Superannuation Fund Act should be treated as akin to an insurance payment received in consequence of an accident. While the retiring allowances are partially attributable to contributions set aside in the past by Mr Gilbert and can therefore be said to be a benefit "purchased" by him, there are no rights of subrogation which would enable the Authority under the Government Superannuation Fund Act to pursue recovery of the pension from any third party. Nor is there any obligation on Mr Gilbert to refund the Authority if he recovers damages from his employer for loss of pension.

[76] We accept there is a material difference between the nature and purpose of the allowances payable under ss 35 and 36 of the Act. It is convenient here to set out s 36 in full:

> **36 Retiring allowance when contributor medically unfit for further duty**
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> (1) Every contributor who, before becoming entitled to a retiring allowance under section 35 of this Act, retires from the Government service on the ground of being medically unfit for further duty shall, if the Authority is satisfied that his retirement has been consented to by the controlling authority, be entitled to receive from the Fund an annual retiring allowance computed as provided in the said section 35.
>
> (2) The Authority may, in its discretion, suspend or reduce or cancel any retiring allowance payable under this section, whether it first became payable before or after the commencement of this subsection, if—
>
> (a) The contributor resumes employment, whether in the Government service or elsewhere, or becomes gainfully self-employed; or
>
> (b) The contributor, having ceased to be medically unfit for further duty, fails to accept any employment offered by a controlling authority and considered by the Authority to be suitable and reasonable for him; or
>
> (c) The Authority is of the opinion that the degree of disability of the contributor is insufficient to justify the payment of the retiring allowance in full or in part; or
>
> (d) The contributor fails without sufficient justification to submit himself for medical examination when and as often as required by the Authority; or
>
> (e) The Authority does not know the present whereabouts of the contributor or whether he is alive or dead.
>
> (2A) The Authority may, in its discretion, vary or revoke any decision made by it under this section in respect of any retiring allowance payable under this section, whether the decision was made or the retiring allowance first became payable before or after the commencement of this subsection.
>
> (3) The provisions of subsection (2) of this section shall not apply to any contributor after the contributor has attained the age of 60 years.
>
> (4) For the purposes of this Part of this Act a contributor shall be deemed to be medically unfit for further duty if on the certificate of at least 2 medical practitioners approved by the Authority it is established to the satisfaction of the Authority that by reason of mental or bodily infirmity … the contributor has become substantially unable to perform any duties which the controlling authority and the Authority consider suitable and reasonable for him.

> (5) Any decision by the Authority to suspend or reduce a retiring allowance under the provisions of subsection (2) of this section shall be disregarded for the purposes of section 45 of this Act.

[77] The allowance under s 36 is intended to compensate where, for medical reasons, an employee has become substantially unable to perform his or her duties and the employer agrees to early retirement in consequence. While s 36 provides that payment of the retiring allowance (calculated in accordance with s 35) is obligatory, that obligation does not arise unless and until the employer consents. Proof of the necessary medical ground is required by certificates in respect of the matters identified in s 36(4). Moreover the allowance may be suspended, reduced or cancelled at the discretion of the Authority on any of the ground set out in s 36(2) at any time up to the contributor attaining the age of 60 years.

[78] By contrast, the retiring allowance under s 35 is payable as of right when the contributor reaches the age of 65.[41] It is then payable for the remainder of the contributor's life according to the statutory formula. Unlike the retiring allowance under s 36, the normal retiring allowance is not susceptible to suspension, reduction or cancellation.

[79] Despite the discretionary nature of the early retirement allowance under s 36, Mr Gilbert has continued to receive the retiring allowance under s 36 on an uninterrupted basis until he attained the age of 65 years. In the present case, therefore, there is no uncertainty about his continuing entitlement or about the allowance he has in fact received.

[80] Contrary to the conclusion reached in *Longden*, we do not see any unfairness to Mr Gilbert in the approach adopted in the Employment Court on this issue. He has been fully compensated for his loss of earnings as a result of the breach of contract and, by virtue of the early receipt of his retiring allowance he will be better off in pension terms according to the actuarial calculations accepted by the Judge

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[41] Government Superannuation Fund Act 1956, s 35(1) and (3)(a).

than he would have been if he had retired at the normal age of 65. He has therefore been restored in pension terms to the position he would have been in absent the breach of contract by his employer.

[81] If the value of his pension received prior to age 65 were to be deducted as Mr Gilbert contended, he would receive a windfall gain at the expense of his employer. That would be unfair to his employer and contrary to the essentially compensatory nature of damages for losses of this character.

