AINSLEY BENEFIELD

THE SHAME OF IT: COMPENSATION FOR HUMILIATION, LOSS OF DIGNITY AND INJURY TO FEELINGS IN PERSONAL GRIEVANCES

LLM RESEARCH PAPER

EMPLOYMENT LAW (LAWS532)

LAW FACULTY
VICTORIA UNIVERSITY OF WELLINGTON

2002

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TABLE OF CONTENTS

ABSTRACT 4
I INTRODUCTION 5
A Focus of this Paper 5
II MONETARY REMEDIES 6
A Damages for Mental Distress 7
B Exemplary Damages 7
III COMPENSATION IN THE EMPLOYMENT CONTEXT 8
A Common Law 8
B Personal Grievances 9
1 Growing discontent with the rule in Addis in New Zealand 9
2 The rule in Addis in England 10
C Employment Contracts Act 1991 11
D Employment Relations Act 2000 11
1 Other remedies under the Employment Relations Act 12
IV ELEMENTS OF HURT AND HUMILIATION COMPENSATION 13
A General Principles 13
1 Compensation not automatic 13
2 Burden of proof 14
3 Subjective test 15
4 Causation 16
5 Remoteness 17
6 Manner of personal grievance 18
7 Employer's ability to pay 19
8 Award not punitive 20
9 Contributory fault 20
B What are these Feelings? 21
C Formulation of Award 21
D Relationship to Other Remedies 23
E Tax Implications 24
1 Settlements 25
F Role of Hurt and Humiliation Compensation 26
V SUFFICIENCY OF AWARDS 26
A Statistics 26
1 Awards under the Labour Relations Act 1987 26
2 Awards under the Employment Contracts Act 1991 27
3 Awards under Employment Relations Act 2000 28
4 Out of court payments 29
B Observations of Insufficiency 29
1 Dissent of Thomas J in Thwaites 31
2 Judicial restraint 32
3 Position in England 33
4 Implications for New Zealand 34
5 Contrasting settlement trends 34
C Arguments Awards are too Generous 35
1 Commentators 35
D Discussion 36
E Alternative Methods of Influencing Quantum 37
F Conclusion on Quantum Sufficiency 38

VI RELATIONSHIP BETWEEN JOB STATUS AND QUANTUM 39
A Statutory Cap 39
B Inclusion of High-Income Earners in Personal Grievances 40
1 Telecom South and Air New Zealand decisions 40
2 Trotter 41
C Research into Award Disparity 42
1 Averages 42
2 Distribution of Awards 43
D What these Figures Represent 44
E Reasons 45
1 Willingness to bring a personal grievance 45
2 Representation 46
3 Implications for low-income employees 47
4 Have senior employees actually got more to lose? 47
4 Value of money 49
5 Ability to pay 49
6 Rebuttal from the view of the low-income grievant 50
7 Illustration 50
VII EFFECT OF THE ERA 51
A Good Faith 51
B Mediation and the Employment Relations Authority 52
VIII CONCLUSION 53
BIBLIOGRAPHY 54

ABSTRACT

This paper reviews the development of compensation for humiliation, loss of dignity and injury to feelings in the employment context. Traditionally excluded at common law, this remedy came to the forefront in New Zealand when expressly included as a remedy for personal grievances in 1973. The statutory provisions remain unchanged, and now play a key role in compensating employees found to have suffered a personal grievance. The judicially developed principles guiding the determinations of these awards are investigated. Compensation for hurt and humiliation has taxation and discretionary advantages over other monetary remedies, often making it the primary remedy sought.

Issues arising out of this development are addressed. The first of these is the level of awards made, with commentators often alleging insufficiency. Statistics are used to support the conclusion that judicial restraint and strong reliance on consistency are restricting awards to quantum which is not addressing the actual emotional losses of employees. Issues of equity also arise. In principle, awards ought to reflect the actual subjective injury caused by the employer. Logic predicts the human feelings involved will be similar across employees of levels and status. However statistics illustrate a significant disparity in awards, clearly in favour of high-income employees. Potential reasons are evaluated, yet offer no clear justification for the inequity inflicted on low-income grievants.

Word Length

The text of this paper (excluding contents page, footnotes and bibliography) comprises approximately 14 000 words.

I INTRODUCTION

Can you put a price on your feelings? Maybe not the feelings themselves, but the Employment Relations Act 2000 (ERA) allows compensation for injury to feelings, along with humiliation and loss of dignity where an employee has suffered a personal grievance. Money attempts, as best it can, to make up for the suffering incurred.[1] This paper addresses the role of this 'hurt and humiliation' compensation in the development of personal grievances in New Zealand. The history of the current provision is traced through the common law, Labour Relations Act 1987 (LRA) and the Employment Contracts Act 1991 (ECA). The principles underlying this compensation are reviewed, illustrating where, when and how much is likely to be awarded.

Issues arising out of past awards are then addressed. The first is that of sufficiency of hurt and humiliation awards across the board. Naturally, there are arguments the awards are both too high and too low. Sufficiency is evaluated with reference to developments in the United Kingdom. The second issue questions the alleged correlation between awards for hurt and humiliation and the grievant's occupation or income level. The existence, potential explanations and implications of such a correlation are investigated. The paper concludes by questioning whether the relatively new provisions of the ERA have the ability to redress any of these possible inequities.

A Focus of this Paper

The ERA defines personal grievances as including acts of unjustified dismissal, unjustifiable disadvantage, discrimination, sexual harassment, racial harassment and duress.[2] Compensation for humiliation, loss of dignity or injury to feelings is available when a grievance exists. This paper will primarily focus on unjustified dismissal grievances, as this is by far the most commonly occurring category of personal grievance.[3] Where relevant, other types of grievance will be specifically addressed.

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[1] *Trotter v Telecom Corporation of New Zealand Ltd* [1993] 2 ERNZ 659, 700 Chief Judge Goddard.
[2] Employment Relations Act 2000, s103.
[3] 49.7% of all Tribunal adjudications up to 1999, and 94.3% of all personal grievances. Derived from Ian Mc Andrew "Some facts and figures on dismissal for misconduct" (2000) 25(3) NZJIR 303, 306.

II MONETARY REMEDIES

McGregor on Damages defines damages as:[4]

> [t]he pecuniary compensation, obtainable by success in an action, for a wrong which is either a tort or a breach of contract, the compensation being in the form of a lump sum awarded at one time, unconditionally.

A wrong must be committed before damages are awarded. Even if the plaintiff suffers a loss, no damages can be awarded if there is no wrong committed.[5] Damages intend to compensate the plaintiff for damage or loss incurred. Lord Blackburn set out what has become the accepted measure for damages:[6]

> [the] sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation.

An award of damages does not guarantee full compensation as the courts impose various limits on awards. Principles of duty, remoteness of damage, contributory negligence, mitigation, uncertainty and the scope of an area of law are all factors engaged to limit certain damages. These factors also assist in distinguishing the existence and extent of liability for damages.[7]

The loss compensated for can be pecuniary or non-pecuniary in nature. Pecuniary losses include all financial and material losses, normally involving a straightforward calculation from the value of the loss. Non-pecuniary losses are non-material or intangible in nature, losses one cannot necessarily point to or value. Damages for non-pecuniary loss must often attempt to substitute a loss considered more important than money, and invoke calculation difficulties.[8]

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[4] Harvey McGregor QC *McGregor on Damages* (16th ed, Sweet and Maxwell Ltd, London, 1997) 3 para 1.
[5] McGregor, above, 7 para 7.
[6] *Livingstone v Raywards Coal Co* (1880) 5 AC 25, 39 Lord Blackburn.
[7] McGregor, above, 10 para 12.
[8] McGregor, above, 8-9 para 9.

A Damages for Mental Distress

Contract law did not originally allow recovery for mental distress or injury to feelings. The House of Lords in *Addis v Gramophone Co* asserted damages could not compensate for injured feelings arising from a breach of contract.[9] In relation to the wrongful dismissal at hand, the damages were limited to the financial loss relating to the wrongful notice period. The rule in *Addis* was applied to contract law in general, not merely wrongful dismissal claims. The commercial nature of contracts justified this restriction, as the parties could not have contemplated recovery for mental distress at the time of contract formation. By the 1960s academics began to question the universal application of this reasoning. It was proposed that injured feelings ought to be recoverable where the contract is not wholly commercial, and the parties may have contemplated such consequences and damages.[10]

The English courts picked up this proposition and began to award damages for mental distress in situations ranging from spoiled holidays to negligent solicitors.[11] *Bliss v South East Thames Regional Health Authority* curtailed the expansion of these damages.[12] *Bliss* affirmed distress was not a recoverable consequence of wrongful dismissal. The courts then refused to award damages in a number of cases with similar contracts as the earlier awards.[13] Consequently, there is no general liability for distress or other emotional distress arising from a breach of contract. However where the object of the contract is to provide pleasure, relaxation or peace of mind, damages may be awarded for distress following a breach.[14]

B Exemplary Damages

Normal compensatory damages focus on the harm done to the plaintiff. In contrast, exemplary damages punish the defendant for inflicting this harm.[15] The defendant must commit more than a mere wrong, the conduct must be sufficiently

[9] *Addis v Gramophone Co* [1909] AC 488, 497 Lord Collins (*Addis*).
[10] McGregor, above, 58 para 99.
[11] McGregor, above, 58 para 100.
[12] *Bliss v South East Thames Regional Health Authority* [1987] ICR 700 (CA).
[13] McGregor, above, 60 para 102.
[14] *Watts v Morrow* [1991] 4 All ER 937 Bingham LJ.
[15] McGregor, above, 287 para 430.

outrageous to deserve punishment. In general, exemplary damages cannot be awarded apart from a few limited exceptions.[16] The rule in *Addis* precludes exemplary damages for a breach of contract, unless the outrageous conduct also amounts to a tort.[17] The Law Commission for England and Wales recommends the continuation of this ban on exemplary damages for breaches of contract.[18] In New Zealand, Hammond J deviated from this general principle, allowing exemplary damages for a breach of contract where the conduct can be said to be so outrageous as to justify an award.[19]

III COMPENSATION IN THE EMPLOYMENT CONTEXT

A Common Law

Wrongful dismissal provided the only means of challenging a dismissal at common law. Dismissals were only wrongful when the employer did not give sufficient notice, either specified by the contract or 'reasonable notice'.[20] If the notice requirements were satisfied, the employer was not required to give a reason for dismissal.[21] The protection was dependent on contractual provisions, and therefore minimal where there was a short notice period, as in most arbitrated awards. This protection could also be circumvented by a payment in lieu of notice.[22] As stated above, *Addis v Gramophone Co* established the common law rule that damages could only be awarded for the financial loss caused by incorrect notice periods.[23] Damages could not compensate for any non-pecuniary loss or for the dismissal itself.[24] Consequently, recovery for wrongful dismissals was often minimal.

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[16] *Rookes v Barnard* [1964] AC 1129. The exceptions include oppressive, arbitrary or unconstitutional conduct by government servants and conduct calculated to result in profit above compensation.
[17] *Addis v Gramophone Co* [1909] AC 488, 494-6 Lord Atkinson.
[18] Law Commission for England and Wales *Aggravated, Exemplary and Restitutionary Damages* (No 247) (London, 15 December 1997) 120, paras 5.71-3.
[19] *Tak & Co Inc v AEL Corporation Ltd* (1995) 5 NZBLC 99,357 Hammond J.
[20] Gordon Anderson "The origins and development of the personal grievance jurisdiction in New Zealand" (1988) 13 NZJIR 257, 259.
[21] Robin Mckay (ed) *Employment Law Guide* (5th ed, Butterworths, Wellington, 2001) Erpt9.17.
[22] Anderson, above, 259-60.
[23] *Addis v Gramophone Co* [1909] AC 488.
[24] New Zealand Law Commission *Aspects of Damages: Employment Contracts and the Rule in Addis v Gramophone Co Report 18* (Wellington, March 1991) 11.

