

**IN THE EMPLOYMENT COURT OF NEW ZEALAND  
AUCKLAND**

**I TE KŌTI TAKE MAHI O AOTEAROA  
TĀMAKI MAKĀURAU**

**[2024] NZEmpC 123  
EMPC 477/2021**

IN THE MATTER OF proceedings removed from the Employment  
Relations Authority

BETWEEN SIOUXSIE WILES  
Plaintiff

AND THE VICE-CHANCELLOR OF THE  
UNIVERSITY OF AUCKLAND  
Defendant

Hearing: 6-24, 28 November 2023  
(Heard at Auckland)

Appearances: C W Stewart and D Church, counsel for plaintiff  
P Skelton KC, R Judge and S-J Lloyd, counsel for defendant

Judgment: 8 July 2024

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**JUDGMENT OF JUDGE J C HOLDEN**

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**Contents**

These proceedings arise in the context of the COVID-19 pandemic.....	[1]
The parties agree on the principal issues.....	[15]
The proceedings were removed to the Court by the Authority .....	[17]
The Court was assisted by expert evidence.....	[19]
Associate Professor Wiles is employed in the Faculty of Medical and Health Sciences at the University .....	[20]
Associate Professor Wiles raised concerns .....	[23]
The University raised questions over Associate Professor Wiles’s “outside activities”.....	[57]
Associate Professor Wiles’s claims are in her statement of claim .....	[72]
The University has a role as critic and conscience of society .....	[80]
The Collective Agreement addresses public commentary and academic freedom .....	[91]
Academic staff may undertake outside activities.....	[92]

Disadvantage is a broad term .....	[98]
As a good employer, the University must comply with its policies and procedures .....	[102]
The University has contractual obligations on health and safety.....	[104]
Associate Professor Wiles claims the University interfered with her ability to respond to Māori .....	[110]
The University is obliged to act in good faith.....	[116]
What non-financial remedies are available? .....	[128]
What financial remedies are available?.....	[129]
Distress compensation is recoverable if there is unjustifiable disadvantage	[129]
Damages are to put the wronged party in the position they would have been in, but for the breach	[130]
Damages and compensation may be recoverable but are not cumulative	[134]
A penalty may be ordered for a breach of contract	[135]
A penalty may be recoverable for breach of the statutory obligation of good faith	[136]
The University’s response was problematic.....	[142]
The health and safety response was insufficient and too slow	[148]
Conclusion on health and safety	[163]
The focus on alleged outside activities was misplaced	[166]
Conclusion on treatment of Associate Professor Wiles	[174]
Academic freedom only tangentially engaged.....	[176]
Te Tiriti claim not made out; findings consistent with tikanga obligations .....	[178]
Remedies are due .....	[180]
Costs are reserved .....	[190]

### **These proceedings arise in the context of the COVID-19 pandemic**

[1] As the COVID-19 pandemic arrived in New Zealand, a small number of academic experts became well known in the media, explaining the science and the approach to managing the risks of the pandemic.

[2] These academics felt they had an obligation to assist with the COVID-19 response. As one of the academics explained in evidence, they felt it was a situation of “all hands on deck”. They put in considerable time and effort in providing this public commentary.

[3] Most New Zealanders were appreciative of the information and advice these commentators provided; many people became amateur epidemiologists and pandemic modellers. There were, however, a small number of people who doubted the prevailing scientific views and did not like the advice being provided. An even smaller

number of those people engaged in appalling behaviour, harassing the commentators through emails and social media. There also were some in-person approaches. The women were the subject of personal criticism in a way their male colleagues were not. They were getting particularly awful communications, including threats of rape and murder.

[4] Associate Professor Siouxsie Wiles, from the University of Auckland, was one of the most prominent of the academic commentators. In evidence, the epidemiologist Professor Rodney Jackson commented that Associate Professor Wiles was an expert communicator and that, particularly with a younger audience, she provided highly effective communication, filling a space that many of the other COVID-19 commentators may not have been as good at filling.

[5] During the relevant time, Associate Professor Wiles provided a significant amount of commentary on the COVID-19 pandemic for mainstream media platforms. Those platforms then often posted links to that material on their social media pages. Associate Professor Wiles also made some direct social media posts, principally on Twitter (as it was then known) and Facebook. In addition, she discussed the pandemic at some private speaking engagements and made marae and other community visits. During this time, she also undertook a small handful of media appearances that were not directly relevant to COVID-19, including television appearances on *Have You Been Paying Attention?*, on *Give Us a Clue*, and on Māori television.

[6] The journalist John Campbell gave evidence of Associate Professor Wiles's extensive television appearances on COVID-19 matters over the two-year period from March 2020 to March 2022. He said there were a number of reasons she was called on. Mr Campbell noted that she is very strong at communicating the nature of what has been a novel and evolving global pandemic in terms that do not exclude science but that are comprehensible to non-scientists. He said that she had the capacity to distil what might otherwise have been the theoretical into the human and the relevant, something that was crucial at a time when people were learning how contagious COVID-19 was.

[7] Mr Campbell said that he and his colleagues felt that Associate Professor Wiles had a genuine ability to reach all kinds of audiences and that whenever she was appearing on a television programme, that programme had good engagement across their audience range. In practical terms, in 2020 with COVID-19 being a completely new virus, there was a limited range of academics on which the media could call. Mr Campbell said it was incredibly valuable to have a local credible source of scientific information and analysis. He noted that universities promote their academics for public use and that he always understood that having experts giving public commentary was part of the way universities marketed themselves to the non-academic world. He commented that Associate Professor Wiles was very available for interviews; for example, his producers could call her at 10 pm the night before a proposed breakfast interview, and she would make herself available.

[8] Associate Professor Wiles also assisted in communications to Māori about COVID-19 and the government's response, in particular in Matakaoa, a remote community in the East Cape.

[9] Tina Ngata (Ngāti Porou) gave evidence about the Matakaoa community. Ms Ngata was a COVID-19 response lead for Matakaoa. Ms Ngata explained that Matakaoa is one of the most socioeconomically deprived communities in the country, with some of the worst and overcrowded housing situations. She noted that it has nationally significant figures in asthma and respiratory illnesses, rheumatic fever, heart disease and diabetes: all being factors that placed members of the community at greater risk of severe COVID-19. The Matakaoa community was, however, highly regarded for its COVID-19 response.<sup>1</sup>

[10] Ms Ngata said that Associate Professor Wiles was part of that response and can be credited with some of its success; Associate Professor Wiles visited the local marae twice and was trusted by the Matakaoa community; her communication was relatable and accessible.

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<sup>1</sup> In 2022, it won the New Zealander of the Year: Community Organisation of the Year and the Matariki Award (which she explained is like the New Zealander of the Year for Māori) for community.

[11] Ms Ngata said that it would have been a big loss to the Matakaoa community if Associate Professor Wiles had been restricted from engaging with it, and that Associate Professor Wiles was “responding to a space to restore Treaty justice”, combatting the fear of COVID-19 for Māori in her community.

[12] The University of Auckland recognised Associate Professor Wiles’s contribution to the public discourse on COVID-19, including repeatedly referencing it in the University’s 2020 Annual Report and republishing articles about Associate Professor Wiles. The University also maintains a presence on social media and included references to Associate Professor Wiles on its social media pages.

[13] She was also recognised more widely for her efforts; she was given a “Stuff Westpac Women of Influence” award; she was named as one of the BBC’s 100 most inspiring and influential women; and she was the “KiwiBank New Zealander of the Year” in 2021. Alongside those accolades, however, she attracted some of the worst vitriol of any public COVID-19 commentator in New Zealand.

[14] The focus of this case is the response of the Vice-Chancellor of the University of Auckland, Professor Dawn Freshwater, who employed Associate Professor Wiles.<sup>2</sup>

### **The parties agree on the principal issues**

[15] At a high level, the parties agree that the principal issues for determination are:

- (a) Was Associate Professor Wiles unjustifiably disadvantaged in her employment in the period up to 12 July 2021 when Associate Professor Wiles raised her personal grievance?
- (b) Did the University breach its contractual obligations to Associate Professor Wiles?
- (c) Did the University breach its statutory obligations of good faith?