Fourth issue: did the Employment Court err in finding that the tax consequences of the damages award are not to be taken into account?

[82] As already noted, the Judge accepted in the second remedies judgment that he was bound by the decision of this Court in *North Island Wholesale Grocers v Hewin.*[42] He reversed his indication given in the first remedies award[43] that if there were an indication from the Commissioner of Inland Revenue that tax would be levied on the awards in the year of their receipt, they would have to be grossed-up with the intention that Mr Gilbert would receive, net of tax, the amount he would have received if the lost remuneration had been paid in the year it would otherwise have been earned.

[83] In the second remedies decision, the Judge acknowledged there were sound reasons for the approach adopted in *Hewin* of ignoring the tax consequences when assessing the damages for wrongful dismissal. The Judge noted, on the other hand, there was a powerful argument that Mr Gilbert would not be adequately compensated without a grossing-up exercise. He noted[44] that, depending on other income earned by Mr Gilbert, the vast majority of the lump sum award he received in 2005 would have been taxed at the marginal rate of 39 cents in the dollar. By contrast, if Mr Gilbert had earned the income year by year, his average rate of income tax would have been approximately 25 cents in the dollar.

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42 *North Island Wholesale Grocers v Hewin* [1982] 2 NZLR 176.
43 At [85].
44 At [33].

[84] Mr Gilbert challenges the approach adopted by this Court in *Hewin.* The Department supports the finding by the Judge.

[85] In *Hewin*, the respondent was found to have been wrongfully dismissed as the managing director of the appellant company. His gross loss of remuneration in consequence was found by the trial Judge to be in excess of $178,000. The issue was whether allowance should be made for the taxation consequences of the award. This Court found that the decision of the House of Lords in *British Transport Commission v Gourley*[45] should not be followed in New Zealand. In that case, by a majority, the House of Lords held that, in assessing damages for loss of earnings in personal injury actions, allowance must be made for taxation. This was subject to two conditions being satisfied. The first was that the compensation was being assessed in respect of the loss of sums which, had they been received, would have been subject to tax. The second was that the damages awarded to the plaintiff were not themselves subject to tax. As Richardson J noted in delivering the majority judgment for Woodhouse P and himself:[46]

> The *Gourley* rule reflects the philosophy that in those circumstances the incidence of tax is not too remote to be taken into account and that in view of its inevitable impact on income earners it is wrong in principle and out of touch with reality to treat it as a purely collateral matter in determining what sum is required to compensate the plaintiff for his loss.

[86] After reviewing authorities in other jurisdictions, the majority of this Court concluded that *Gourley* ought not to be extended to this country to claims for compensation for loss of office. The reasons for that finding[47] may be briefly summarised :

(a) *Gourley* was a case concerning the assessment of damages in tort for personal injury. In contrast, damages for wrongful dismissal flow from the contract and proceedings are brought for the loss of the promised benefits. The employer's contractual obligation is to pay the whole of the agreed remuneration. If the employee sues for unpaid or short-paid remuneration he recovers his contractually

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45 *British Transport Commission v Gourley* [1956] AC 185.
46 At 189.
47 At 15 - 16.

agreed amount. The taxation consequences are not the concern of the employer.

(b) Assessing the tax burden fairly attributable to the lost remuneration is a "difficult if not hopeless task" to impose on courts given the graduated tax system prevailing in this country. The ultimate tax liability may be affected by a variety of external considerations which are indeterminate. The assumptions required in applying the *Gourley* rule involve a high degree of artificiality and speculation.

(c) The income tax legislation provides a code for the taxation of compensation for loss of office.

(d) It is highly unsatisfactory that serious tax questions should be dealt with by employer and employee in the absence of the Commissioner.

[87] Somers J succinctly put the contrary view in his dissenting judgment:[48]

> … The fundamental principle is that damages are compensatory. Assessment must reflect as best it can the realities of everyday life. Accordingly where the calculation depends to a significant extent upon earnings account should be taken of income tax. If that is not done a plaintiff will receive more than he ought. …

[88] We acknowledge Mr Gilbert's submission that there may be cases where the application of this Court's decision in *Hewin* will result in unfairness through the imposition of tax at a higher rate than would have applied if the income had been received year by year (when it ought to have been paid but for the defendant's breach of contract). That outcome might occur where the whole of an award is subject to taxation in the year in which it is received with the effect of placing the income in a higher tax bracket.