B Personal Grievances

In response to the inadequate protection provided by wrongful dismissal the Industrial Conciliation and Arbitration Act 1954 was amended in 1970 to allow for a for the payment of compensation for such a dismissal.[25] Section 117 of the Industrial Relations Act 1973 soon expanded personal grievances by introducing the concept of 'unjustified' dismissal. The effectiveness of this protection was limited by its restricted application. Only a union, on behalf of a member who was covered by an award or registered agreement, could bring a personal grievance. The Court was able to award reinstatement, lost wages or compensation, and began introducing a number of factors that had been inadmissible at common law. This included compensation for the manner of the dismissal or humiliation.[26] The LRA continued the limited application of personal grievance protection, yet expressly included compensation for "humiliation, loss of dignity, and injury to the feelings of the worker."[27]

1 Growing discontent with the rule in Addis *in New Zealand*

Employees not protected by the personal grievance procedure continued to pursue wrongful dismissals, and were consequently limited by the rule in *Addis*. Cases claiming damages for injury to feelings were often struck out.[28] Judicial discontent grew, with the rule in *Addis* described as an "intransigent position" and the law for non-unionised employees as "lagging behind."[29] The implied term of fairness played in increasing role in the determination of dismissal cases.[30] The accumulation of these factors lead to the rejection of the rule in *Whelan v Waitaki Meats Ltd.*[31] Gallen J concluded the rule in *Addis* did not preclude a general damages award of $50 000. *Addis* was seen to exclude the ability to award general damages for breach of contract. There was little legal or logical justification for precluding damages for mental distress for employment contract breaches. An anomaly would arise between employees who were covered by the LRA and those

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[25] Industrial Conciliation and Arbitration Amendment Act 1970, s179.
[26] Anderson, above, 269.
[27] Labour Relations Act 1987, s227(c)(i).
[28] New Zealand Law Commission, above, 15.
[29] *Gee v Timaru Milling Co Ltd* (4 February 1986) High Court Auckland A387/85 Barker J.
[30] New Zealand Law Commission *Aspects of Damages: Employment Contracts and the Rule in Addis v Gramophone Co Report 18* (Wellington, March 1991) 18.
[31] *Whelan v Waitaki Meats Ltd* [1991] 2 NZLR 74 Gallen J.

who were not.[32] The actions of the employer were found to have breached implied contractual obligations and caused undue mental distress, anxiety, humiliation, loss of dignity and injury to his feelings.[33] The refusal to apply the *Addis* rule brought damages for wrongful dismissal closer to the protection of the LRA.

2 *The rule in* Addis *in England*

In contrast to New Zealand's developments, the English common law continued to follow the rule in *Addis.* The right to bring a wrongful dismissal continued, with a statutory right to bring an unfair dismissal claim introduced in 1971.[34] This right is now contained in Part X of the Employment Rights Act 1997, with compensation as an available remedy. The Act confers a broad jurisdiction on the Tribunals to award compensation, yet places statutory limits on the amount awarded.[35] *Norton Tool Co Ltd v Tewson* established that compensation under the statutory scheme was limited to financial losses.[36] Losses flowing from mental anguish or distress were therefore not compensable under the common law or statutory scheme.

Malik v Bank of Credit and Commerce International SA (in liq) liberated the common law restriction slightly.[37] Lord Steyn stated the true ratio in *Addis* to be that damages were recoverable only for loss caused by a breach of contract, not for loss caused by the manner of dismissal. This allowed damages for loss of reputation, as this breached an implied term to not act in a manner destructive to the relationship of mutual trust and confidence.[38] In 2001 *Johnson v Unisys* addressed a claim for losses flowing from psychiatric illnesses caused by an unfair dismissal, with the claim framed as a breach of implied contractual terms.[39] The ratio in *Johnson* ruled out extending common law damages to cover such mental anguish. However it was Lord Hoffman's obiter comments relating to statutory compensation that caused a stir. In his opinion, losses flowing from humiliation,

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[32] New Zealand Law Commission, above, 19.
[33] New Zealand Law Commission, above, 20.
[34] Industrial Relations Act 1971.
[35] *Johnson v Unisys* [2001] 2 All ER 801, 820 para 54 Lord Hoffman.
[36] *Norton Tool Co Ltd v Tewson* [1973] 1 All ER 183.
[37] *Malik v Bank of Credit and Commerce International SA (in liq); Mahmud v Bank of Credit and Commerce International SA (in liq)* [1997] 3 All ER 1 (*Malik*).
[38] *Malik*, above, 19-20.
[39] *Johnson v Unisys* [2001] 2 All ER 801, 820 para 54 Lord Hoffman.

distress and mental anguish fall within the scope of statutory compensation. He considered the *Norton Tool Co* limitation was too narrow, and ought to be extended.[40]

In summary, damages for wrongful dismissal in England continue to follow the rule in *Addis*, albeit a narrowed form. Obiter dicta in *Johnson v Unisys* has set the scene for recovery for losses relating to humiliation, loss of dignity and distress under the unfair dismissal statutory scheme.

C Employment Contracts Act 1991

Upon the finding of a personal grievance, section 40(1)(c) of the ECA permitted the Employment Tribunal (the Tribunal) or Employment Court (the Court) to award:[41]

> 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.

This provided compensation on essentially the same terms as the LRA. However the ECA allowed any employee to bring a personal grievance, regardless of union membership. Access to hurt and humiliation compensation was therefore universal, remedying the previous anomaly between personal grievance and wrongful dismissal claims. Employees could continue to bring wrongful dismissal claims under the ECA. This right was normally only invoked where the termination clause predated the ECA, the grievance was not raised within the required 90 days, to bypass the Tribunal for a higher award or speedier hearing, or to avoid the ECA's mandatory contributory fault requirement.[42]

D Employment Relations Act 2000

Section 123(c)(i) reproduces the wording of section 40(1)(c)(i) of the ECA. All employees continue to be able to bring a personal grievance, now to the

[40] See Ian Smith "Employment Law Brief" [2001] 151 New LJ 673; David Reade "Injury to Feelings in Unfair Dismissal" [2001] 6.1 Employment Law & Litigation 4.
[41] Employment Contracts Act 1991, s40(1)(c)(i).
[42] Stephanie Dyhrberg "Remedies in respect of personal grievances and surviving common law options" in New Zealand Law Society *Employment Law Conference 2000* (23-24 November 2000, Wellington) 180-1.

Employment Relations Authority (the Authority).[43] Section 113 of the ERA prescribes the only way to challenge a dismissal is by way of a personal grievance, abolishing the right to bring a wrongful dismissal claim. The continuity of wording in these sections maintains the relevance of the case developments under the LRA and the ECA.

1 Other remedies under the Employment Relations Act

Reinstatement is the primary remedy for a personal grievance under the ERA.[44] This had also been the case under the LRA. In either case, reinstatement is not often sought and rarely awarded. Section 123(b) authorises the Authority or Court to award the employee reimbursement of wages or other money lost from the personal grievance. Reimbursement involves a straightforward calculation, the lesser of the remuneration the employee has lost between the grievance and the judgment, or three months remuneration.[45] This compensates past pecuniary losses owed to the grievant from the employment contract.

Section 123(c)(ii) authorises the payment of compensation for the loss of any benefit which the employee might reasonably have expected prior to the personal grievance. This subsection compensates losses relating to future gains that were not achieved due to the personal grievance. These losses will also often relate to the contractual benefits, with the court determining which benefits the employee might reasonably have expected. This may include loss of future employment possibilities. The latter two remedies are both directly related to the employment contract, compensating for entitlements the employee ought to have received *but for* the grievance. Neither remedy addresses the manner of the grievance. The Authority or Court can order one or more of these remedies, none are exclusive. Under the ERA, the Authority or Court tends to categorise the amounts paid under each subsection.[46]

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[43] See Employment Relations Act 2000, s6 for the definition of 'employee'.
[44] Allowed for in s123(a), and made the primary remedy in s125.
[45] Employment Relations Act 2000, s128.
[46] This is the policy behind section 128. *Trotter v Telecom Corporation of New Zealand* [1993] 2 ERNZ 659, 693 Chief Judge Goddard.

IV ELEMENTS OF HURT AND HUMILIATION COMPENSATION

A General Principles

Awards of section 123(c)(i) compensation are not restrained by common law constraints, and each case is decided on its facts. Although precedent is not strictly applicable, the discretion has developed on a principled basis.[47] The Court of Appeal considered "[r]easonable consistency is required; established patterns should not be departed from without good and enunciated reasons."[48] As there is no specific legislative guidance on these awards, Cooke P suggests:

> what is to be aimed at is an award that is fair and reasonable between the parties as a matter of good industrial practice in the current economic climate.....[and]... that moderation would have been expected by Parliament in the exercise of the jurisdiction that Parliament has given.[49]

1 Compensation not automatic

An award of hurt and humiliation compensation does not automatically follow a finding of a personal grievance. A specific claim for this compensation must be made.[50] There is no presumption that distress or injured feelings follow a grievance, the grievant must bring evidence to show actual distress or emotional injury.[51] Previously this has included evidence from the complainant, professional medical opinions, the grievant's family or whanau, and diary entries.[52] An employee's protests following the grievance, are considered to speak volumes as to the effect on them.[53]

Although a family member may be "the best witness of the effects on the person,"[54] the award must not compensate that family member for any emotional

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[47] These principles are recognised as being set out in three Court of Appeal decisions; *Telecom South Ltd v Post Office Union* [1992] 1 NZLR 275; *Air New Zealand Ltd v Johnston* [1992] 1 NZLR 159; *Horsburgh v NZ Meat Processors IUOW* [1988] 1 NZLR 698.

[48] *Telecom South v Post Office Union* [1992] 1 NZLR 275, 280 Cooke P (*Telecom South*).

[49] *Telecom South*, above, 281 Cooke P.

[50] *Port Nelson Ltd v Robertson* [1995] 1 ERNZ 103, 103 Cooke P. Award put aside as breach of natural justice as compensation not in fact claimed before the Employment Court.

[51] *Department of Survey and Land Information v New Zealand Public Service Association* [1992] 1 ERNZ 851, 857 Cooke P.

[52] For a description of other types of evidence see further *Personal Grievances* (Butterworths, June 2002) para 11.20.

[53] *Department of Survey and Land Information v New Zealand Public Service Association*, above, 857 Cooke P.

[54] *Lavery v Wellington Area Health Board* [1993] 2 ERNZ 31, 56 Chief Judge Goddard.

injury inflicted upon them. Although people close to the grievant are likely to suffer following a grievance, they are not party to proceedings, so cannot be compensated.[55] This is distinct from compensating the grievant for feelings injured because they are aware of the effect on their family where, "[o]ne can readily visualise the natural sense of having let the family down causing the grievants additional stress."[56]

2 *Burden of proof*

The extent of the burden of evidence depends on the action at the centre of the grievance. If an action is prima facie more distressing, the court may be more willing to infer distress with less evidence. For example, where an employee was dismissed for theft, in an otherwise "blameless life in employment," Chief Judge Goddard found it "possible to imagine without any great difficulty" the feelings alleged.[57] In terms of the general standard of proof, it is suggested:[58]

> [a] good test of the strength of the evidence of distress is the extent to which it has been attacked in cross-examination and how it has come through that attack. In dealing with intangibles the [Authority] should not impose an unduly high burden of proof on the applicant.

Despite these rules relating to the burden of proof it has been noted that evidence regarding these feelings is rarely subject to any great attack in cross-examination. Additionally, it has been noted that fairly substantial awards are often made with minimal evidence as to the actual feelings of the grievant.[59] For example, the $10 000 award in *New Zealand Steel Fasteners v Thwaites* was "dealt with briefly," his evidence had not emphasised sufficient injury to justify the $45 000 claimed, yet the Tribunal easily accepted some injury.[60] Although in principle compensation is not automatic, Chief Judge Goddard accepts, "some injury to feelings can be assumed to be involved in any unjustified dismissal."[61] The burden

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[55] *Air New Zealand Ltd v Johnston (No 2)* [1992] 1 ERNZ 700, 707 Cooke P.
[56] *New Zealand Public Service Association v Land Corporation Ltd* [1991] 1 ERNZ 741, 764 Chief Judge Goddard.
[57] *Glengarry Hancocks Ltd v Madden* [1998] 3 ERNZ 361, 375-6 Chief Judge Goddard.
[58] *Lavery v Wellington Area Health Board* [1993] 2 ERNZ 31, 56 Chief Judge Goddard.
[59] *LW Petchell Ltd v Roberts* (14 December 1994) Employment Court Auckland AEC56B/94 Judge Finnigan.
[60] *New Zealand Steel Fasteners v Thwaites* [2000] 2 NZLR 565, 573 para 29 Gault J.
[61] *Trotter v Telecom Corporation of New Zealand* [1993] 2 ERNZ 659, 703 Chief Judge Goddard.

of proof is also relative to the eggshell skull rule, discussed below.[62] Where the grievant is seeking to compensate for a reaction beyond what a 'reasonable employee' may feel, the grievant will be required to bring more substantial evidence.