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<sup>2</sup> Throughout this judgment, I use both “University” and “Vice-Chancellor” as meaning the employer.

(d) What remedies (if any) is Associate Professor Wiles entitled to?

[16] More particulars on each of those issues are identified in Associate Professor Wiles's second amended statement of claim, which is discussed later in this judgment.

### **The proceedings were removed to the Court by the Authority**

[17] In its determination dated 24 December 2021, the Employment Relations Authority removed these proceedings to the Employment Court for hearing at first instance.<sup>3</sup> They were removed on three bases:<sup>4</sup>

- (a) There were important questions of law that were likely to arise other than incidentally.
- (b) The case was of such a nature and of such urgency that it was in the public interest that it be immediately removed to the Court.
- (c) The Authority was of the opinion that the Court should determine the matter.

[18] When the proceedings were removed, the Court was in a position to deal with them expeditiously. However, as noted in the Court's judgment dated 20 March 2023, the case has been delayed, initially due to the parties' availability and preparation issues and then because there were contested interlocutory applications.<sup>5</sup>

### **The Court was assisted by expert evidence**

[19] The Court received evidence from a number of experts, including on the nature and characteristics of abusive behaviour, on academic freedom and on approaches to security. That evidence has been very helpful to the Court in considering the key issues in these proceedings.

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<sup>3</sup> *Hendy v The Vice-Chancellor of the University of Auckland* [2021] NZERA 586 (Member Larmer)

<sup>4</sup> At [116]; see Employment Relations Act 2000 s 178(2).

<sup>5</sup> *Wiles v The Vice-Chancellor of the University of Auckland* [2023] NZEmpC 45, [2023] ERNZ 143 at [3]–[9].

## **Associate Professor Wiles is employed in the Faculty of Medical and Health Sciences at the University**

[20] Associate Professor Wiles has been with the University of Auckland since 2009. She is covered by the University of Auckland Academic Staff Collective Agreement. She became an Associate Professor at the University in 2018. She is currently an Associate Professor in the Department of Molecular Medicine and Pathology in the Faculty of Medical and Health Sciences. She is also a researcher for Te Pūnaha Matatini, a TEC-funded centre of research excellence that is hosted by the University. Her expertise is in microbiology, infectious diseases, and science communication.

[21] Associate Professor Wiles was also the subject of an internal “buy-out” agreement entered into in 2014 between the University’s Faculty of Science and its Faculty of Medical and Health Sciences. Under the buy-out agreement, Associate Professor Wiles was to spend 40 per cent of her time supporting an initiative in science communication, to be led from the Faculty of Science. Her primary task under the buy-out agreement was to lead the development and delivery of a post-graduate and, subsequently, a final year undergraduate course in science communication. The role was based in the Department of Physics and responsible to the Dean of Science through the Head of Department, Physics.

[22] At all relevant times, Professor John Fraser was the Dean of Medical and Health Sciences and Professor John Hosking was the Dean of Science.

## **Associate Professor Wiles raised concerns**

[23] Associate Professor Wiles first raised a concern with the University about external communications in March 2020, when she received a quantity of emails and texts from a person who felt the advice being provided, including on the issue of mask wearing, was inadequate. He threatened to (and did) report Associate Professor Wiles to the University’s Human Participants Ethics Committee, as well as to the Vice-Chancellor for disciplinary action. This person clearly felt strongly about the issues that he was raising, but his emails were focussed on the advice and were not personally abusive towards Associate Professor Wiles. He was persistent, however,

and both Associate Professor Wiles and her colleague Professor Shaun Hendy were concerned about this and raised their concern with the University.

[24] From about that time, Associate Professor Wiles also started receiving what she classed as “low-level harassment” via email and social media. She alerted the University to that too. She also anticipated receiving targeted harassment from people who supported what became known as “Plan B”, which was an alternative approach to managing the pandemic, being promoted by a relatively small number of people.

[25] In August 2020, Kate Hannah emailed the University alerting it to the high levels of online harassment that members of the team working on the COVID-19 research programme were receiving and advising that she expected an increase in harassment. At that time, Mrs Hannah was the deputy director of equity and diversity at Te Pūnaha Matatini and a research fellow in the Department of Physics. Mrs Hannah’s emails were sent to quite a number of people within the University, including the relevant deans, heads of department, the director of communication and marketing, and the deputy Vice-Chancellor. Associate Professor Wiles and Mrs Hannah were upset at the lack of response from most of the people to whom they sent their correspondence and raised that with the Vice-Chancellor. The Vice-Chancellor responded and advised that Andrew Phipps, the University’s director of human resources, would be in contact.

[26] The intensity of the criticism and abuse increased markedly from September 2020, after University of Auckland epidemiologist Dr Simon Thornley appeared on the television programme Q&A and alleged the New Zealand Government had been captured by scientists with “extreme views”. Dr Thornley promoted “Plan B”. It seems that this interview lent some credibility to the people who were opposed to the approach being advocated for by Associate Professor Wiles and almost all the other experts, and that was adopted by the Government.

[27] There were further escalations at other inflection points, with examples being when the issue of vaccines started to be discussed and then implemented in early 2021, the introduction of vaccine mandates from May 2021,<sup>6</sup> the start of what became known as the “Auckland lockdown” in August 2021, and the large protest at Parliament in February and March 2022.

[28] A particularly upsetting event occurred in late January 2021, when Associate Professor Wiles learnt from a journalist that her telephone number, personal email address, home address and an image of her home had been posted on a website that was opposed to the Government’s approach to dealing with the pandemic. Associate Professor Wiles contacted the Police regarding this “doxing” and advised the University. In addition, Professor Hendy emailed a number of people within the University hierarchy advising them of the doxing of Associate Professor Wiles, saying the matter was urgent and expressing a view that the University needed both a plan for dealing with the specific and distressing incident of doxing and a plan for the ongoing harassment. Mr Phipps replied to Associate Professor Wiles saying that contacting the Police was the right course of action and that he was happy to pick up their conversation from the previous year regarding harassment. He said he would be in touch. The next day, 31 January 2021, Professor Hendy emailed Mr Phipps and copied in Associate Professor Wiles and others at the University expressing the view that the University should consider engaging private security advice. There were follow-up emails from Associate Professor Wiles, Professor Hendy and Mrs Hannah.

[29] On 11 February 2021, there was a meeting attended by Associate Professor Wiles, Mrs Hannah, Associate Professor Helen Petousis-Harris, Mr Phipps and Stefanie Boyer, the associate director, HR advisory, to discuss the situation. Workplace health and safety issues were raised; Mr Phipps and Ms Boyer suggested that the academics consider moderating their commentary while a review of the situation took place. The academics asked for an independent review. Ms Boyer was identified as Associate Professor Wiles’s Staff Risk Intervention Team (SRIT) contact.

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<sup>6</sup> The vaccine mandates initially covered managed isolation and quarantine facilities and border workers, with broader mandates following.

[30] The SRIT was set up in 2018 to focus on harassment from external and unknown sources. It deals with harassment relating to specific staff members, misbehaving students and staff, wider training for University staff, and ensuring that process documents are current and updated. It was preceded by a working group on gender-based harassment of staff, which had been established towards the end of 2017 as a response to increased gender-based harassment towards women. The SRIT team meets monthly and stays in contact between meetings.

[31] In the first half of 2021, further incidents of doxing occurred, which were reported by Associate Professor Wiles. There were other meetings between the academics and the University at which a review of the University processes was requested and other concerns were raised about the effectiveness of the University's monitoring of harassment. Associate Professor Wiles and the other academics continued with their external communications work. This included Associate Professor Wiles visiting marae in the area around East Cape to work with hapu on encouraging vaccine rollouts.