[89] On the other hand, as Judge Colgan acknowledged, the reasoning adopted by the majority in *Hewin* provides powerful support for the opposite view. *Hewin* has stood for a long period of time and was affirmed by this Court in *Horsburgh v New*

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[48] At 196.

Zealand Meat Processors Union.[49] If we were to accept Mr Gilbert's submission on this point it would be necessary for us to depart from or overrule *Hewin*. We accept that, in rare cases, such a course may be necessary or desirable, as this Court held in *R v Chilton*.[50] This might be justified, for example, where "… obtaining … a socially just result outweighs the considerations of certainty and predictability in the particular case".[51]

[90] The application of *Hewin* in the present case appears to us to result in unfairness to Mr Gilbert for the reasons identified in [83] above. As Somers J thought in *Hewin*, where the calculation depends to a significant extent on earnings, account should be taken of income tax. In *Hewin*, Somers J was concerned that the plaintiff would recover more than he had lost if taxation were not brought into account. We consider the opposite may also be true. It can be argued that, if a plaintiff is to be properly compensated for his loss, he or she ought to receive an amount which will restore him or her to the position that would otherwise have applied. Here, Mr Gilbert will be worse off if his income is taxed in the year his compensation was received than if he had been taxed on a progressive basis over the years in which his wages would ordinarily have been received. An appropriate upwards adjustment could have been made quite simply which would have meant he recovered not less (and no more) than his net loss after taxation.

[91] However, we are reluctant to reconsider *Hewin* in this case. First, the argument before us focused understandably on the present case. The Court in *Hewin* was concerned about the possible difficulties of assessing the tax treatment that would have applied to the plaintiff in the absence of a breach and although that problem does not seem insurmountable here, it may give rise to considerable difficulties in other cases. Secondly, there may be wider implications of a change to the longstanding approach in *Hewin* which are not before the Court and which ought to be properly explored. It might be necessary, for example, to seek the view of the Commissioner of Inland Revenue which is not practicable in the context of this appeal.

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49 *Horsburgh v New Zealand Meat Processors Union* [1988] 1 NZLR 699, 703-704.
50 *R v Chilton* [2006] 2 NZLR 341 at [83].
51 *Collector of Customs v Lawrence Publishing Co Ltd* [1986] 1 NZLR 404 (CA) at 414 – 415.

[92] Given this conclusion, we decline to disturb the application of *Hewin* in the Employment Court.

[93] Mr Gilbert submitted that the Employment Court had no jurisdiction to recall its first remedies decision on the tax point, citing *Horowhenua County v Nash (No 2)*.[52] We accept that in granting Mr Gilbert's application to recall the first remedies judgment, Judge Colgan did not refer to the correctness or otherwise of his decision to consider the tax consequences of the awards. However, he did grant Mr Gilbert's application so far as it related to "the appropriate application of the marginal tax rates for the grossing-up of the remuneration compensation awards in the relevant tax years".[53]

[94] During the second remedies hearing, counsel for the Department made an oral application to revisit the decision earlier made to take into account the taxation consequences. According to counsel for the Department, Mr Gilbert did not object to that application. Even if he had, we consider the application would inevitably have been granted since there can be no doubt that the Employment Court was bound by the decision in *Hewin* and had plainly misapplied it. As such, it fell clearly within the guidelines for the recall of judgments laid down by the former Chief Justice in *Horowhenua County*. We accept the submission made on behalf of the Department that it would have been wholly unreal to have denied the Department the opportunity to re-open this issue given the lengthy delays in resolving the remedies issues and the wholesale extent to which Mr Gilbert had been permitted to revisit earlier decisions.

[95] We therefore find there was jurisdiction for the Employment Court to reconsider its decision on this issue.

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52 *Horowhenua County v Nash (No 2)* [1968] NZLR 622 at 633.
53 At [61].

Fifth issue: did the Employment Court err in its approach to interest on the awards?

[96] In his notice of appeal, Mr Gilbert raised two issues. First, it is said that the Judge erred in discounting future losses to 14 October 2002 by failing to make any allowance for interest on that sum until the date of judgment or payment. This issue was dealt with in the first remedies judgment.[54] The Judge noted that the actuaries had agreed that, in calculating the loss of earnings for the period after 14 October 2002, there should be a sum deducted for net interest after tax. In that respect a 4.7 per cent deduction was directed by the Judge. However, given the subsequent delays, the Department accepts that the deduction for net interest earned ought not to be applied.