3 Subjective test

Compensation is awarded on a subjective basis, for the actual humiliation, distress or injured feelings incurred by the employee. The employer must therefore take the employee as they find them.[63] This 'eggshell skull' principle means a particularly fragile employee may be compensated for their reaction to a personal grievance, even if it goes well beyond what the employer might have expected from a reasonable employee. This rule is consistent with the principle that each personal grievance is to be decided on its own facts, and is inherent in the concept of compensating for loss. The award aims to make amends for the injured feelings incurred, requiring an examination of the actual feelings of the grievant.

Foreseeability is often an element in this determination. Where an employer is aware of factors making the employee more susceptible to emotional harm, the employer may be required to account for this in their actions. Foreseeability has been inferred through previous expressions of grief, distress or concern at employer's actions, offers to resign due to this concern, or knowledge of recent medical history.[64] In many circumstances, such as redundancy, the employee's expressions will not alter the decision, yet ought to impact the way in which the employer implements the decision. The price for flagrant disregard of these indications may be payable later, where the fragile employee is entitled to recover for their actual damage.

Conversely, as the award is not intended to punish the employer, more robust employees may have awards reduced. In grievances where the employee has been perceived as 'robust', 'resilient' or possessing 'strength of character' the

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[62] See Part IV A 3 Subjective test.
[63] *Wellington Shop Employees Union v Pacemaker Transport Wellington Ltd* [1989] 2 NZILR 762, 769.
[64] See *Transmissions & Diesels Ltd v Matheson* (26 February 2002) Court of Appeal CA97/01, 2-3 paras 5-6 Richardson P.

Authority or Court has either decreased or cancelled out the award.[65] This may often be relevant where the grievant is a union activist within the workplace. Circumstances that may humiliate the average employee may have no emotional effect on a 'hardened' employee.

A factor given weight in certain grievances is the effect of the employer's atmosphere. Mutual trust and confidence is implied into all employment agreements, yet some employers develop a workplace culture that goes beyond this. For example, in *New Zealand Public Service Association v Land Corporation,* the employee had "always considered Landcorp a fair and caring employer."[66] In *Charta Packaging v Howard* evidence was given of a 'family culture' where the employer encouraged an atmosphere of friendship between management and staff.[67] Such cultures may raise employee's expectations of treatment, resulting in the personal grievance action coming as more of a shock and invoking a higher level of distress or injured feelings. Subsequently, the employer may be subject to higher claims under section 123(c)(i).

4 *Causation*

In *Aoraki Corporation Ltd v McGavin* the Court of Appeal emphasised the need for the injured feelings to be causally linked to the personal grievance.[68] The personal grievance in *Aoraki* concerned the manner or procedural unfairness of a 'genuine' redundancy. The Court reviewed the law on redundancy compensation following *Brighouse Ltd v Bilderbeck,*[69] where Cooke P had found it difficult to draw a distinct line between substantive justification and procedure. The majority in the Court of Appeal emphasised in *Aoraki*:[70]

> the form of the remedy must be directed to the particular wrong. The statutory scheme requires the tribunal and the Employment Court to identify and focus

[65] See *NZ Air Line Pilots Association (Inc) v Air NZ* [1992] 3 ERNZ 73, 113 Judge Colgan.
[66] *New Zealand Public Service Association v Land Corporation* [1991] (1) ERNZ 741, 762 Chief Judge Goddard.
[67] *Charta Packaging v Howard* (22 February 2002) Court of Appeal, CA125/01, paras 10-11 McGrath J.
[68] *Aoraki Corporation Ltd v McGavin* [1998] 3 NZLR 276 Judgment of Richardson P, Gault, Henry, Keith, Blanchard and Tipping JJ (*Aoraki).*
[69] *Brighouse Ltd v Bilderbeck* [1995] 1 NZLR 158
[70] *Aoraki,* above, 293.

on the nature and scope of the personal grievance which it determines the employee has.

Where the dismissal or redundancy was genuine, the loss or injury must flow only from the manner in which it was carried out. The Employment Court erred when it also compensated for the injury to feelings caused by the loss of the job.[71] These feelings were not compensable under section 40(c)(i) of the ECA. This causative link is particularly relevant when seeking hurt and humiliation compensation for procedural unfairness grievances. *Charta Packaging v Howard* recently applied this causation principle. In reducing the award, the Court noted the Employment Court had erred in awarding some compensation for the loss of the job rather than the defective procedure.[72]

Causation may also be an issue where the employee has some form of existing emotional injury, as an employer is not expected to compensate for injury caused by an external factor. This requires a judicial determination on the cause of losses at hand. The courts emphasise the need to draw a clear distinction between evidence of distress caused by personal circumstances and dismissal.[73] An employer has also been held not liable for emotional harm where the grievance reactivated pre-existing emotional injuries.[74]

5 *Remoteness*

The distress or humiliation must also be of sufficient proximity to the personal grievance. Remoteness has prevented awards where the emotional injury is instigated through an employer's action, yet primarily derived from actions of the ensuing police investigation,[75] or the defending of a subsequent trial.[76] Although there is a causative link the distress is too far removed from the actions of the employer for compensation to be justified. Causation and remoteness restrict the categories of emotional injury that would otherwise be recoverable. The

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[71] *Aoraki*, above, 296-9.
[72] *Charta Packaging v Howard* (22 February 2002) Court of Appeal CA125/01, para 34 McGrath J.
[73] *Air New Zealand Ltd v Samu* [1994] 1 ERNZ 93, 96 Judge Finnigan.
[74] *Hemopo v South Pacific Tyres NZ Ltd* [1992] 1 ERNZ 111, 120 Judge Castle.
[75] *Wellington Clerical Workers IUW v JN Anderson & Son Ltd* [1979] ACJ 333, 335 Chief Judge Horn.

maintenance of the subjective test is somewhat justified by these limitations on recovery.

6 *Manner of personal grievance*

As the loss of a job is inherently upsetting, the manner in which the dismissal is carried out is also crucial. An inappropriate manner can aggravate the injury to feelings, increasing compensation. For example, the action may have been undertaken in a public place, or where other employees were present.[77] Injury may be aggravated where the action was unexpected by the employee, and announced in an abrupt manner, particularly a summary dismissal.[78] If dismissed summarily and required to leave the workplace immediately, serious impact on the grievant's feelings is foreseeable. The actions surrounding a constructive dismissal will also be pertinent. Not only does the situation of being forced to either resign or be fired place employees under stress, it often attracts false perceptions of guilt, creating further humiliation.

Many of the feelings aggravated by the manner of dismissal depend on the reactions of others around the grievant. In *Trotter v Telecom Corporation of New Zealand* Trotter was required to leave within a week and was denied after-hours access during that time.[79] The limited period was insufficient for Trotter to organise his work or tell co-workers his version of events. Likewise in *New Zealand Public Service Association v Land Corporation,* the grievants were required to leave by the end of that day, a mere three hours away.[80] This left these grievants even less time to contact senior employees or professional colleagues. The severe nature of these departures aroused suspicions and insinuated to co-workers the respective grievants were in the wrong. In both circumstances the Court was willing to recognise the hurt this situation would be likely to inflict on any employee.

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[76] *Auckland Hotel etc Employees IUW v Kentucky Fried Chicken (NZ) Ltd* [1982] ACJ 329, 330 Judge Williamson.

[77] See *LD and DJ Kendall Ltd v Northern Hotel etc Employees IUW* [1990] 3 NZILR 256, 260 Judge Travis.

[78] See *Madsen v Aotearoa International Ltd* [1995] 1 ERNZ 325, 335 Judge Finnigan.

[79] *Trotter v Telecom Corporation of New Zealand* [1993] 2 ERNZ 659, 701 Chief Judge Goddard (*Trotter*).

[80] *New Zealand Public Service Association v Land Corporation* [1991] 1 ERNZ 741, 762 Chief Judge Goddard.

Considerations of the manner of dismissal are not limited to the life of the employment contract. Conduct after the grievance may continue to aggravate the distress to the employee, and be considered when determining compensation.[81] An extreme example is where the employer made death threats to the employee sometime after the dismissal, naturally causing further distress.[82]

7 *Employer's ability to pay*

The employer's ability to pay the compensation may be relevant in some proceedings. This plea does not operate as a defence to a personal grievance or compensation claim, yet in extreme situations may act to mitigate the award. Chief Judge Goddard noted "[t]here must…be some good reason, other than mere sympathy for the employer, to warrant a reduction or deduction from the award otherwise warranted in the name of compensation."[83] 'Concrete evidence' is required to substantiate the insufficient means, limiting possible abuse.[84] The exception may be more likely to arise in non-profit or charitable organisations, schools and perhaps small employers.[85] It is suggested this exception should be used sparingly, as an anomaly would arise where 'poorer' employers could mistreat employees in ways their 'richer' counterparts would be accountable for.[86]

In the past the Court has also engaged measures to ensure payment where the employer may otherwise face difficulties. Inability to pay may arise where the compensation is approached as a lump payment. The Authority or Court can potentially engage its equity and good conscience jurisdiction to order payment by installments.[87] This ensures payment for the grievant and accountability for the employer. Inadequate means may also influence the Court's view on alternative

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[81] *Trotter,* above, 701 Chief Judge Goddard.
[82] *Le Grand Hotel Ltd v Vaile* (19 June 2002) Employment Court Auckland AC34/02, para 22 Judge Colgan.
[83] *Trotter v Telecom Corporation of New Zealand Ltd* [1993] 2 ERNZ 659, 701 Chief Judge Goddard.
[84] *Performance Plus Fertilisers Ltd v Slako* (4 September 1995) Employment Court Wellington WEC61/95, Chief Judge Goddard.
[85] In *Reid v Arts* (23 May 1997) Employment Court, Wellington, WEC25/97, Chief Judge Goddard, the impact on a reasonable share-milker was partial reasoning for restraining the quantum.
[86] See *Sparkes v Parkway College Board of Trustees* [1991] 2 ERNZ 851, 869 Chief Judge Goddard.
[87] Employment Relations Act 2000, ss157, 189. Comparable to the powers to make compliance orders under s137.

remedies. Reinstatement may be more plausible, or reimbursement may be focused on rather than compensation.[88]

8 Award not punitive

As the title suggests, a section 123(c)(i) award aims to compensate the employee's injured feelings. It should not directly aim at punishing the employer. Even where employers have undertaken extremely undesirable actions, the Court emphasises the award must not act as exemplary damages.[89] Most often when the employer acts objectionably, the injury and subsequent award reflect the level of misconduct. The non-punitive nature becomes most relevant where the employee's resilience cancels out the compensation. Despite any severity, the Court will not be able to make an award under section 123(c)(i).

The development of an exemplary damages jurisdiction may have the potential to address this divergence. *Attorney-General v Gilbert* confirmed exemplary damages were available for outrageous and flagrant breaches of employment contracts.[90] Although such damages were not warranted in *Gilbert*, the jurisdiction was not challenged. The breach of an employment contract differs from the statutory prescription of the personal grievance procedure. Section 123 prescribes an exhaustive list of personal grievance remedies, without exemplary damages. A limited jurisdiction to award exemplary damages, akin to the section 133 jurisdiction for employment contracts, would ensure reprimand for extreme employer misconduct towards robust employees.

9 Contributory fault

Section 124 of the ERA permits the Authority or Court to "consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance."[91] If necessary, the remedies can be reduced to reflect this contribution. This jurisdiction has been invoked to reduce an award of hurt and humiliation compensation where the employee could have undertaken

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[88] *Northern Clerical etc Union v Beachlands Engineering Ltd* [1991] 3 ERNZ 1023, 1032 Judge Travis.

[89] *Nelson Air Ltd v NZ Airline Pilots Association* [1991] 3 ERNZ 1128; *Paykel Ltd v Ahlfeld* [1993] 1 ERNZ 334; *Hobday v Timaru Girls High School Board of Trustees* [1994] 1 ERNZ 724.

[90] *Attorney-General v Gilbert* [2002] 2 NZLR 342, 365 para 113 Elias CJ.

reasonably obvious steps to alleviate the situation causing the injured feelings.[92] Contributory fault is often addressed through a less direct route, finding there is no injury of feeling to compensate. This is likely to occur where the employee was dismissed for misconduct, such as assault, and the dismissal is substantively justified. A grievance may be made out on procedural grounds, the Court may find there are not sufficient injured feelings, or any that do exist may be self-induced.[93]

B What are these Feelings?