[32] The ongoing harassment led the academics to raise concerns regarding a threat presented by one person, requesting the University to issue a pre-emptive trespass notice against him. That was not done. The University says it did not consider that was the appropriate course of action, and it was not recommended by the Police.

[33] Associate Professor Wiles and the other academics continued to email the University expressing concerns about the ongoing harassment and seeking support. Professor Hendy emailed the University expressing concern that the University was taking a reactive stance to the academics' safety and security and again seeking a thorough and credible review to be undertaken.

[34] During this period, the University said it was not agreeable to an external review but would undertake an internal one.

[35] The University obtained legal advice from Simpson Grierson on the University's obligations towards academic staff who make public statements on social media, and provided that to Associate Professor Wiles and her colleagues ahead of a

meeting on 28 June 2021. The legal advice recommended the University amend its policies to expressly confirm that the University does not expect its academic employees to be active on social media, that it encourages staff to engage in public statements in a scholarly manner with due regard to their safety, and that it encourages staff to refrain from commenting on social media where that would appear to lead to a greater risk of online harassment.

[36] The meeting on 28 June 2021 was a significant one. At that meeting, the University advised Associate Professor Wiles that the University did not require academic staff to make public statements but that employees that did so were not disadvantaged in promotion or performance.

[37] The University advised Associate Professor Wiles and the other academics that they should consider pulling back from COVID-19 commentary and that providing such commentary did not form part of their jobs. Mr Phipps noted it was a balance between the critic and conscience role, and protecting staff from situations that create undue or unreasonable risks of harm. The University's legal counsel, who was at the meeting, went further and said that if a hazard could not be managed or eliminated, the only option in terms of the health and safety legal requirements was to say that it cannot be done, no matter the loss.

[38] Towards the end of June 2021, after the meeting, one of the people who was harassing the academics came onto the University campus and confronted Professor Hendy in his office. This was the same individual in respect of whom the academics had requested the University to issue a pre-emptive trespass notice against. This led to the University of Auckland assisting Professor Hendy in obtaining a trespass order against that individual.

[39] There continued to be meetings and correspondence between Associate Professor Wiles, the other academics, and the University, and, on 12 July 2021, Associate Professor Wiles raised a personal grievance (as did Professor Hendy and Mrs Hannah).

[40] On 13 July 2021, the University engaged Quantum Security Services Ltd to undertake a security and safety audit. The focus of the audit was on the harassment and threats of violence that some academic staff were receiving as a result of their public profile. At that time, the proposed completion date for the audit was 13 August 2021.

[41] On 23 July 2021, following further correspondence from Professor Hendy, the University advised that it had approached WorkSafe New Zealand and that WorkSafe had agreed to contribute to the audit.

[42] In early August 2021, while on a work-related visit to Wellington, Associate Professor Wiles was livestreamed and approached by people who were well-known to hold anti-vaccination views. Professor Hendy advised Ms Boyer of the incident on Associate Professor Wiles's behalf. He sought advice urgently on what steps should be taken. Ms Boyer responded within four minutes, recommending that Associate Professor Wiles call the police immediately.

[43] On 9 August 2021, the Vice-Chancellor wrote to Professor Hendy, Associate Professor Wiles and Mrs Hannah, responding to the personal grievances and complaints they had raised. That letter referred to the three academics' social media presence and the responses they had been receiving. The letter also referred to the legal opinion received by the University regarding its health and safety obligations and an analysis of the University's policies and practices and how they relate to the use of social media. The Vice-Chancellor advised: "We again urge you to keep any public commentary to a minimum until we can conclude the current external security and safety investigation that we are undertaking." She also encouraged them to utilise the University's EAP and/or to take paid leave until the end of the audit if that would be of assistance.

[44] Over the next few days, Ms Boyer and Associate Professor Wiles were in further email communication regarding ongoing harassment from the people Associate Professor Wiles had met in Wellington. Ms Boyer acknowledged that Associate Professor Wiles believed that the main harassment she was receiving was

not as a result of using Twitter or other social media platforms, but rather as a result of her fulfilling her academic role, including her role of critic and conscience.

[45] It was also in mid-August 2021 that Associate Professor Wiles received a document described as a “Cease and Desist Order”. This document referenced the Nuremburg Trials and stated that defences called at those trials did not exempt complicit personnel from charges, imprisonment, and execution. Associate Professor Wiles referred that document to Ms Boyer, asking her to make SRIT and Quantum Security aware of it. Associate Professor Wiles asked whether monitoring of emails would be in real time and whether she would be kept up to date with the nature of any threats. Ms Boyer advised her that the quarantine mailbox was checked every couple of days but that it could probably be increased to a daily check. Ms Boyer asked Associate Professor Wiles if she would like her emails to be quarantined or whether she preferred to let emails come through to her so she could see them. Associate Professor Wiles did not take up the offer to quarantine emails, saying that, for her physical safety, she wished to be aware of whether threats were escalating.

[46] On 25 August 2021, Ms Stewart, counsel for Associate Professor Wiles, wrote to the Vice-Chancellor setting out some concerns of Associate Professor Wiles and Professor Hendy. She sought urgent mediation, advising that if the University was unwilling to engage with mediation, or if mediation failed to adequately resolve the concerns, Ms Stewart was instructed to file proceedings in the Authority. The University responded through its counsel disputing that its response to Professor Hendy and Associate Professor Wiles’s concerns had been inadequate but agreeing to mediation once Quantum Security’s audit had been received and once COVID-19 Alert Levels had moved so that the participants could meet in person.<sup>7</sup>

[47] Associate Professor Wiles and Professor Hendy filed their proceedings in the Authority on 22 September 2021. On 8 October 2021, there was a mediation, which was unsuccessful.

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<sup>7</sup> At that time, Auckland was in Alert Level 4, under the Government’s COVID-19 Alert Level system, preventing in-person meetings.

[48] In mid-October 2021, Quantum Security finalised its security and safety audit report (the Quantum report). The audit report noted that many participants welcomed the audit itself with some commenting on the University showing its commitment to do more than “just” meet its obligations. It also said that, compared with other organisations, SRIT was seen as an effective mechanism for its terms of reference and protocols. Quantum Security said that individual University team members were highlighted by their colleagues for their caring, empathetic approach to the concerns of affected staff members and that there was a genuine desire on the part of University representatives to do more for the security and safety of staff, particularly relating to online harassment and digital safety.

[49] Quantum Security made a number of suggestions as opportunities for improvement, being:

- (a) to develop more explicit risk management and assurance for online harassment and digital safety;
- (b) to consider providing additional resources to prevent and respond to online harassment and digital safety, recognising the increasing workload;
- (c) to improve monitoring for evolving digital safety and online threats and harassment; and
- (d) to provide staff members with techniques and tactics to keep themselves safe online and digitally.

[50] On 24 December 2021, Associate Professor Wiles received an email from an organisation that called itself “Nuremberg” advising her that she had been listed on the “Accused List on Nuremberg”. Associate Professor Wiles forwarded that email within the University asking for it to be added to her SRIT file. She said she had no expectation of a response to the email but wanted to forward it in case it became buried in her inbox by January. Associate Professor Wiles’s email then went on to discuss proposed enhancements to her home security and noted that she did not receive a

response from the University in relation to her request for an update on the reports from the security consultants and on getting the security enhancements installed. Associate Professor Wiles's email was acknowledged, with the University saying it would follow up on where things were at on return from the Christmas break.

[51] It was also on 24 December 2021 that the proceedings brought by Professor Hendy and Associate Professor Wiles were removed by the Authority to the Court.<sup>8</sup>

[52] In January 2022, the University received the draft implementation plan for the Quantum report and forwarded that to Associate Professor Wiles for feedback. Associate Professor Wiles provided feedback on 26 January 2022. She said that while she was supportive of the recommendations of the report, she was concerned about the speed of implementation and that few interim mitigations had been identified to support her and her colleagues. She also expressed concern about the lack of individual risk assessments for those staff members who were experiencing harassment. She noted that the policy required staff to pay for any enhancements themselves up front, which she said had very serious equity implications, and discussed delays in implementing security measures.