[97] The second matter raised in the notice of appeal on this topic was the contention that the Judge had erred in relation to an award of interest on distress damages. It will be recalled that the Judge determined interest in the sum of $5,208.33 in that respect. As we understood Mr Gilbert's submission to us at the hearing of the appeal, he no longer pursues this point. In any event, we are satisfied there is no basis to interfere with the Judge's discretionary judgment on that issue.[55]

[98] Mr Gilbert has already received substantial awards of interest in relation to the loss of income for the period to 14 October 2002. The Judge awarded interest at 11 per cent per annum (the then prescribed rate under s 87 of the Judicature Act 1908) in his first remedies judgment. This amounted to $102,974. The Judge also ordered ongoing interest at the then prescribed rate of five per cent per annum from 14 October 2002 to the date of payment. These sums were awarded in the first remedies judgment and were paid to Mr Gilbert in September 2005 as part of the substantial payment made at that time. The sum of $5,208 (the interest on distress damages) was paid at the same time along with substantial sums for the costs awarded to Mr Gilbert.

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[54] At [83].

[55] At [93] and [94] of the first remedies judgment.

[99] In his written submissions, Mr Gilbert appeared to be raising questions about the calculation of interest for the period up to 14 October 2002 but, as we understood his oral submissions to us, his focus was on the interest which he contended ought to be paid on the loss of salary for the subsequent period, ie from 14 October 2002 to the end of his anticipated working life. Again, we see no basis to interfere with the discretionary judgment made by the Judge in respect of the first period.

[100] We are, however, sympathetic to an award of interest on the sum finally calculated for Mr Gilbert's loss of income for the period from 14 October 2002 onwards. While the Court's power to award interest is discretionary, the discretion is to be exercised as the justice of the case requires.[56] There is no fixed rule as to the commencement date of interest although justice may require that interest should run from the date the cause of action arises down to the date of judgment. Where a defendant has had the use of money which should have been available to the plaintiff to use and enjoy the plaintiff should generally be compensated accordingly.[57] Other discretionary factors may include delay attributable to one party or the other.

[101] We accept there are a variety of factors which may impact on the calculation of interest. First, there have been long delays, some of which were at least prima facie contributed to by Mr Gilbert such as the delay of nearly two years before he applied for the recall of the first remedies judgment. On the other hand, Mr Gilbert should not be responsible for delays attributable to the court system (eg, delays in the delivery of judgment post-hearing) or delays attributable to the Department. We accept too that, to the extent further sums are due by the Department for loss of salary in the period post 14 October 2002, the Crown has had the use of the money and Mr Gilbert has not. A further factor is that, at least in recent years, the present prescribed rate of interest under the Judicature Act (7.5 per cent) is rather higher than could be earned on bank deposit rates.

[102] According to figures produced at the hearing of the appeal by the Department

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[56] *Wilson & Horton Ltd v Attorney-General* [1997] 2 NZLR 513 (CA) at 530 and *Day v Mead* [1987] 2 NZLR 443 (CA) at 463.

[57] *Day v Mead* per Cooke P at pages 452 – 453 and Somers J at pages 463 - 464.

(calculated by its actuary, Mr Higgins) an additional sum in the range of $41,460 to $53,803 (depending on stated assumptions) is payable to Mr Gilbert in respect of loss of earnings in the period after 14 October 2002. These figures were supplied to the Department as at 6 August 2009 and may yet require some amendment.

[103] Although the Department made a substantial payment in 2005, it has had the use of the funds representing any balance due throughout the relevant period. Doing the best we can to balance the various factors identified, we have concluded that interest should be paid on any unpaid balance of the amount determined to be due for salary loss after 14 October 2002 at the rate of five per cent per annum. Interest is to run from 14 October 2002 until the date of payment.

Summary

[104] We allow the appeal in two respects only:

(a) The interest reduction of 4.7 per cent referred to in [107](d) of the first remedies judgment dated 4 December 2003 is not to be applied in calculating the appellant's salary loss after 14 October 2002.

(b) Interest at five per cent per annum is payable by the respondent to the appellant on any unpaid balance of the sum determined to be due by the respondent to the appellant in respect of loss of salary in the period from 14 October 2002 to the end of his working life. The interest is to run from 14 October 2002 until the date of payment.

[105] In all other respects the appeal is dismissed.

[106] The appellant has been successful in part but unsuccessful on the main issues. In the circumstances we do not consider it appropriate to award costs either way.

Solicitors:
Crown Law Office, Wellington for Respondent