In many cases the evidence substantiates the feelings specified in the section; the humiliation of unemployment, or dignity lost by co-workers' perceptions. Compensation is not limited to these categories however. The court has used these words merely as a springboard, also compensating for reactions such as a 'sense of abandonment', 'loss of self-confidence', the 'taint of dismissal,' offence and shock.[94] Symptoms with a more physical aspect have included psychological collapse, depression, and suicide. One particular line of compensated feelings, loss of status, will be more closely examined below with respect to dismissals of senior employees.[95] These feelings serve as illustrative examples of what is potentially a very wide category, with each award depending on the evidence of the individual's reaction. Despite this potential, in practice the courts address a fairly narrow band of injuries. In most cases the court is willing to accept there is a general feeling of shame that accompanies unjustified dismissals. In many cases this may be what is pleaded, only bringing evidence of different feelings where an exceptional award is claimed.

C Formulation of Award

Chief Judge Goddard summed up the method by which judges ought to assess quantum:[96]

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[91] Employment Relations Act, s124.

[92] See *Transmissions & Diesels Ltd v Matheson* (26 February 2002) Court of Appeal CA97/01, 10 para 20 Richardson P.

[93] *NZ Meat Processors etc IUW v Richmond Ltd* [1991] 2 ERNZ 566, 573 Judge Castle; *Rota v Transportation Auckland Corporation Ltd* (25 May 1999) Employment Court Auckland AC12A/99 Judge Travis.

[94] See *Personal Grievances* (Butterworths, 2002) para 11.21.

[95] See Part VI E 4 Have senior employees got more to lose?

[96] *Trotter v Telecom Corporation of New Zealand Ltd* [1993] 2 ERNZ 659, 709 Chief Judge Goddard.

> [i]n general, the assessment of compensation under [s123(c)(i)] is just that, an assessment. Injury to feelings, humiliation, and distress are not matters that are capable of arithmetic calculation, exact valuation, or close reasoning...It is really a matter of impression.

An award must reflect the grievant's personality, the evidence of distress, and the principles developed. Citing the principle of consistency, reference to previous levels awarded is common in both counsel's arguments and judgments. The Employment Institutions Information Centre collates information regarding the levels of compensations awarded previously in the Tribunal, Authority and Court, which are often referred to. Judicial comments on quantum are also often referred to. These range from a "token" $500,[97] through to a "high figure" of $20 000,[98] and a "high-water mark" of $50 000.[99] In the United Kingdom referring to past awards is seen as a means of determining what is fair and reasonable in the absence of any other yardstick.[100]

The Employment Court has cautioned both of these comparative methods. Judge Colgan has observed factors the tabulated information does not or cannot account for, which detracts from its effectiveness. This information does not represent the large number of awards decided in mediation or privately. The figures tabulated are also the final figures awarded. This point of reference does not acknowledge the factors which may have influenced the decision. When referring to previous judicial comment, the passage of time and potential inflation ought to be taken into account.[101]

Even where there is no express reference to previous awards, observing the outcome of Authority decisions indicates a strong implicit reliance on such awards. Often there is little discussion linking the actual emotional injury to a specific level

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[97] *Auckland and Tomoana Freezing Works etc IUW v South Pacific Meat Corporation Ltd* [1991] 3 ERNZ 1146, 1152 Judge Colgan.
[98] *Trust Bank Wellington Ltd v Lavery* [1995] 1 ERNZ 105, 109 Cooke P.
[99] Observation of *Ogilvy & Mather (New Zealand) Ltd v Turner* [1996] 1 NZLR 641 in *Carter Holt Harvey v Pirie* [1997] ERNZ 648, 652 Thomas J.
[100] Kemp & Kemp *The Quantum of Damages* (looseleaf, 4th ed, Sweet & Maxwell, London, 1982) vol 1, para 1-004 (last updated March 2002).

of compensation. Once a personal grievance is made out, and there is no evidence contradicting the existence of some emotional injury, it appears an award may be almost automatically made. Chief Judge Goddard has acknowledged this assumed existence of moderate emotional injury.[102] This assumption translates to the fact that most awards are concentrated under $5000.[103] Exceptional circumstances are required to displace this assumption. Assessing quantum in this automatic manner indicates strong judicial reluctance to deviate from past awards.

An implicit ceiling on the quantum of hurt and humiliation compensation appears to exist. Despite claims of up to $150 000,[104] awards have not ventured past what was asserted as the "high water mark" of $50 000. *Transmissions & Diesels Ltd v Matheson*[105] provides the most telling example of this point. Matheson was so upset after the events leading up to his resignation, considered a constructive dismissal, he committed suicide the next day. Suicide must be considered the most extreme measure of distress, or in the words of Judge Shaw, his distress was "as profound as it could possibly be."[106] Despite his estate's claim of $100 000, the Employment Court awarded $50 000.[107] Ironically, the Court of Appeal partially reduced the award to reflect his contribution to the stress and the short duration of stress, resulting in a final award of $35 000. It may be fair to question what further evidence of stress is required to displace this ceiling.

D *Relationship to Other Remedies*

An award for hurt and humiliation compensation is not made in a vacuum. The award will be made in light of the other remedies awarded to the grievant. Originally, the courts often made global awards, not distinguishing between categories of damages or compensation, an option advocated as potentially more representative of the court's calculation.[108] In *STAMS v The Pad and Paper*

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[101] *Charta Packaging v Howard* (17 May 2001) Employment Court Wellington WEC85/00, para 25 Judge Shaw.
[102] *Trotter v Telecom Corporation of New Zealand Ltd* [1993] 2 ERNZ 659, 703 Chief Judge Goddard.
[103] See Part V A Statistics.
[104] *Hemopo v South Pacific Tyres NZ Ltd* [1992] 1 ERNZ 111, 119 Judge Castle.
[105] *Transmissions & Diesels Ltd v Matheson* (26 February 2002) Court of Appeal CA97/01 Richardson P.
[106] *Matheson v Transmissions and Diesels Ltd* [2001] 1 ERNZ 1, 25 Judge Shaw.
[107] The Court acknowledged a gratuitous payment of $10 000 already made.
[108] Alan Geare "Dismissal Cases 1990-1991" (1992) 17 NZJIR 109, 116.

Company the Court commented where the grievant receives a high amount of reimbursement it may be unnecessary to make an award of hurt and humiliation compensation.[109] Thomas J strongly refuted this in *New Zealand Fasteners Stainless Ltd v Thwaites*: [110]

> [c]ompensation for humiliation, loss of dignity and injured feelings is a head of damage in its own right. It should not be seen as some sort of solatium to be added to the 'real' compensation.

Global awards are further discouraged by the statutory scheme introduced with the LRA. The policy behind what is now the section 128 reimbursement directions, steers the court towards breaking down awards, showing exactly the grievant was being compensated for.[111] This is consistent with the aims of each remedy. The impact of the dismissal and any injured feelings are not accounted for in the other remedies. If section 123(c)(i) is not individually addressed, the personal non-pecuniary side effects of the grievance will not be recognised or compensated. The Law Commission for England and Wales also supports the need for separate compensation for non-pecuniary loss.[112]

E Tax Implications

The Inland Revenue Department (IRD) has issued a public ruling stating that compensation paid under section 123(c)(i) of the ERA is not taxable under the Income Tax Act 1994.[113] This continues the tax status of section 40(1)(c)(i) of the ECA.[114] This assessment required determining whether hurt and humiliation compensation was monetary remuneration. Although the payment would not exist but for the employment relationship, the IRD considers the compensation is not payment for the employment, instead it is recognition of the grievance.[115] This

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[109] *STAMS v The Pad and Paper Company* [1990] 3 NZILR 1030, 1045 Chief Judge Goddard.
[110] *New Zealand Fasteners Stainless Ltd v Thwaites* [2000] 2 NZLR 565, 576 para 41 Thomas J.
[111] *Trotter v Telecom Corporation of New Zealand Ltd* [1993] 2 ERNZ 659, 693 Chief Judge Goddard.
[112] Law Commission for England and Wales *Damages for Personal Injury: Non-Pecuniary Loss* (No 257) (London, 9 April 1999) 30 para 3.17.
[113] Inland Revenue Department Public Ruling PUB 01/04 Assessability of Payments Under the Employment Relations Act for Humiliation, Loss of Dignity and Injury to Feelings ("the Ruling").
[114] See Leslie Brown "Taxation of Compensation in Personal Grievances Revisited" [1996] ELB 141.
[115] Aaron Dearden "Tax Free Compensation" [2001] ELB 93, 93.

differentiates hurt and humiliation compensation from the other monetary remedies, all of which are taxable as monetary remuneration.

The non-taxable status applies to awards irrespective of whether they are imposed by the Authority or Court, mediated or settled upon.[116] In a settled award the parties will therefore be required to allocate a portion of the overall award as hurt and humiliation compensation. The Ruling states if the allocation is perceived as a 'sham', attributed only to minimise tax, the Commissioner may enquire about the method of evaluation of this amount. The Ruling reserves a right to reopen excessive allocations, yet does not specify how the Commissioner would reassess the allocation.[117]

1 Settlements

This aspect of the Ruling raises a topical issue; allocation to heads of compensation within settled awards. The growing trend of public sector 'golden handshakes' instigated an Auditor–General report on these employment settlements.[118] The report addresses the existence of public sector settlements, which are most often accompanied by severance payments. It evaluates when settlement is appropriate, alternative and often ignored measures, and the role fault ought to play, with emphasis on the public sector risks of external accountability and lawful authority. The report recommends a principled approach to settling disputes. The six principles include; minimising potential for irreconcilable problems, reaching soundly based and authorised decisions to settle, observing probity and integrity principles, applying appropriate terms, maximising transparency and avoiding public and political embarrassment.

Hurt and humiliation compensation played a fairly substantial role in the report of the Auditor-General. The almost invariable practice of including a payment for hurt and humiliation within settlements was noted. The non-taxable status was perceived as a major cause of this trend. Structuring packages around hurt and humiliation compensation for this reason raises concerns, particularly as

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[116] Dearden, above, 93.
[117] The Ruling relied upon *Case S* (1996) 17 NZTC 7,603, 7,606 Barber J.
[118] Report of the Controller and Auditor-General *Severance Payments in the Public Sector* (Wellington, May 2002).

there will be no judicial determination as to the existence of either a valid grievance or injured feelings and the practice undermines the principle of voluntary compliance within the tax system.[119] In the public sector, the payments allocated to hurt and humiliation ranged from $25 000 to $240 000. Some entire settlements were classified as compensation for hurt and humiliation.[120] The public often interprets this trend as unduly rewarding departing employees, who have possibly been performing poorly, with an attempt to minimise tax. These observations highlight that outside of the courtroom, the taxation status is playing a major role in payments for hurt and humiliation.

F Role of Hurt and Humiliation Compensation

Once a personal grievance enters the judicial forum a grievant cannot emphasise hurt and humiliation compensation for its tax benefits. However this remedy continues to be preferred due to its focus on judicial discretion rather than contractual entitlement. Unlike reimbursement and compensation for loss benefits, a section 123(c)(i) award is not dependent on proving contractual entitlements. It relies solely on the judicial determination of the extent on injured feelings. The taxation and discretionary advantages results in almost all personal grievances including a claim for compensation under section 123(c)(i).[121] The courts have stressed this compensation is not automatic, however it is considered unusual for compensation to not follow a personal grievance.[122] As this remedy is almost universally claimed and awarded, the related statistics are useful indicators of success in personal grievances.[123]

V SUFFICIENCY OF AWARDS

A Statistics

1 Awards under the Labour Relations Act 1987

Boon researched unjustifiable dismissals under the LRA, focusing on remedies awarded in all Labour Court decisions and a sample of Mediation Service

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[119] Report of the Controller and Auditor-General, above, 24 para 2.34.
[120] Report of the Controller and Auditor-General, above, 36 para C.19.
[121] Ian McAndrew "Adjudication in the employment tribunal: Some facts and figures on caseload and representation" [1999] 24(3) NZJIR 365, 370.
[122] *New Zealand Baking Trades Employees IUOW v The French Bakery Ltd* [1991] 1 ERNZ 409; Michael Leggat "Compensation for Non-Financial Losses" [1998] ELB 61, 62.
[123] McAndrew, above, 370.

decisions between 1987 and 1991.[124] Of the 447 unjustifiably dismissed employees, 367 were awarded compensation, with an average award of $8 134.[125] This figure includes compensation for both injured feelings and loss of benefits. Boon drew a distinction between grievants who were reinstated and those who were not. The 40 reinstated employees were awarded an average of $3 700, compared to $7 549 for the majority of employees who were not reinstated.[126] In the few cases where the grievant was reinstated, there may be an assumption that the reinstatement mitigates the injuries sustained. The act of reinstatement may be seen as reducing the non-pecuniary loss needing to be compensated. Additionally, Boon observed a few very high awards in 1990 and 1991 might have inflated some of the averages drawn from this sample.