[53] On 20 April 2022, Associate Professor Wiles received a call from a police detective, checking in on her and asking her what security measures the University was putting in place to ensure her safety once the University resumed in-person teaching after the mid-semester break. Having received that call, Associate Professor Wiles arranged a meeting with Philip Kirkham and Robin Southall to discuss what plans were in place while there was in-person teaching. Mr Kirkham is the University's Campus Operations Manager and is responsible for the University's security services (both physical and building). Mr Southall was an HR manager who replaced Ms Boyer as Associate Professor Wiles's SRIT contact. While Mr Kirkham acknowledged past threats, he advised that those threats had not escalated. His view was that extra steps in relation to in-person teaching were not feasible, although there appears to be acknowledgement that

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<sup>8</sup> *Hendy v The Vice-Chancellor of the University of Auckland*, above n 3. The proceeding was later discontinued with respect to Professor Hendy.

Associate Professor Wiles's name did not need to be on publicly accessible boards advising where classes were being held. Associate Professor Wiles was advised to call the control room if she needed to, and otherwise to remain vigilant.

[54] On 10 May 2022, while Associate Professor Wiles was cycling to work, she was approached by a member of the public who was shouting her name and pointing at her. Apparently, he then advised Associate Professor Wiles that she “sucked” and that “you’ll get yours” or something to that effect. She advised this incident to Ms Southall who was sympathetic and advised her to be careful, and that if she saw the person again, to make a note of his features.

[55] On 12 May 2022, the University provided Associate Professor Wiles with a draft individual risk assessment prepared by KPMG. The risk assessment noted that there were a number of opportunities for reducing risk, such as reducing the level of personal information available, reducing the ability for unknown people to contact Associate Professor Wiles, reducing the information about her location on campus, strengthening the security at her home, and increasing her ability to de-escalate threats. However, it also acknowledged that each opportunity involved trade-offs that would not necessarily be acceptable to Associate Professor Wiles and the University. After receiving feedback from Associate Professor Wiles and making some amendments, the University finalised the risk assessment on 13 June 2022.

[56] On 27 September 2023, the Quantum report was finalised, and on 11 October 2023, the University advised that all the recommendations in the Quantum report had been taken onboard and actioned.<sup>9</sup>

### **The University raised questions over Associate Professor Wiles’s “outside activities”**

[57] From October 2021, the University started raising concerns with Associate Professor Wiles about her conduct and actions.

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<sup>9</sup> Associate Professor Wiles does not accept that all the recommendations have been fully actioned.

[58] On 26 October 2021, Associate Professor Wiles received a letter from Professor John Fraser, Dean of the Faculty of Medical and Health Sciences. That letter advised Associate Professor Wiles that, as part of investigating her concerns, it had come to the University's attention that she had been undertaking a wide range of outside activities that the University was unaware of and that may be being carried out in her private capacity and not in accordance with the University's policies. Professor Fraser sought advice on her outside activities, including those which had been undertaken in her private capacity "for example, celebrity speaker" engaged through a talent agency. Professor Fraser sought to know what fees she was being paid for outside activities, including for her writing for Stuff and on Radio New Zealand's Nine to Noon programme. Professor Fraser asked whether the outside activities were being carried out in accordance with the University's Outside Activities Policy, noting that staff members must seek the prior written approval from the academic head for all professional or academic-related outside activities. Professor Fraser asked her to provide the information to him by 12 November 2021, following which a meeting would be set up to which she was welcomed to bring a support person or representative. Professor Fraser went on to say:

We wish to assure you that we appreciate that you have been undertaking outside activities with good intentions and that much of your commentary has been of benefit to the public in understanding and responding to the COVID-19 pandemic. However, given the safety concerns that have arisen in relation to those activities and the current lack of clarity regarding the nature and extent of those activities, we need to understand what exactly you have been doing (and whether it is work-related or private) and arrange approval protocols so that we can ensure that we can support you for work-related activities and ensure that the Policy is fully complied with going forward.

[59] Associate Professor Wiles responded to Professor Fraser's letter in a letter dated 3 November 2021. She noted that, from her perspective, the harassment she received came from her COVID-19 related media work, not her speaking engagements, public science engagement activities, or more general media work. She also said she believed that the University was well aware of her media engagements through the reports it receives on media engagements by staff. Associate Professor Wiles noted that the policy allows staff to undertake occasional lectures or radio, television, or kindred performances, to prepare books or articles and so forth without permission, provided there is no impact on other duties of the employee.

[60] Associate Professor Wiles set out in a table the non-teaching and research activities she had undertaken or committed to since March 2020, including the fees for those activities. She noted three matters that she considered were private paid work, being as a guest on *Have You Been Paying Attention?*, on *Give us a Clue*, and on Māori TV. In each of those cases, a small fee was received but donated to the School of Medical and Health Sciences Foundation to support Associate Professor Wiles's research.

[61] The schedule also records three significant speaker engagements undertaken or committed to for which a fee was negotiated by Johnson & Laird Talent Management as Associate Professor Wiles's agent. The fees for those three engagements totalled over \$100,000. Again, the fees were donated to the Medical and Health Sciences Foundation. Associate Professor Wiles advised that after she was approached by Johnson & Laird to have them represent her as a paid speaker, she discussed that with her then head of department.

[62] Professor Fraser responded to Associate Professor Wiles on 16 November 2021. In that letter, he says that the University remained concerned that she had not sought approvals through proper channels as is required by the policy. He referred to "Brand Siouxsie" and remarked that:

There is a significant difference between engaging in normal academic discourse through meetings and other engagements and hiring oneself as a celebrity speaker.

[63] Professor Fraser confirmed the University's position going forward:

- We do not consider any externally funded outside activities to form part of your work for the University and we do not consider the University to have any obligations towards you as your employer in relation to those activities. When undertaking this work, you are doing so in your personal capacity, and you must not associate yourself with the University (in accordance with clause 26 of the Outside Activities Policy). You must also ensure that you have ongoing HOD approval to engage in such outside activities.
- When undertaking external activities as part of your work for the University, you must ensure that such activities are approved by your HOD and that time spent on those activities is consistent with your contractual obligations (in accordance with clause 12 of the Outside Activities Policy).

[64] Professor Fraser noted that he had asked or will be asking other staff who could be at risk because of high public profiles for the same or similar information as part of the health and safety audit and assessment process. There was no evidence of him doing so.

[65] On 25 February 2022, the University raised concerns with Associate Professor Wiles about comments she made in a report to an external funder in which she advised that she was facing a serious challenge that was impacting on her mental and physical wellbeing and that she was involved in legal action against the University regarding what she saw as their failure to respond appropriately to the harassment she was receiving.

[66] The University considered that her comments were inappropriate in such a report to a funder, as well as being factually incorrect and misrepresenting the position of the University. Associate Professor Wiles was asked to resubmit her report and confine commentary to matters of relevance to the funder and the research on which the report should be based.

[67] Associate Professor Wiles immediately agreed to remove those parts from the report although she disagreed with the University about its relevance or that it was factually incorrect.

[68] Associate Professor Wiles had her annual performance review on 11 March 2022 and was advised that she must keep her science communication and other service commitments to one day a week.

[69] Mr Phipps wrote to Associate Professor Wiles on 20 April 2022. In the letter, the University again raises the issue of the comments made to the external funder, which it says were not appropriate, responds to the concerns raised by Associate Professor Wiles regarding her perceived lack of support from the University, and raises what the University says were behaviours of concern. In that context, several tweets from Associate Professor Wiles were identified and said to be

not appropriate or justified. Mr Phipps also raises “ongoing concerns about [Associate Professor Wiles’s] public communications”. The letter continues:

Although it is not our preference to escalate this matter, if you continue to communicate publicly in a manner that has the potential to bring the University into disrepute and/or has the potential to undermine our confidence in you as an academic staff member, the University will have to consider whether it is appropriate to take formal action. Good faith obligations go both ways and we expect you to honour your duties of loyalty and adherence to our policies.

[70] The letter concludes with Mr Phipps acknowledging the significant harassment that Associate Professor Wiles was receiving and saying that the University remained committed to supporting her through that. It invites her to let the University know if there is any other support which it can offer to her and noting that EAP is available if that would be of assistance to her.

[71] The tweets referred to by Mr Phipps do not relate to COVID-19 matters but to other issues that had arisen at the University. The tweets range from February 2020 through to March 2022 and had not been raised with Associate Professor Wiles previously. In evidence, Mr Phipps said that he did not search for the tweets but that they had been referred to him at various times and were in his inbox. In cross-examination he was referred to tweets from other members of the academic staff that were similar in tone or content, and he was not aware of any of those staff members being approached about their communications.<sup>10</sup>

### **Associate Professor Wiles’s claims are in her statement of claim**

[72] In litigation, the pleadings are central. They identify the issues and thereby inform the parties in advance of the case they have to meet and so enable them to take steps to deal with it.<sup>11</sup> They establish the parameters of the case and form a road map for the Court and the parties.<sup>12</sup>

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<sup>10</sup> Mr Phipps accepted some of the staff members were not approached, and in other cases he was not aware of any approach.

<sup>11</sup> *Farrell v Secretary of State for Defence* [1980] 1 WLR 172 (HL) at 180; and *Hopper Group Ltd v Parker* (1987) 1 PRNZ 363 (CA) at 366.

<sup>12</sup> *Price Waterhouse v Fortex Group Ltd* CA179/98, 30 November 1998 at 17–18; and *Airways Corporation of New Zealand Ltd v Postles* [2002] 1 ERNZ 71 (CA) at [5].

[73] Associate Professor Wiles’s claims are set out in her second amended statement of claim. She claims unjustifiable disadvantage, breaches of contract and breaches of good faith. She limits the scope of her claim to the period up until 24 August 2022.<sup>13</sup>

[74] Her personal grievance for unjustifiable disadvantage was raised on 12 July 2021 and covered matters before that date. Specifically, Associate Professor Wiles claims the Vice-Chancellor did not take any meaningful or proactive steps to protect her safety, causing her ongoing disadvantage. In making that claim, Associate Professor Wiles says the actions taken and inactions by the University have been purely reactionary and inadequate. She says:

- (a) The University adopted a position that it is not responsible for harassment on social media, even though the harassment was not limited to social media. Even where harassment did occur on social media, it usually followed Associate Professor Wiles giving public commentary through mainstream media. She says the University relied heavily on the notion that it does not “require” academic staff to make public comments.
- (b) The University consistently maintained a position that Associate Professor Wiles was not required to provide public commentary (and therefore doing so did not constitute “work” for which the University had health and safety responsibilities).
- (c) The University consistently adopted a victim-blaming attitude and instructed Associate Professor Wiles to keep public commentary to a minimum, despite this being inconsistent with her duties.
- (d) The University failed to undertake an internal security review despite previously committing to do so.
- (e) The University failed to undertake to conduct a risk assessment for Associate Professor Wiles.

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<sup>13</sup> This matter was set down to be heard by the Court in September 2022 but was adjourned.

- (f) Despite having received recommendations from its legal advisors, including: to update its policy around this issue, to prepare an emergency response plan, and to support employees to engage with the New Zealand Police, the University did not communicate directly with Associate Professor Wiles regarding the implementation of any such measures.

[75] As part of her personal grievance, Associate Professor Wiles also says:

- (a) The University specifically instructed her to act in a way inconsistent with both the University's contractual and statutory obligations.
- (b) The University consistently sought to deflect from its responsibilities by accusing her of acting unlawfully and/or in breach of the University's Outside Activities Policy and suggesting that the harassment that she has suffered has been as a result of "outside activities".
- (c) The University delayed engaging and then implementing an external security review. It has also failed to put in place interim measures pending the substantive implementation of the recommendations of the external review despite the ongoing risks to Associate Professor Wiles.

[76] Associate Professor Wiles also makes breach of contract claims. She says the Vice-Chancellor breached the implied term in Associate Professor Wiles's employment agreement to provide a safe working environment for her. She also says the University is in breach of various obligations included in the Collective Agreement:

- (a) by not acting as a "good employer" by failing to provide adequate protection and support to her, including in relation to its health and safety obligations;

- (b) by failing to comply with the University's statutes, guidelines, and policies;
- (c) by instructing her to minimise her public commentary, contrary to her right to academic freedom;
- (d) by failing to adhere to the express obligation to comply with the Vice-Chancellor's obligations under the Health and Safety at Work Act 2015 and her commitment to the highest standards of health, safety and wellbeing through continual improvement;
- (e) by instructing Associate Professor Wiles to act in a way inconsistent with specific performance criteria, by which Associate Professor Wiles is assessed for promotion, including criteria reflecting the University's statutory obligations in relation to academic freedom and the role of critic and conscience of society.

[77] Broadly, the breach of contract claims fall into three categories:

- (a) The University breached its health and safety obligations to Associate Professor Wiles;
- (b) The University instructed Associate Professor Wiles to act inconsistently with the University's, and her, Te Tiriti o Waitangi/Treaty of Waitangi obligations; and
- (c) The University instructed Associate Professor Wiles to minimise her public commentary, contrary to its obligations with respect to academic freedom.

[78] Associate Professor Wiles claims that the University breached its statutory good faith obligation under s 4(1A)(b) of the Employment Relations Act 2000 to be

active and constructive in establishing and maintaining a productive employment relationship in which parties are responsive and communicative. She alleges:

- (a) The University failed to respond to her concerns and take meaningful action in a timely manner.
- (b) The University failed to act on health and safety recommendations.
- (c) The University instructed Associate Professor Wiles to act in a way that would have been fundamentally inconsistent with her obligations under the Educational and Training Act 2020, including to honour Te Tiriti o Waitangi and support Crown-Māori relationships.
- (d) The Vice-Chancellor declined to meet with Associate Professor Wiles and her colleagues.
- (e) The University embarked on an internal employment investigation around her alleged “outside activities” instead of addressing the real issue for Associate Professor Wiles, being the harassment she was receiving.
- (f) The University engaged in misleading conduct when it described her work as “outside activities” and by suggesting her actual “outside activities” were causing harassment.
- (g) The University singled out Associate Professor Wiles for alleged non-compliance with the Outside Activities Policy.
- (h) The University wrote to her, alleging she was in breach of the Code of Conduct, amongst other things.
- (i) The University otherwise acted in breach of its equity obligations, statutes, guidelines, and policies.

[79] Associate Professor Wiles seeks:

- (a) compensation pursuant to s 123(1)(c)(i) of the Act;
- (b) recommendations from the Court as to steps that the University should take to prevent similar employment relationship problems from occurring again in the future, pursuant to s 123(1)(ca) of the Act;
- (c) a declaration that the University has breached its (expressed and implied) contractual obligations owed to Associate Professor Wiles pursuant to the Collective Agreement;
- (d) general damages for breach(es) of contract;
- (e) penalties for breach(es) of contract;
- (f) a declaration that the University breached its statutory and implied contractual duties of good faith by failing to engage constructively regarding Associate Professor Wiles's safety;
- (g) penalties for breach(es) of good faith;
- (h) general damages for breach(es) of good faith;
- (i) a declaration that any penalties awarded be paid to Associate Professor Wiles, rather than to the Crown, pursuant to s 136(2) of the Act;
- (j) costs; and
- (k) such other relief as the Court deems fit.