2 *Awards under the Employment Contracts Act 1991*

Skiffington undertook similar research during the early years of the ECA. This research focuses on 599 personal grievances of unjustified dismissal adjudicated by either the Tribunal or the Court between May 1992 and May 1993.[127] The Tribunal awarded an average of $3 878 for hurt and humiliation compensation over 475 grievances. The Employment Court averaged $10 000 over 124 grievances. Overall the average was $6 935. The Employment Court adjudicates on a smaller number of what may be considered the more serious grievances. These grievances attract higher awards, explaining the marked difference between the averages.

In 1998 Couch presented statistics on personal grievance remedies during the period 1992 to 1998. The statistics were separated on the basis of the geographical location of the Tribunal. The averages during this period ranged from $4 100 to $6 500.[128] The median awards were generally $3 000 or $4 000, with some years increasing to $5 000.[129]

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[124] Bronwyn Boon "Remedies for Unjustifiable Dismissal under the Labour Relations Act 1987" [1992] 17 NZJIR 101,102-3.
[125] Boon, above, 106.
[126] Boon, above, 106.
[127] Lorraine Skiffington "What is a Job Worth?" [1994] ELB 74, 75.
[128] Tony Couch "Statistics and Comment" in New Zealand Law Society *Employment Law Conference 1998* 119, 125.

The Industrial Relations Research Centre has constructed a cumulative database of Tribunal decisions. The following table collates the amounts awarded for grievances decided under the ECA until 1998.

Table One: Compensation awarded under s40(c)(i) ECA[130]

Level of Compensation	Frequency	Percent
No compensation awarded	179	12.6
Up to $5 000	845	59.5
Between $5 001 and $10 000	316	22.3
Over $10 000	80	5.6
Total	1420	100

Rather than giving an average award, this research displays the distribution of compensation between different brackets of quantum. Clearly, a large majority of grievants were awarded compensation below $5 000. Awards above $10 000 occurred in only 5.6 per cent of grievances, demonstrating high awards are the exception rather than the rule.

3 *Awards under Employment Relations Act 2000*

The limited information available on ERA remedies may mean it is too early to make any strong conclusions regarding trends. The Employment Institutions Information Centre released a table of compensation awarded under section 123(c)(i) of the ERA during the 2001 calendar year. Table two presents the awards made by the Authority during this time.[131]

Table two: Compensation awarded under s123(c)(i) ERA in 2001[132]

Level of Compensation	Frequency	Percent
Up to $5 000	69	61.6
Between $5 000 and $10 000	33	29.5
Over $10 000	10	8.9
Total	112	100

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[129] Couch, above, 125.

[130] Ian McAndrew "Adjudication in the employment tribunal: Some facts and figures on caseload and representation" (1999) 24(3) NZJIR 365, 370.

[131] The Employment Court is omitted as there was only one award of $10 000.

This data provides early indications the Authority continues to award a majority of grievants below $5000. With closer examination, McAndrew has indicated these figures may show a move towards the $5000 to $10 000 as the usual bracket of awards in misconduct grievances.[133]

4 Out of court payments

The Auditor-General's report sets out the following statistical information on mediated and settled awards under the ERA. Table three focuses on the distribution of quantum over three wide brackets.

Table three: Hurt and Humiliation Payments : 2 October 2000 to 20 March 2002[134]

Amount of Payment	**Authority awards**		**Mediation Service**		**Private Settlements**[135]	
	Frequency	Percent	Frequency	Percent	Frequency	Percent
$1 to $4 999	50	61.6	1358	61.8	259	38.3
$5 000 to $19 999	31	38.4	702	32.1	280	41.3
Over $20 000	-	-	136	6.2	138	20.4
Total	81	100	2196	100.1	677	100

Payments settled privately are far more likely than Authority awards to be above $5 000. Where the Authority has not yet ventured into the bracket of awards above $20 000, one in five authorised private payments are in this bracket, together with 6.2 per cent of mediated agreements. There is a stark contrast between adjudicated awards and out of court payments for hurt and humiliation.

B Observations of Insufficiency

The level of awards presented has attracted widespread criticism. Observers of insufficiency often begin analysis by stressing the central role of employment in many employees' lives. As summarised by Anderson:[136]

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[132] Employment Institutions Information Centre "Compensation for Humiliation etc Table (s123(c)(i) ERA) 1 January 2001 – 31 December 2001".
[133] Ian McAndrew "Adjudication outcomes in the Employment Tribunal: Some early comparisons with the Employment Relations Authority" [2001] 26 NZJIR 341, 348.
[134] Department of Labour "Hurt and Humiliation Payments: 2 October 2000 to 20 March 2002" in Report of the Controller and Auditor-General *Severance Payments in the Public Sector* (Wellington, May 2002) 34, para C.7.
[135] Payments under settlements agreed by parties and recorded by authorised mediators.

> [w]hile it may be obvious it may be worth restating that the great majority of workers rely exclusively on their employment to provide them with an income and an acceptable standard of living. Moreover most workers do not receive an income that is sufficiently large to allow the accumulation of sufficient savings to tide them over significant periods of unemployment.

Jobs are more than economic survival mechanisms. For many employees, jobs play a central position in social and personal development. The shared New Zealand attitude to work, or the "strong and all-pervasive" work ethic described by Thomas J, may further this centrality.[137]

Despite the pivotal role of employment, jobs are often held in precarious positions. The imbalance of power in the employment relationship, almost always in favour of the employer, is now statutorily recognised.[138] The personal grievance procedure is one mechanism of addressing this imbalance, offering redress by way of employment protection. Therefore where personal grievance remedies are inadequate, there may be a disproportionate impact on the employee's economic and social well-being.

Unsurprisingly, unions were among the first to criticise the adequacy of compensation. When the Department of Labour issued the Green Paper on Industrial Relations Reform in 1985, one of the key Federation of Labour complaints was the inadequate remedies provided by the personal grievance procedure. Specifically, the levels of compensation did not recognise the true losses suffered.[139]

Many commentators have gone on to support the union stance. Anderson commented, "compensation rarely covers the full cost to the worker of lost wages and other loss."[140] These led to the oft-cited conclusion, "a worker who is found to

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[136] Gordon Anderson "The Origins and development of the personal grievance jurisdiction in New Zealand [1988] 13(3) NZJIR 257, 258.
[137] *New Zealand Steel Fasteners v Thwaites* [2000] 2 NZLR 565, 577 para 44 Thomas J.
[138] Employment Relations Act, s3(a)(ii).
[139] Anderson, above 272.
[140] Anderson, above, 269.

be unjustifiably dismissed will almost always end up losing."[141] Some of the possible reasoning offered for awarding less than adequate results include the role of contributory fault, and the fact that the personal grievance procedure is not creating nor compensating for a legal right to continued employment.[142]

After presenting the statistics summarised above, both Boon and Skiffington concluded in a similar vein. Acknowledging it is difficult to give a monetary value to a job and subsequent intangible loss, Boon still suggests "that $7 459 is a poor price to be paid for an unjustifiably lost job."[143] Both observe the principle behind the personal grievance of redressing aggrieved workers is not being met in practice.[144] The compensation levels awarded are not putting right the wrong of the personal grievance. Skiffington concludes "in light of the low levels of compensation awarded, achieving the goal of a fair and equitable outcome for the employee is yet to be realised."[145]

1 Dissent of Thomas J in Thwaites

These criticisms moved to a judicial forum in the vigorous dissent of Thomas J in *New Zealand Steel Fasteners v Thwaites*.[146] The majority found the redundancy in *Thwaites* to be substantively justified, however allowed the award of $10 000 to remain for humiliation and distress caused by the procedural deficiency.[147] Thomas J agreed with the genuine redundancy finding, yet dissented in relation to the quantum of compensation.

This dissenting judgment reviews the development of compensation for humiliation and injury to feelings under section 40(1)(c)(i) of the ECA, condemning several aspects. This section signalled a legislative intent to allow employees with personal grievances to pursue compensation for non-pecuniary harm, intending to offer an effective remedy.[148] However Thomas J categorises awards under this head

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[141] Anderson, above, 270.
[142] Anderson, above, 270.
[143] Bronwyn Boon "Remedies for Unjustifiable Dismissal under the Labour Relations Act 1987" [1992] 17 NZJIR 101, 107.
[144] Boon, above, 107; Lorraine Skiffington "What is a Job Worth?" [1994] ELB 74, 76-7.
[145] Skiffington, above, 76.
[146] *New Zealand Steel Fasteners v Thwaites* [2000] 2 NZLR 565 (*Thwaites*).
[147] *Thwaites,* above, 573-4 paras 28, 31 Gault J.
[148] *Thwaites*, above, 575 paras 36-37 Thomas J.

as "anything but generous" failing to provide an effective remedy and resulting in an "empty right".[149] This was observable in the statistics showing that where the employee was not a senior manager, the awards were invariably $10 000 or less.[150]

2 *Judicial restraint*

Thomas J adopted the stance that:[151]

> [t]he Court's traditional providence in regard to non-monetary loss means that such awards tend to become frozen at a level which the passage of time and changes in circumstances or expectations make inadequate.

A key contribution to this 'frozen level' of awards is ongoing judicial restraint in determining quantum. Thomas J laid the blame squarely on the Court of Appeal rather than the Employment Court, with the regular emphasis on the need for restraint in deciding awards.[152] This was illustrated by Tipping J's obiter statement in *Andrews v Parceline Express Ltd*:[153]

> Firm restraint must be kept on the quantum of awards in this area. While the type of damage for which the compensation is awarded is real, a sense of proportion must be maintained. That is so both in relation to common law damages of the present kind and in relation to damages awarded under the Employment Contracts Act for such things as humiliation, loss of dignity and injury to feelings.

The sense of proportion required becomes the justification for courts continually awarding at what Thomas J considers "a disproportionately low level."[154] This restraint is perhaps exemplified by the almost notorious practice of the Court of Appeal reducing many Employment Court awards.[155]

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[149] *Thwaites*, above, 575 para 38 Thomas J.
[150] *Thwaites*, above, 575 para 39 Thomas J.
[151] *Thwaites*, above, 576 para 41, Thomas J.
[152] *Thwaites*, above, 576-7 para 42, Thomas J. See *Carter Holt Harvey Ltd v Pirie* [1997] ERNZ 648, 652 Thomas J; *Health Waikato Ltd v Van der Sluis* [1997] ERNZ 236, 243 McGechan J.
[153] *Andrews v Parceline Express Ltd* [1994] 2 ERNZ 395, 398 Tipping J.
[154] *Thwaites,* above, 577 para 43 Thomas J.
[155] See John Hannan "Recent Trends in Remedies and Conflict of Laws in the Employment Law Context" (Institute of International Research, 13th Annual Industrial Relations Conference, March 1999) 1.

3 Position in England

Thomas J also referred to the situation of non-pecuniary damages in England. Reacting to growing concern about the inadequacy of damages, the Lord Chancellor requested a Law Commission report into levels of damages.[156] The report focused on non-pecuniary damages for personal injury. At the time of the report, non-pecuniary compensation was not available for unjustified or wrongful dismissals, so the findings were not directly applicable to employment law.[157] However the focus on non-pecuniary loss and the difficulty in formulating such awards maintains the relevance to hurt and humiliation compensation in New Zealand.