## **The University has a role as critic and conscience of society**

[80] One of the characteristics of universities is that “they accept a role as critic and conscience of society”.<sup>14</sup> They also are characterised by “a wide diversity of teaching and research, especially at a higher level, that maintains, advances, disseminates, and assists the application of knowledge, develops intellectual independence, and promotes community learning”.<sup>15</sup>

[81] Academic staff are key to universities discharging the role of critic and conscience and do it in a variety of ways, including through teaching, research, and engaging in public debates. Not all academic staff operate in the same way, and the balance of activities varies.

[82] To discharge its role as critic and conscience, a university, its academic staff, and its students have academic freedom; it is a fundamental defining value of a university.

[83] In enacting the Education and Training Act, Parliament intended that academic freedom and the autonomy of universities (and other tertiary institutions) be preserved and enhanced.<sup>16</sup>

[84] In exercising their academic freedom and autonomy, universities must act in a manner that is consistent with:

- (a) the need to maintain the highest ethical standards and the need to permit public scrutiny to ensure the maintenance of those standards; and
- (b) the need to be accountable and make proper use of resources allocated to them.<sup>17</sup>

[85] In this context, academic freedom means that, as they carry out their work, academic staff are free, “within the law, to question and test received wisdom, to put

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<sup>14</sup> Education and Training Act 2020, s 268(2)(d)(i)(E).

<sup>15</sup> Section 268(2)(d)(ii)(A).

<sup>16</sup> Section 267(1).

<sup>17</sup> Section 267(2).

forward new ideas, and to state controversial or unpopular opinions”.<sup>18</sup> Academic freedom includes the right for academic staff to, within the law, criticise the university that employs them.

[86] Academic staff are protected from institutional disciplinary action or other sanction where, as they carry out their work, they exercise academic freedom.<sup>19</sup> Academic freedom is a privilege and brings with it responsibility. To gain the protection, academic staff are expected to adopt high ethical standards, and their expressed opinions are to be evidence-based; academic freedom will not protect commentary by academic staff that does not meet those standards.

[87] The “within the law” qualifier also confirms that academic freedom cannot be asserted to protect actions that are unlawful. Obvious examples of that are statements that are defamatory or discriminatory, or that amount to hate crimes or harassment.

[88] The importance of academic freedom is reflected in the way criteria for performance are developed by the University for performance reviews relating to appointment, continuation, or promotion. Those criteria must reflect the University’s statutory obligations, including in relation to academic freedom and the critic and conscience of society. However, only the criteria for performance must reflect the University’s obligations in relation to academic freedom; no evidence was provided as to whether the employees of the University are assessed against how well they are utilising their academic freedom during performance reviews.

[89] Academic freedom sits alongside other obligations, including health and safety obligations. One does not trump the other; they need to work together. Universities cannot use “safety” as a pretext to shut down expressions of a view that is critical of the university or which is unpopular, but there will be examples where an immediate and serious health and safety risk that cannot be managed will need to be accommodated. This may mean, for example, that a particular event, such as a speech or conference, will not be able to proceed in the manner planned.<sup>20</sup>

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<sup>18</sup> Section 267(4)(a).

<sup>19</sup> *Rigg v University of Waikato* [1984] 1 NZLR 149 (Visitor of the University of Waikato) at 207.

<sup>20</sup> *R v University of Southampton* [2016] EWHC 953 (Admin), [2016] ELR 279 at [89].

[90] In the context of employment relationship problems, the right to academic freedom would most often arise where it is raised by an academic staff member facing disciplinary action. I accept, however, that the right also may be engaged where a staff member alleges their employer has interfered with that right and caused the employee an unjustifiable disadvantage. If the right to academic freedom is included or encompassed in a term of the staff member's employment agreement, an interference may also found a claim for breach of contract.

### **The Collective Agreement addresses public commentary and academic freedom**

[91] The Collective Agreement addresses public commentary and academic freedom, reinforcing the protection that academic freedom gives academic staff:

#### **7.3 Academic Freedom**

The disciplinary procedures shall not be applied to any academic employee as a consequence of exercising their rights and obligations in relation to academic freedom and the critic and conscience of society pursuant to s 161 of the Education Act 1989.

...

#### **12 PUBLIC COMMENTARY & ACADEMIC FREEDOM**

In recognition of the rights of the public and the right of the employee to academic freedom, employees may enter into public debate and dialogue on matters relevant to their professional expertise and experience.

##### **12.1 Academic Freedom**

An employee in commenting on matters of public interest outside their particular areas of expertise or responsibility must do so in a private capacity unless the employee has first obtained the specific approval of the employer through the appropriate academic head.

### **Academic staff may undertake outside activities**

[92] Under the University's Outside Activities Policy, the University encourages outside activities consistent with its objectives, acknowledging that such activities enhance the academic status of the individual concerned and the reputation of the University. The University accepts there is value for the University and its staff from staff undertaking outside activities, including public service and professional work.

The University says it encourages its academic staff to engage in public commentary on areas of their expertise and acknowledges that the freedom of academic staff to do so is in the public interest.

[93] Under the policy, academic staff are permitted to undertake a limited amount of professional activity and public service outside the University, provided such activities are at a high level and rely on the special knowledge and expertise of the staff member. Their activities must be conducted in such a way that the staff members' responsibilities to the University always take precedence.

[94] Although the policy requires a staff member to seek the prior written approval of the academic head for all professional or academic-related outside activities, the policy also allows staff to undertake occasional lectures on radio, television, or kindred performances, preparation of books and articles, and other matters without permission, providing there is no impact on the other duties of the employee.

[95] As part of their performance review, all academic staff members are to summarise the nature and time spent on any outside activities, including consultative or other paid outside work, undertaken during the preceding 12 months.

[96] Generally, the expectation is that at least 80 per cent of an academic staff member's work time is spent on teaching and research, leaving up to 20 per cent of their time available for public activities outside their teaching and research obligations.

[97] However, the 80:20 split must be seen in the context of a normal academic period. As is clear from the evidence, those who have been engaged in COVID-19 work were working well in excess of their usual hours. The University accepts that when Associate Professor Wiles was commenting publicly on COVID-19 matters, that constituted work. There also was no suggestion from the University that Associate Professor Wiles's public commentary impeded her teaching and research commitments.

## Disadvantage is a broad term

[98] A personal grievance for unjustifiable disadvantage is one that alleges that the employee's employment, or one or more conditions of the employee's employment, is or are affected to the employee's disadvantage by some unjustifiable action by the employer.<sup>21</sup> In that context, "disadvantage" is a broad term. There is no restriction on the type of disadvantage that may fall for consideration. The Court or Authority considers the actual effect of the decision under challenge on the employment. Whether the employment is affected to the employee's disadvantage by some unjustifiable action necessarily involves focussing on what has occurred, and then assessing the impact on the employee's employment.<sup>22</sup>

[99] The "conditions of the employee's employment" are broader than just contractual terms and conditions; they include the rights, benefits and obligations arising out of the relationship<sup>23</sup> as well as conditions which were understood and applied by the parties in practice or habitually.<sup>24</sup>

[100] Here, the conditions applying to Associate Professor Wiles include statutes, the applicable terms of the Collective Agreement, the guidelines and policies as they applied to Associate Professor Wiles, the University's Code of Conduct, and the internal buy-out agreement entered into in 2014.

[101] Associate Professor Wiles points to several other policies that she says are relevant to her claims, including:

- (a) The University's Media, Public Communication and Statements Policy, which guides staff when commenting publicly, including to the media.

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<sup>21</sup> Employment Relations Act, s 103(1)(b).

<sup>22</sup> *Matthes v New Zealand Post Ltd* [1994] 1 ERNZ 994 (CA) at 997–998.

<sup>23</sup> *Tranz Rail Ltd v Rail & Maritime Transport Union Inc* [1999] 1 ERNZ 460 (CA) at [26]; see also *Spotless Facility Services NZ Ltd v MacKay (No 2)* [2017] NZEmpC 15, [2017] ERNZ 64 at [50]; and *Cronin-Lampe v Board of Trustees of Melville High School (No 2)* [2023] NZEmpC 221 at [114].

<sup>24</sup> *Tranz Rail Ltd v Rail & Maritime Transport Union Inc*, above n 23, at [27]; and *ANZ National Bank v Doidge* [2005] ERNZ 518 (EmpC) at [50]; both cases citing *British Broadcasting Corp v Hearn* [1977] 1 WLR 1004 (CA).

- (b) The University's Academic Standards Policy, which outlines standards for academic grades as referred to in various HR policies covering academic staff, including appointments, continuation, promotions, and academic performance review policies. The standards note that they must, among other things, reflect the University's statutory obligations under the Education Act 1989 in relation to research-informed teaching, academic freedom, and the critic and conscience of society, and must address the University's equity and Treaty of Waitangi obligations.
  
- (c) The University's Health, Safety and Wellbeing Policy, which aims to assist staff and students to understand their responsibilities with respect to health, safety, and wellbeing at the University, and in turn help set their expectations of the University.

**As a good employer, the University must comply with its policies and procedures**

[102] The University says that, although the Collective Agreement imposed a contractual duty on employees to comply with all the University's statutes, guidelines and policies, and while it was reasonable to assume that the University would also comply with its own policies, there was no contractual obligation to do so. I do not understand the University to be accepting that it did not comply with its own policies, just that it was not contractually required to do so. That submission does not take account of the contractual obligation that the University expressly has, to act as a good employer in all dealings with employees covered by the Collective Agreement. It must be that a good employer will comply with the obligations it gives itself in the policies it promulgates. Therefore, even if the policies were not contractual in themselves, the contractual obligation to act as a good employer meant that the University was contractually obliged to comply with its policies; a failure to do so would be a breach of the contracted duty to be a good employer.

[103] I also agree with Associate Professor Wiles that the good employer obligations under the Collective Agreement and as provided in s 597 of the Education and Training Act are relevant to the assessment of whether the University has acted as a fair and

reasonable employer in the circumstances as well as to the assessment of whether it has acted in good faith.<sup>25</sup>

### **The University has contractual obligations on health and safety**

[104] The University recognises that it has obligations to take all reasonably practicable steps to keep its employees safe at work and to avoid or minimise harm, including mental harm, caused by hazards in the workplace.

[105] Under the Collective Agreement, the University is committed to the highest standards of health, safety and wellbeing through continual improvement whilst ensuring the continued delivery of worldclass education and research; it also commits itself to being safe, inclusive and equitable. Both the University and its employees are expressly required to comply with their obligations under the Health and Safety at Work Act.

[106] The Health and Safety at Work Act envisages a systematic approach to identifying potential hazards and risks and to putting in place measures for eliminating or minimising those hazards and risks.

[107] Employers must eliminate risks to health and safety so far as is reasonably practicable and, if it is not reasonably practicable to eliminate those risks, to minimise them so far as is reasonably practicable.<sup>26</sup> The reasonableness of the employer's conduct must be measured against knowledge reasonably attained by employers who are mindful of their responsibility to manage the health and safety of their employees and to manage reasonably foreseeable risks.<sup>27</sup>

[108] In considering what is reasonably practicable, it is necessary to have regard to the likelihood and foreseeability of the hazard or the risk occurring, the degree of harm that might result from the hazard or risk, and the current state of knowledge about the likelihood that harm of that nature and severity will be suffered. Hindsight is

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<sup>25</sup> *GF v Comptroller, New Zealand Customs Service* [2023] NZEmpC 101, [2023] ERNZ 409 at [32] and [35].

<sup>26</sup> Health and Safety at Work Act 2015, s 30.

<sup>27</sup> *Attorney-General v Gilbert* [2002] 2 NZLR 342 (CA) at [88].

impermissible when making this assessment. Also relevant is the current state of knowledge about the ways of eliminating or minimising the risk and the availability, suitability, and cost of doing so. A measure will not be reasonably practicable if the cost is grossly disproportionate to the risk.<sup>28</sup>

[109] There also are overlapping implied terms applying to the University, requiring it to provide a safe working environment, including to take reasonable care to avoid exposing employees to unnecessary risk or injury to physical or psychological health and, in particular, to provide a safe system of work.<sup>29</sup>

**Associate Professor Wiles claims the University interfered with her ability to respond to Māori**

[110] Associate Professor Wiles does not claim a personal treaty right. Her statement of claim does not make a claim of breach of tikanga. Rather, the claim made by Associate Professor Wiles is that, by interfering with her ability to respond to Māori, the University put her in breach of the University's and her Te Tiriti obligations, which caused her disadvantage and/or was a breach of the University's contractual obligations to Associate Professor Wiles and/or was in breach of its statutory obligation of good faith owed to Associate Professor Wiles.

[111] The evidence given by Associate Professor Wiles and Ms Ngata, is consistent with the framing of Associate Professor Wiles's claim.

[112] Ms Ngata agreed that Associate Professor Wiles was not claiming a personal Te Tiriti right but was claiming that the University and its academic staff had obligations under Te Tiriti and that the University was in breach of those obligations because its conduct had compromised Associate Professor Wiles's ability to speak publicly on matters of national interest which, by definition, included those of Māori interest.

[113] Counsel for Associate Professor Wiles referred to *GF v Comptroller, New Zealand Customs Service* in her written closing submissions, and made quite

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<sup>28</sup> At [83]; and Health and Safety at Work Act, s 22.

<sup>29</sup> *Attorney-General v Gilbert*, above n 27, at [6].

extensive written submissions on the role of tikanga in employment law generally and in this case.<sup>30</sup> Associate Professor Wiles's statement of claim and submissions did not clearly allege any particularised breaches of tikanga. However, I accept that tikanga obligations provide context to the rest of the University's obligations and have considered relevant principles, including manaakitanga, whanaungatanga, kotahitanga, and kaitiakitanga, as part of my decision process.

[114] Counsel for Associate Professor Wiles also submitted that under the Collective Agreement contributions by academic staff to the University's Te Tiriti obligations are an express performance criterion for academic promotion. If that was the case and the University impeded her from complying with her obligations, that could provide a basis for a disadvantage claim. However, as noted previously in relation to academic freedom, only the criteria for performance must reflect the University's obligations in relation to Te Tiriti; no evidence was provided as to whether the employees of the University are assessed against how well they are complying with the University's Te Tiriti obligations during performance reviews.

[115] The issues for the Court are whether Associate Professor Wiles had personal Te Tiriti obligations to Māori, whether the University interfered with those obligations, and whether it was contractually obliged or required as a matter of good faith to refrain from such interference. If Associate Professor Wiles succeeds in her claim with respect to Te Tiriti, remedies will need to be considered.

### **The University is obliged to act in good faith**

[116] Associate Professor Wiles's claim for breach of the obligation to act in good faith is founded on s 4 of the Act. She says the statutory duty of good faith is a "statutory term" of all employment agreements, which she says is broadly akin to, or impliedly encompassed by, the implied term of mutual trust and fair dealings.

[117] Counsel for Associate Professor Wiles submits further that the contractual obligations in employment relationships must be exercised in accordance with the duty of good faith, without a requirement for the express incorporation of good faith in the

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<sup>30</sup> *GF v Comptroller, New Zealand Customs Service*, above n 25.

given employment relationship, and which can be actioned by way of damages claims for breach of good faith.