(a) Law Commission conclusions

The report concluded damages for non-pecuniary loss in serious personal injuries were too low.[158] In determining the amount of increase required, the Commission considered public opinion of levels of damages was one of the influential factors, and commissioned a survey to gauge opinion.[159] The results of this survey were incorporated into the Commission's final recommendation that damages above £3000 ought to be increased by a factor more than 1.5 but less than 2, with damages below £3000 increased but on a sliding scale from a factor of 1.5 down.[160] The Commission then investigated various means of implementing this change. Imposing legislative minima and maxima, with lists of relevant factors was strongly rejected for its rigidity and politicising the question of damages.[161] The report favoured a judicial adjustment, leaving the setting of appropriate levels to the Court of Appeal or House of Lords in an appropriate case.[162] Therefore the English Court of Appeal in *Heil v Rankin & Associated Appeals* thoroughly considered the recommendations, and concluded the judicial guidelines on non-pecuniary damages

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[156] Law Commission for England and Wales *Damages for Personal Injury: Non-Pecuniary Loss* (No 257) (London, 9 April 1999).
[157] See Part III B 2 The Rule in *Addis* in England.
[158] Law Commission for England and Wales, above, 32 para 3.22.
[159] Law Commission for England and Wales, above, 38 para 3.42.
[160] Law Commission for England and Wales, above, 85 para 3.110.
[161] Law Commission for England and Wales, above, 73 para 3.139.
[162] Law Commission for England and Wales, above, 81 para 3.156. There was a legislative fallback recommendation if the courts failed to implement any change within three years.

ought to be revised.[163] The *Heil* recommendation applied only to awards above £10000, increasing these awards by a third.[164]

4 *Implications for New Zealand*

With respect to the English developments, Thomas J expressed concern at the fact that "without the external prompting which occurred, the Courts had failed to make the necessary adjustment."[165] Symptoms of this internal failing are observable in the development of hurt and humiliation compensation. Thomas J stressed the need for real compensation, recognising the traumatic experience of unjustifiably losing a job. Section 123(c)(i) awards were not currently redressing these losses adequately. The application of these factors emphasised led Thomas J to the opinion that the compensation on *Thwaites* ought to be substantially increased.[166]

5 *Contrasting settlement trends*

Table three highlights that significantly higher hurt and humiliation payments occur in private settlements or the Mediation Service compared to the Authority.[167] An initial reaction may be that these settlements are achieving what the judiciary are not. However, practitioners' comments suggest otherwise. A major cause of this disparity is the effect of tax implications. In negotiating settlements employers are often willing to accept higher allocations of payment to the hurt and humiliation category. This does not affect the amount the employer pays, while increasing the net amount an employee receives. It may also allow for a reduction of the overall settlement package.[168] Practitioners also acknowledge a growing acceptance that all settlement packages include some hurt and humiliation payment, irrespective of what feelings were in fact injured.[169] Payments are often made in the shadow of threatened personal grievance action. In these cases neither an actual

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[163] *Heil v Rankin & Associated Appeals* [2000] 3 All ER 138 Lord Woolf MR.
The Judicial Studies Board in UK produces guidelines as to the appropriate level of damages for particular personal injury cases. Kemp & Kemp *The Quantum of Damages* (looseleaf, 4th ed, Sweet & Maxwell, London, 1982) vol 1, para 1-013 (last updated March 2002).
[164] *Heil*, above para 83 Lord Woolf.
[165] *New Zealand Steel Fasteners v Thwaites* [2000] 2 NZLR 565, 576 para 41 Thomas J.
[166] *Thwaites,* above, 580 para 57 Thomas J.
[167] See Part V A 4 Out of court payments, table three.
[168] Report of the Controller and Auditor-General *Severance Payments in the Public Sector* (Wellington, May 2002) 35, para C.11.
[169] Report of the Controller and Auditor-General, above, 35 para C.11.

grievance nor injured feelings may have occurred, yet the employer is willing to make some payment to avoid litigation.[170]

Therefore, high settled awards do not necessarily correlate to severe emotional injury. These observations indicate that these awards reflect the combination of an assumption a payment will be made, employer's desires to avoid litigation and tax liability. Although there is a difference between awarded and settled payments, the latter private payments are not necessarily responding to the alleged failings of the judiciary.

C Arguments Awards are too Generous

Thomas J clearly asserts his stance on hurt and humiliation compensation. However this opinion remains a dissent, with countless other judgments implementing the restraint criticised. Continuing restraint can be traced back to the general principles of hurt and humiliation compensation. Cooke P directed future decisions to be fair and reasonable between both parties, emphasising the moderation Parliament expects to be applied to the jurisdiction to award this compensation.[171] Following enunciated principles, particularly as imposed on the lower levels of the judicial hierarchy, will result in a consistent level of awards. Where Court of Appeal cases such as *Carter Holt Harvey Ltd v Pirie* articulate the need for restraint, this influences the level where consistency settles.[172] The moderation and restraint enunciated have clearly had a hand in keeping most awards below $5 000.

1 Commentators

It has also been questioned whether the employment institutions have in fact been too generous in determining awards for non-pecuniary loss. This criticism draws on a comparison between awards of the employment institutions and the ordinary courts. It is suggested: [173]

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[170] Report of the Controller and Auditor-General, above, 35 para C.10.
[171] *Telecom South v Post Office Union* [1992] 1 NZLR 275, 281 Cooke P.
[172] *Carter Holt Harvey Ltd v Pirie* [1997] ERNZ 648, 652 Thomas J.
[173]Michael Leggat "Compensation for Non-Financial Losses" [1998] ELB 61, 63.

> the comparative willingness of the specialist employment institutions to make large compensatory awards, applying what appears to be an altogether different scale, has established dismissal claims in a discrete category among civil causes of action.

Where $20 000 to $25 000 is effectively the ceiling on most tort claims, the employment institutions award up to $50 000. Although the exception rather than the norm, these larger awards occur more regularly than in the ordinary courts. Leggat suggests:[174]

> the almost invariable award of some compensation for non-pecuniary loss to an unjustifiably/wrongfully dismissed employee attracts little controversy, the frequency of larger awards, would suggest that the Employment Court (and the Tribunal in a few cases) are applying their statutory and common law discretions post-*Addis* to an excessive level.

Two issues can be drawn from this criticism. The first focuses on the awards at the upper end, implying these awards are both too large and frequent. The second is that lower awards occur in most grievances, and are accepted. The combination of these issues implies courts are being too generous in different manners across the spectrum of grievance claims.

D Discussion

The statistics present a number of trends, setting the backdrop for these opposing trends. Primarily, it is shown that most grievants are likely to receive less than $5 000 compensation for hurt and humiliation in a personal grievance if pursued through the employment institutions. Awards above $10 000 are clearly the exception, rather than the rule. Alternatively, higher awards are made where potential grievances are settled before reaching the Authority, however this is not directly attributable to a higher level of suffering. Deriving from the same set of statistics and trends, various parties have formed arguments asserting the awards are both too high and too low.

[174] Leggat, above, 63.

The opposing opinions may arise due to a conflict between the reasons grievants pursue hurt and humiliation compensation, the role the general principles intend this compensation to be, and in practice what is awarded. The principles set the standard for formulating awards to compensate for non-material losses, and require a valuation on the intangible concept of injury to feelings. The figure is limited through legal requirements of proof, causation, remoteness, and focuses on the impact on the employee not the actions of the employer. Overall, the principles suggest awards will follow a structured assessment and redress the grievant's non-pecuniary loss.

Grievants themselves have come to perceive hurt and humiliation compensation as a primary means of redressing their grievances. Either with intent or subconsciously, the compensation may be pursued to pay for the job lost rather than the feelings injured. The non-taxable status and discretionary jurisdiction form a desirable remedy. Both the parties and third party observers often use the amount awarded under this head as the primary indicator of success. These assumptions regarding grievant's perceptions may be reflected in the sometimes excessive amounts claimed under section 123(c)(i).

In practice, the award may not meet the criteria set by either the principles or the grievant's expectations. It appears that in a large number of cases the Authority is effectively awarding automatic compensation. Although in principle, any award is dependent on the facts, compensation is often given on very little evidence and with very little discussion devoted to the determination. Regardless of the amount claimed, most awards end up under $5 000. To achieve any higher, the applicant must essentially bring exceptional circumstances demanding the Authority to consider effectively breaking the mould.

E Alternative Methods of Influencing Quantum

The Law Commission recommendation to increase quantum in the United Kingdom is recognised as an exceptional event, unlikely to occur again.[175] If discontent for the quantum of awards under section 123(c)(i) grows, a similar

[175] *Heil v Rankin & Associated Appeals* [2000] 3 All ER 138, para 99 Lord Woolf MR.

external review remains a possibility in New Zealand. Such action may be at the extreme end of actions, to be engaged if drastic change is needed. The ERA provisions avoid legislative direction on judicial discretion, decreasing the possibility of this action in New Zealand. This is consistent with the Law Commission's rejection of legislative action.

A second possible means of controlling awards is the implementation of judicial guidelines, again drawing guidance from England. When the jurisdiction of lower courts was significantly expanded, the Judicial Studies Board Guidelines were introduced.[176] These guidelines are essentially a composition of previous judgments, offering guidance on appropriate brackets of non-pecuniary awards for certain circumstances. In New Zealand, the Employment Information Institutions Centre already collates basic information. Formulating this information into guidelines may reduce the discretion held by Authority members, or may merely formalise the methods already engaged by Authority members. However, it may also provide the opportunity for a certain measure of increasing awards if necessary. The value of certain common emotional reactions may be categorised at a value between $5 000 and $10 000, increasing the value of the 'core' award bracket.

F Conclusion on Quantum Sufficiency

Overall, the arguments current quantum levels are insufficient appear more favourable. New Zealand legislation has intentionally deviated from common law restrictions on recovery for this form of non-pecuniary loss. It remains the role of the judiciary to ensure this is an effective remedy. Although some grievants are using this compensation as a sole vehicle for redress for the loss of a job, the courts are in a position to disregard irrelevant aspects of claims. Awards do not need to pay the full amount claimed to be effective, yet they must address the harm of the individual grievant, an aspect that appears to be glossed over in the aims of consistency. The continuing focus on restraint impedes the aim of achieving real compensation for the actual injured feelings of grievants. Removing this impediment primarily lies in the hands of the judiciary. Real compensation for

[176] Kemp & Kemp *The Quantum of Damages* (looseleaf, 4th ed, Sweet & Maxwell, London, 1982) vol 1, para 1-013 (last updated March 2002).

emotional injuries sustained will only occur if application of the principles of hurt and humiliation compensation changes in practice.

VI RELATIONSHIP BETWEEN JOB STATUS AND QUANTUM

Independent of the overall sufficiency of awards, questions arise relating to the sufficiency of awards in relation to the grievant's income level or job status. The section 123(c)(i) award ought to reflect the actual amount of emotional injury occurred, without ties to the employment contract. Theory dictates that if a high-paid consultant and a low-paid retail assistant are unjustifiably dismissed in the same manner and incur the same emotional injuries, the awards ought to be equal. There has been a large amount of speculation regarding the weight of this theory in practice. High-income earners can almost expect to be awarded a higher level of hurt and humiliation compensation, raising questions of equity for low-income employees.

A Statutory Cap

During the passage of the Employment Contracts Bill, the New Zealand Law Commission proposed capping section 40(1)(c)(i) at six months of the applicants income.[177] This was criticised for the fact it would "arbitrarily have created marked discrepancies between grievants…based upon their employment status."[178] The drafting of the ECA rejected such a cap. Subsequent decisions have reinforced this rejection, emphasising the irrelevance of income, a factor the other monetary remedies address. Additionally, the established principles of this compensation ought to "eliminate stereotypical attitudes such as an assumption that those who hold higher office have further to fall and therefore suffer greater hurt."[179] Despite these warnings, it soon appeared "the Court takes the view that the humiliation, loss of dignity and hurt feelings of senior executives or managers is likely to be greater than in cases of less qualified employees."[180]

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[177] New Zealand Law Commission *Aspects of Damages: Employment Contracts and the Rule in Addis v Gramophone Co Report 18* (Wellington, March 1991) 57.
[178] John Hughes "Executive dismissals and compensation for career expectancy" [1992] NZLJ 79, 84.
[179] *Martin v Park and Clarke Ltd* (5 July 2000) Employment Court Wellington WC35/00, Judge Shaw.
[180] *New Zealand Steel Fasteners v Thwaites* [2000] 2 NZLR 565, 575 para 39 Thomas J.

B *Inclusion of High-Income Earners in Personal Grievances*

1 Telecom South *and* Air New Zealand *decisions*

Before the ECA most managerial and high-income earners were excluded from the personal grievance process due to their predominantly non-union status.[181] Towards the end of the LRA, the contemporaneous decisions of *Telecom South v Post Office Union*[182] and *Air New Zealand Ltd v Johnston*[183] were the first to address unjustified dismissal claims of senior level managers.[184] Telecom had summarily dismissed a senior executive in an "almost brutal" manner. The Labour Court awarded $55 000 reimbursement for lost wages, $220 000 compensation for lost benefits and $20 000 compensation for humiliation and distress.[185] The $20 000 was not challenged on appeal. The Labour Court in *Air New Zealand* awarded $59 772 reimbursement and a global figure of $135 000 compensation.

The Court of Appeal noted the 'executive' element of these cases allowed the Court to deal with significantly higher levels of awards. This observation is directly applicable to the awards for reimbursement and compensation for loss of benefits. Despite the licence to deal with higher amounts, the Court still reduced both awards, as both were "much higher than any previously made by the Labour Court or Arbitration Court."[186] In particular the "manifestly excessive" $220 000 was sent back and the $135 000 in *Air New Zealand* was reduced to $15 000 compensation for economic loss and $10 000 compensation for humiliation and distress.

It must be questioned whether the Court of Appeal inferred the executive element also permitted higher levels of compensation for humiliation and distress. The $20 000 in *Telecom* was not challenged, despite the fact it was substantially higher than most previous awards. With little discussion substantiating these high awards, it appears the Court was willing to accept a higher realm of compensation

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[181] John Hughes, "Personal Grievances" in Raymond Harbridge (ed) *Employment Contracts: New Zealand Experiences* (Victoria University Press, Wellington, 1993) 89, 107.
[182] *Telecom South v Post Office Union* [1992] 1 NZLR 275 (*Telecom South*).
[183] *Air New Zealand Ltd v Johnston* [1992] 1 NZLR 159 (*Air New Zealand*).
[184] *Telecom South,* above, 280-1 Cooke P.
[185] *Post Office Union v Telecom South* [1990] 1 NZILR 786, 838 Judge Palmer.
[186] *Air New Zealand*, above, 161 Cooke P.

where the income level in question was also higher. The principles within these decisions were stated to be applicable to future cases under the ECA.

2 Trotter

The first influential executive grievance under the ECA was *Trotter v Telecom Corporation of New Zealand Ltd.*[187] Trotter was employed as a senior manager with Telecom from 1990, with no problems until 1992 when a new supervisor was appointed. Trotter was then demoted due to unsatisfactory performance. After being allowed only a short time to improve, Trotter was dismissed for poor performance. In respect of the large claim made, Chief Judge Goddard notes:[188]

> while some injury to feelings can be assumed to be involved in any unjustifiable dismissal, the extent of that injury is not normally readily apparent and any substantial, and especially any unusually large, claim for compensation should be supported by evidence.

Actions causing or aggravating the injury to feelings here included; the abrupt and predetermined manner of dismissal, the immediate evacuation required, the impact on Trotter's social life, groundless allegations against him, Telecom's exaggerated account of investigations and statements made which affected Trotter's credibility.[189] These factors "attract an award of compensation significantly higher than anything that has gone before," which, following partial mitigation for the relative youth and expected resilience of the applicant, was settled at $40 000.[190]

The Employment Court was careful to deal with Trotters $150 000 claim for loss of reputation separately as, "injury to reputation…is concerned with the effect on the minds of others, [where] the effect on the dismissed employee's own mind is dealt with by awards for humiliation and injury to feelings."[191] Trotter claimed his reputation had been severely damaged internally, externally and internationally, to the extent any future position he may obtain would be likely to earn at least $60 000

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[187] *Trotter v Telecom Corporation of New Zealand Ltd* [1993] 2 ERNZ 659 (*Trotter*).
[188] *Trotter*, above, 703 Chief Judge Goddard.
[189] *Trotter*, above, 701-703 Chief Judge Goddard.
[190] *Trotter*, above, 704 Chief Judge Goddard.
[191] *Trotter*, above, 707 Chief Judge Goddard.

less per year. The Court accepted that the market for someone with Trotter's skills is small, and the stigma of dismissal in such a market is severe, yet declined to award under this head, as this damage was compensated under loss of future remuneration.[192]

C Research into Award Disparity

These cases paved the way for executives pursuing personal grievances. Once included in the procedure, allegations of disparities in awards began to emerge in favour of senior employees. Statistics will be used to investigate the validity of these allegations.

1 Averages

Part of Skiffington's research investigated the substance of these allegations.[193] The employees involved in the 599 personal grievances researched were categorised on the basis of occupation. The categories are based on the Department of Statistics New Zealand Standard Classification of Occupations, with a general trend of decreasing in likely income level. The categories used are:[194]

1) Legislators, administrators and mangers
2) Professionals
3) Technicians and associate professionals
4) Clerks
5) Service and Sales workers
6) Agriculture and fishery workers
7) Trades workers
8) Plant and machine operators and assemblers
9) Labourers and Elementary service workers.

A comparison of awards at each end of the occupational scale was used to indicate disparities in awards. At the Tribunal, managers and administrators were awarded an average of $6 800. Plant and machine operators and assemblers were awarded an average of $1 600. The averages for Categories 2 to 7 ranged from $3 000 to $5 000.[195] In the Employment Court these averages increased to $14 000 and $2 000 for Categories 1 and 8 respectively. The differences between these averages

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[192] *Trotter*, above, 710 Chief Judge Goddard.
[193] Lorraine Skiffington "What is a Job Worth?"[1994] ELB 74. See Part V A 2 Awards under the Employment Contracts Act 1991.
[194] Skiffington, above, 75.
[195] Skiffington, above, 75.

provided a firm basis to conclude there are questions of equity for low-income employees pursuing personal grievances.[196] Skiffington recognised the question of equity is complex, with a number of interrelated factors affecting the distribution of awards. Despite any complexity, it still appears the income level of the grievant was a factor the judges considered in awarding this remedy, perhaps implicitly. Skiffington suggests the "system appears to give prominence to 'administrative convenience' over concerns for equity."[197]

2 *Distribution of Awards*

Using the tables of compensation awarded released by the Employment Institutions Information Centre as a starting point, the Industrial Relations Research Centre (IRRC) collates information on the occupational distribution of awards. The data relates to Tribunal decisions from the instigation of the Tribunal through to May 2002. If possible, the occupation is categorised on the basis of the Employment Institutions Information Centre information. Where the occupation is not given, the IRRC reads the full decision to obtain the occupation. The 1999 decisions are currently being read, otherwise the following statistics are current to May 2002. This information is presented in the table on the following page.

[196] Skiffington, above, 76.
[197] Skiffington, above, 76.

Table four: Crosstabulation: employee occupation by compensation s 40(1)(c)(i)[198]

Occupation	Total cases	No award[199]	0-$5000	$5001-$10000	$10000 +
Managers	426	13.5%	48%	28%	10.5%
Professionals	116	21.5%	45%	20%	14%
Administrators & Legislators	36	8.5%	47%	30.5%	14%
Technicians & Associate Professionals	164	17%	49%	27.5%	6.5%
White Collar	200	9%	64%	21.5%	5.5%
Sales & Service	516	11%	68%	16.5%	5%
Agricultural & Fisheries Workers	84	18%	68%	13%	1%
Trades Workers	177	14%	68.5%	14.5%	2.5%
Plant & Machine Operators and Assemblers	232	14.5%	68.5%	14.5%	2.5%
Miscellaneous	136	14.5%	69%	15.5%	1%
Supervisors	57	14%	58%	21%	7%
Unions (in disputes or mixtures)	5	20%	80%	-	-

D *What these Figures Represent*

The IRRC figures focus on the distribution, rather than average of awards. The percentages indicate which bracket a grievant from a particular occupation was most likely to be awarded in. All occupations are centred under $5 000, yet a substantially larger proportion of lower income occupations, such as trade workers, is awarded within this bracket. Perhaps the most telling awards bracket is above $10 000. Where 10.5 to 14 per cent of high-income claimants, such as managers, professionals administrators and legislators, were awarded over $10 000, a mere 1 to 2.5 per cent of low-income grievants were awarded this amount. The percentage of high-income grievants in the $5 000 to $10 000 category is also higher than lower income earners. Between 20 and 30 percent of high income occupations were awarded in this bracket, compared to 13 to 14.5 percent of low-income earners.

In summary, these figures confirm earlier speculation regarding the distribution of awards. Most low-income grievants are awarded compensation of less than $5 000. 40 per cent of grievants in high-income occupations were awarded

[198] Ian McAndrew "Crosstabulation: employee occupation by compensation s40(1)(c)(i)" Industrial Relations Research Centre, Management Department, Otago University (received 3 July 2002).

over $5 000, where only 14 per cent of low-income grievants achieve this amount. If an award is over $10 000, it is overwhelmingly likely to have been awarded to a grievant in a high-income occupation.

The general principles of hurt and humiliation compensation provide no support for this disparity. A distinct line is drawn between hurt and humiliation compensation and reimbursement for lost wages or compensation for lost benefits. The latter awards are dependent on contractual entitlements such as salary level. In contrast, the existence and extent of a hurt and humiliation award ought to depend on the evidence of actual injury to feelings. The existence and validity of this trend will therefore be examined.

E Reasons

The statute does not envisage it, the Courts warn against it, yet the statistics indicate the level of hurt and humiliation compensation awarded is connected to a grievant's job status. Judge Shaw notes, "[i]t is difficult to discern a rational explanation for distinguishing the degrees of hurt and humiliation experienced by people by reason of their seniority."[200] Indeed the mere existence of a positive correlation between the income level and likely award of a grievant does not necessarily indicate a causal connection. In many cases it may lead only to speculation on what factors cause the relationship.[201] Factors that may provide reasoning or justification for this correlation will be examined below. These factors are not offered as the definitive or only cause. They are examined as possible explanations for a trend in awards that goes against the statutory and judicial directions.

1 Willingness to bring a personal grievance

High-level employees are thought to be more likely to bring a personal grievance. This can be observed in the statistics presented above, where managers brought 426 grievances. As the managerial classification is unlikely to have the highest number of actual employees, it is inferred that managerial employees are

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199 Percentages rounded to the nearest half a per cent.
200 *Martin v Park and Clarke Ltd*, (5 July 2000) Employment Court Wellington WC35/00 Shaw J.
201 Ian McAndrew "Adjudication in the employment tribunal: Some facts and figures on caseload and representation" (1999) 24(3) NZJIR 365, 378.

more willing to bring a personal grievance. Statistically, 70 per cent of managers 'win' their personal grievance, making this the most successful occupation group in personal grievances.[202] There are many factors that these trends could be attributed to. Managers may be treated less favourably than other employees, be more aware of their legal rights and likelihood of success, have more financially or socially at stake, or the alternative job market may be narrower, encouraging these employee to take personal grievances. Managers may be less likely to mediate where they believe they have a substantial claim or grievance. This speculation may explain both the tendency of mangers to be more willing to claim, and the tendency for manager's claims to be awarded higher compensation.[203] However, this factor alone ought not to have a direct effect on the quantum of awards. Actual numbers of claims do not affect the proportion of each occupation in the award brackets.

2 *Representation*

Grievant representation is a second suggested reason behind the disparity.[204] Senior employees are thought to be more inclined to, and have more direct access to legal representation. It has been suggested a senior employee may be aware when they have a better claim. If they are in fact more aware, the employee may then be more inclined to seek representation.[205] Grievants with legal representation are more likely to receive awards over $5000 than those without.[206] Legal representation offers specialised advice on the best presentation of evidence of injured feelings. As section 123(c)(i) aims to compensate for actual harm, representation is more likely to anticipate what the Authority or Court is looking for, resulting in a higher award.

This is illustrated by the use of *New Zealand Public Service Association v Land Corporation.*[207] This case has been described as a useful guide to formulating hurt and humiliation claims for senior employees.[208] This description implies a

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[202] McAndrew , above, 373. Note that a 'win' indicates the personal grievance was found to exist, there is not necessarily a remedy awarded.
[203] McAndrew, above, 373.
[204] McAndrew, above 375-6.
[205] Mc Andrew, above, 375.
[206] Mc Andrew, above, 375 Table 7.
[207] *New Zealand Public Service Association v Land Corporation* [1991] 1 ERNZ 741 Chief Judge Goddard.
[208] John Hughes, "Personal Grievances" in Raymond Harbridge (ed) *Employment Contracts: New Zealand Experiences* (Victoria University Press, Wellington, 1993) 89, 112.

senior employee's claim is inherently different to a lower status employee. It is relevant to the representation argument in that a represented employee is more likely to utilise such guidelines to the advantage of their claim. Legally represented employees are also more likely to appeal the decision to the Employment Court. On average, the Employment Court awards higher amounts than the Tribunal or Authority.[209]

3 *Implications for low-income employees*

The reversal of these arguments suggests empowerment of lower paid employees, through education of rights and access to representation, may reverse the inequity. This appears unlikely. The trends themselves pose further barriers to low-paid employees addressing the inequity in such a manner. As the judiciary continue to award in line with this trend, it becomes effectively institutionalised. If a low-paid employee predicts these trends will limit the potential award, there is less incentive to pursue the grievance through the courts. The calculation between relatively high costs and low compensations awarded will often make this procedure uneconomic for a low income grievant, choosing instead to take what is on offer at the early stages of the process.[210] Although the judiciary may be the only avenue to pursue equity for low-income grievants, there may be little personal incentive to pursue such change.

4 *Have senior employees actually got more to lose?*

It is arguable the disparities are caused by high-income grievants actually suffering greater injured feelings. Many compensated feelings, such as anxiety and stress can be expected to occur in any level employee. However, feelings such as 'loss of status' may be unique to some senior-level employees. The Court in *Association of Staff in Tertiary Education v Northland Polytechnic Council* assessed the effects of the public dismissal of the grievant, from an important position in a small city.[211] These circumstances resulted in what the court found a highly traumatic experience, compounded by the widespread public knowledge of the

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[209] See Part V A Statistics.
[210] Kathryn Beck & Penny Swarbick *Running a Personal Grievance Case* (New Zealand Law Society Seminar, May 2002) 7.
[211] *Association of Staff in Tertiary Education v Northland Polytechnic Council* [1992] 2 ERNZ 943, 975 Chief Judge Goddard.

circumstances. The concept of status within society will normally only be applicable to senior level employees. As seniority increases the public profile of the position and employee often increases also. Consequently it is arguable the loss of status will also be greater, demanding higher compensation.

There is a limitation to the argument based on status in society. Where the nature of the position is clearly within the public eye, a degree of resilience may be expected. In *Northern Clerical and Legal Employees' Administrative and Related Workers' Union v Auckland University Students Association* the position was within a students association.[212] The Court held public criticism to effectively be 'part and parcel' of this position, refusing to award compensation for the distress caused by this partially justified criticism. In public office grievances, it must also be considered whether the distress derives from the publicity or the grievance itself.[213]

However, the decision in *Trotter* indicates there is a subtle difference between loss in status and loss of reputation. As seen above, the Court categorised injury to reputation as being the effect on the minds of others, therefore non-recoverable as compensation for hurt and humiliation. These losses had been addressed as lost future benefits.[214] These cases draw a fine line between what 'status-based' losses are recoverable under section 123(c)(i). The framing of the claim may be pivotal to the success of the senior employee's claim. If focused on the internal feelings suffered *from* the loss of status or reputation, rather than the loss itself it may be compensable.

The public status line of reasoning can not be applicable to all senior employees, as many are not in the general public eye any more than the employees below them. Yet the referral to guidelines for senior employees pursuing personal grievances, as introduced above, implies a different set of feelings involved. Although there is a general level of humiliation involved in any dismissal, this

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[212] *Northern Clerical and Legal Employees' Administrative and Related Workers' Union v Auckland University Students Association* (31 July 1992) Employment Court Auckland AEC55/92 Judge Colgan.
[213] *Northern Clerical and Legal Employees' Administrative and Related Workers' Union v Auckland University Students Association,* above, 17 Judge Colgan.
[214] *Trotter v Telecom Corporation of New Zealand Ltd* [1993] 2 ERNZ 659, 705-7 Chief Judge Goddard.

distinction suggests almost a separate category for senior employees. The minimal discussion on this determination in most cases sheds little light on what may substantiate this distinction. Although grievances offer little explanation for this distinction, yet it appears to underlie many decisions.

4 *Value of money*

The subjective value of money may explain the discrepancy in awards. Compensation attempts to put the grievant back in the position they would be had the grievance and suffering not occurred. Would a reasonable person assume that it takes more money to adequately compensate a high-income employee's injured feelings? The judiciary have asserted there is no rational basis for assuming a senior employee suffers more, focussing on the problem rather than the remedy. Instead perhaps the judiciary, and wider society is accounting for how much it takes 'to compensate'. At tentativeness to bestow 'windfalls' on low-income grievants may account for some of the spread in distribution. For example, an award of $20 000 is likely to have more impact on an employee earning $30 000 compared to one earning $80 000. These speculations detract from the general principle that the section 123(c)(i) award will address the actual harm on each employee. Perhaps criticisms should not be directed at the judicial assessments of emotional injury, rather at the assumptions of society concerning the value of money to different status employees. The judiciary may merely be reflecting society's assumptions as to the appropriate quantum.

5 *Ability to pay*

An assumption could be made that the employer of a high-paid employee is more likely to be able afford to pay higher levels of compensation. It would be difficult to make assumptions regarding employers of low-paid employees, as capacity is likely to vary. In limited situations however, small employers may be more likely to attempt to argue compensation should be restrained for this purpose, particularly with small employers.[215]

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[215] See Part IV A 7 Employer ability to pay.

6 *Rebuttal from the view of the low-income grievant*

The loss of status line of feelings has clearly been relevant to these, and other senior employees' compensation claims. In these situations, the grievance is often common knowledge and gossip, exacerbating the humiliation or distress brought onto the unjustifiably treated employee. However the inequity argument does not seek to deny senior employees compensation. Equity could instead be gained through achieving recognition and real compensation for low-income grievants. Status is not solely linked to the public role, of which only a few senior employees have. Status and community are concepts relative to an individual's circumstances and surroundings. Loss of face is likely to occur in any work environment irrespective of the income level. A low-paid labourer may incur the same loss of dignity suffering a personal grievance in front of colleagues, as a senior executive. It is illogical to suggest to this employee that fronting up to family, friends or ex-colleagues following the grievance is easier because the job was not worth as much in the first place.

The threat of unemployment when one is near the poverty line may also aggravate the distress incurred by an unjustified dismissal. Yet this consideration does not appear to hold the same amount of weight as the aggravating factors for managerial employees such as Trotter.[216] Large awards, representing significantly injured feelings arise as the exception to the rule. In practice this exception essentially has a further limitation, only be applicable to senior employees.

7 *Illustration*

Reid v Arts can be used to draw together the points of this discussion.[217] Throughout six months of employment earning $350 a week, the grievant was subjected to numerous instances of verbal abuse, several physical threats, and was pushed to constructive dismissal where the employer told him he was useless and should kill himself. The Tribunal valued the resultant distress at $2000. The Employment Court recognised the inadequacy of awards, particularly as a number of these actions were injurious to the extent of violating fundamental human rights. However, in light of the employers ability to pay, increased this award to only

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[216] See Part VI B 2 Trotter.
[217] *Reid v Arts* (23 May 1997) Employment Court Wellington WEC25/97, Chief Judge Goddard.

$8000. The inherently distressing actions at the centre of this grievance still could not put this farm worker on par with a senior employer made redundant. The extremity of action, yet insufficiency of awards, highlights the inequity faced by low-income employees pursuing personal grievances.

VII EFFECT OF THE ERA

During the development of the hurt and humiliation compensation under the LRA and ECA the above issues of sufficiency and equity have been raised. It is predictable that the same issues will be continue under the ERA, unless other areas of the ERA affect section 123(c)(i). The potential influences of good faith and mediation will be briefly assessed.

A Good Faith

The section 4(1)(a) obligation for parties to an employment relationship to deal with each other in good faith was a contentious inclusion, criticised for its potential uncertainty. The non-exhaustive list of applications in section 4 primarily focuses on collective activities, with the exception of redundancy. This leaves the question of whether good faith will affect personal grievances and hurt and humiliation compensation.

Claimants wishing to invoke good faith may look to Canadian jurisprudence for assistance. Canadian law does not directly permit damages for mental distress following dismissal. This compensation has been let in the back-door, where it may act as a factor increasing the required period of reasonable notice.[218] Good faith has then been applied to this calculation, requiring employers to be candid, reasonable, honest and forthright with employees.[219] If breached, good faith does not supply an independent remedy, yet can increase the damages through reasonable notice. Overall, the quantum to the employee is increased.

A similar good faith argument is unlikely to alter a New Zealand court's assessment of compensation for hurt and humiliation. Applying good faith to

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[218] Paul M. Perrell "Supreme Court Gives Notice about Reasonable Notice" March 1998 <http://www.canadalegal.com/gosite.asp?s=2472> (last accessed 3 September 2002).
[219] *Wallace v United Grain Growers Ltd* [1997] 3 SCR 701, 743 para 98 Iacobucci J.

Canadian wrongful dismissal leaves employees at effectively the same position New Zealand legislation expressly provides. The conduct the courts have asserted good faith requires is arguably the same assured through liability for non-pecuniary losses under section 123(c)(i). The position asserted by the first Court of Appeal decision addressing good faith, *Coutts Cars Ltd v Baguley*, assists this conclusion.[220] With regard to redundancy, the Court commented the ERA did not require a markedly different approach, as it effectively ratified previously implied principles.[221] As the hurt and humiliation statutory provisions remain identical, and are not expressly included the good faith sections, any good faith impact does not likely.

Arguably, good faith is also already assessed where the employee argues the employer's actions increased the expectation of how they could be treated. An employee may argue an expectation to be treated in good faith may have increased the injured feelings incurred when they were treated unjustifiably. Again, such a claim adds little to the debate, achieving the same result as if the employee can show their subjective harm was increased by the caring workplace culture the employer had developed.[222]

B Mediation and the Employment Relations Authority

Section 3(a)(v) promotes mediation as the primary problem-solving mechanism for employment relationship problems under the ERA. Although mediation was available under the ECA, it was rarely engaged. Almost all parties must now attempt mediation before applying to the Authority. The figures presented earlier indicated a tendency for mediated or agreed payments to be higher than adjudicated awards.[223] However this tendency was not attributed to mediation addressing insufficiencies or inequities the courts were failing to address. Instead the emphasis was on tax implications and often avoiding litigation. Promoting mediation will be likely to provide a faster cheaper method of grievance resolution. However, if these agreements are made in the shadow of the law, the trends and disparities set by the courts will pass through. Amounts may be settled with the likely award of the court in mind, particularly for low-income grievants.

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[220] *Coutts Cars Ltd v Baguley* [2002] 2 NZLR 533.
[221] *Coutts Cars Ltd v Baguley*, above, para 42 Gault J.
[222] See Part IV A 3 Subjective test.

Alternatively, senior employees may be more likely to pursue claims further, seeking exceptional compensation, reinforcing the current trends.

VIII CONCLUSION

New Zealand legislation introduced the concept of compensation for mental distress for personal grievances. This inclusion moved away from the constraints of contract, wrongful dismissal and also the practices of other jurisdictions. The inclusion of this remedy recognises the central role of employment in employee's lives, and employment as more than a mere commercial contract. Hurt and humiliation compensation has developed to a pivotal role in personal grievance remedies. For many grievants it is the primary means of attaining redress for the grievance and is used as an indicator of success. The statutory recognition and important role of hurt and humiliation compensation do not necessitate the compensation is achieving the aim of redressing grievant's mental suffering.

The overall levels of compensation are relatively modest, often the result of an automatic assessment rather than an actual evaluation of feelings injured. Judicial restraint and the need for consistency are depriving many grievants of an award that addresses their actual emotional suffering. However it is likely the only means of addressing this insufficiency is through the same judicial hands restraining the current awards. In particular, low-income grievants feel the brunt of this inadequacy. Despite pronunciations of the irrelevance of job income or status, hurt and humiliation awards follow an inequitable distribution. Awards above $10 000 are the exception to the rule, an exception dominated by high-income grievants, with no clear justification. It may appear that the judiciary are treating low-income employees inequitably, yet perhaps the judiciary are merely reflecting an inherent assumption in wider society that it simply takes more to compensate a grievant of wealth. Whatever the cause, the longer these trends continue, the more entrenched they are likely to be come. Consequently, the incentive for low-income grievants to challenge the apparent presumptions and strive for equity decreases.

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[223] See Part V A 4 Out of court payments.

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