[118] Pursuant to s 4, the parties to an employment relationship must deal with each other in good faith.<sup>31</sup> This includes that they must not do anything to mislead or deceive each other or anything that is likely to mislead or deceive each other.<sup>32</sup>

[119] This duty underpins the Act and is infused throughout it. On introduction, the then Minister of Labour noted that the bill made “a clear and unequivocal statement that the best employment relationships are built on good faith and trust”. That is why, she said, “the specific provisions of the bill, when read as a whole, will be seen to support and reinforce those employment behaviours”.<sup>33</sup>

[120] As originally conceived, therefore, good faith infused the obligations of parties to employment relationships, set out throughout the Act. It underpinned the Act but was not a standalone obligation. A few years after it was originally passed, Parliament amended the Act in two ways. First, Parliament made it clear that good faith was not simply another way of describing the implied mutual obligations of trust and confidence; and second, it introduced a standalone penalty for serious breaches of good faith.<sup>34</sup>

[121] Section 4(1A) of the Act, which was inserted in December 2004, confirmed that the duty of good faith is wider in scope than the implied mutual obligations of trust and confidence.<sup>35</sup> Those mutual obligations have long been recognised as an implied term of an employment agreement and among other things require that employers and employees will not, without reasonable or proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between them.<sup>36</sup> The amendment also confirmed that the duty requires the parties to an employment relationship to be active and

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<sup>31</sup> Employment Relations Act 2000, s 4(1)(a).

<sup>32</sup> Section 4(1)(b).

<sup>33</sup> (16 March 2000) 582 NZPD 1166.

<sup>34</sup> Employment Relations Act 2000, ss 4(1A) and 4A, which were introduced by ss 5 and 6 of the Employment Relations Amendment Act (No 2) 2004.

<sup>35</sup> Employment Relations Act 2000, s 4(1A)(a), introduced by s 5 of the Employment Relations Amendment Act (No 2) 2004.

<sup>36</sup> *Auckland Shop Employees Union v Woolworths (NZ) Ltd* [1985] 2 NZLR 372 (CA) at 375.

constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative.<sup>37</sup>

[122] Good faith is flexible and contextual and includes the concepts of co-operation, honesty, openness, and absence of ulterior purpose or motivation.<sup>38</sup> It arguably is an expansion of the statutory good employer obligation found in the Public Service Act 2020 as well as in the Education and Training Act.<sup>39</sup>

[123] In the Act, good faith is most specifically dealt with in respect of collective bargaining.<sup>40</sup> If a party does not comply with the duty of good faith in collective bargaining, then the matter can be referred to the Authority.<sup>41</sup> If the Authority finds there have been serious and sustained breaches of good faith in relation to collective bargaining, it can then exercise the powers set out in s 50J of the Act.

[124] Good faith also has a role to play in personal grievances. The elements of good faith are relevant to the test under s 103A of the Act.<sup>42</sup> The actions that amount to a breach of good faith may therefore be compensable in the context of a personal grievance.

[125] Further, where an employer expressly contracts to honour the obligation of good faith, or there is a term in the employment agreement that encompasses the obligation to act in good faith, then failing to do so would provide a basis for a claim in breach of contract. In the present case, where the University has committed in the Collective Agreement to be a good employer, I consider that such a commitment necessarily involves an obligation to act in good faith.

[126] I do not agree, however, that s 4 creates a “statutory term” in employment agreements. In making that submission, counsel for Associate Professor Wiles points to the concurring judgment of Tipping J in *Coutts Cars Ltd v Baguley* where he was

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<sup>37</sup> Employment Relations Act 2000, s 4(1A)(b).

<sup>38</sup> *Carter Holt Harvey Ltd v National Distribution Union Inc* [2002] 1 ERNZ 239 (CA) at [55].

<sup>39</sup> Public Service Act 2020, s 73; Education and Training Act 2020, s 597; and *Head v Chief Executive of the Inland Revenue Department* [2021] NZEmpC 69, [2021] ERNZ 183 at [274].

<sup>40</sup> Employment Relations Act 2000, ss 31–39.

<sup>41</sup> Section 50C.

<sup>42</sup> *Air New Zealand Ltd v Hudson* [2006] ERNZ 415 (EmpC) at [124]–[129].

considering what the Employment Court meant by saying that it no longer mattered that the contract was silent on the employer's obligations in the events that had arisen. He commented:<sup>43</sup>

What the Court appears to mean is that it may impose a contractual obligation on one of the parties to the employment relationship when there is no express or implied term to that effect. The source of such a power is not identified, other perhaps than the statutory duty of good faith which is now a statutory term of all contractual relationships broadly equivalent to the earlier implied term requiring mutual trust and fair dealing. If the obligation is not an express term nor an implied term, nor a statutory term it is hard to see how it can be applied by the Court.

[127] In that regard, the context of Tipping J's comment was the view taken by the Court of Appeal in *Coutts* that good faith was not significantly different from the mutual obligations of trust and confidence that the courts had implied into employment contracts in the years preceding that case. The amendment in 2004 came after that decision and made clear that this was not the case.

### **What non-financial remedies are available?**

[128] If the Court upholds Associate Professor Wiles's personal grievance, it can make declarations of breach. Additionally, if it finds that any workplace conduct or practices were a significant factor in the personal grievance, it may make recommendations to the Vice-Chancellor concerning the action she should take to prevent similar employment relationship problems occurring.<sup>44</sup>

### **What financial remedies are available?**

*Distress compensation is recoverable if there is unjustifiable disadvantage*

[129] Compensation for hurt, humiliation and injury to feelings is recoverable under s 123(1)(c)(i) of the Act where that is as a result of an unjustifiable disadvantage.

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<sup>43</sup> *Coutts Cars Ltd v Baguley* [2002] 2 NZLR 533 (CA) at [62].

<sup>44</sup> Employment Relations Act, s 123(1)(ca).

*Damages are to put the wronged party in the position they would have been in, but for the breach*

[130] In dealing with contractual damages, the Court endeavours to put the wronged party in the position they would have otherwise been in had the relevant breach not occurred.<sup>45</sup> The award of damages has to be linked to the breach to merit recovery; it must be a likely consequence of the breach.<sup>46</sup> General damages are incapable of precise calculation and are a matter of assessment by the Court with the Court doing its best, on the material presented, to make an assessment using its general knowledge of human and business affairs and common sense.<sup>47</sup>

[131] The recent decision in *Cronin-Lampe v Board of Trustees of Melville High School (No 2)* set out previous awards.<sup>48</sup> The award of general damages of \$75,000 in *Gilbert* is the highest amount previously awarded.<sup>49</sup> In *Cronin-Lampe* that figure was updated for inflation to produce a figure today of \$129,476.<sup>50</sup>

[132] Counsel for Associate Professor Wiles points to the Australian decision *Mathews v Winslow Constructors (Vic) Pty Ltd* where general damages of AUD 380,000 were awarded, and to *Swan v Monash Law Book Co-operative* where general damages of AUD 300,000 were awarded.<sup>51</sup>

[133] An award of damages is not punitive; it is to reflect the damage caused to the wronged party by the breach. To that extent, the same actions may result in different levels of damages for different people depending on the impact on them. It is an individual assessment.

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<sup>45</sup> At [226].

<sup>46</sup> *Attorney-General v Gilbert*, above n 27, at [96].

<sup>47</sup> *Medic Corp Ltd v Barrett (No 2)* [1992] 3 ERNZ 977 (EmpC) at 984.

<sup>48</sup> *Cronin-Lampe v Board of Trustees of Melville High School (No 2)*, above n 23, at [272]–[276].

<sup>49</sup> *Gilbert v Attorney-General* [2000] 1 ERNZ 332 (EmpC) at 394.

<sup>50</sup> *Cronin-Lampe v Board of Trustees of Melville High School (No 2)*, above n 23, at [285].

<sup>51</sup> *Mathews v Winslow Constructors (Vic) Pty Ltd* [2015] VSC 728 at [9]–[34]; and *Swan v Monash Law Book Co-operative t/a Legibook* [2013] VSC 326 at [264].

*Damages and compensation may be recoverable but are not cumulative*

[134] It is open to Associate Professor Wiles to claim remedies both for breach of contract at common law and under the Act.<sup>52</sup> However, those remedies are not to be cumulative; rather, where damages and compensation are recoverable for the same matter, the higher of the two awards is appropriate.<sup>53</sup>

*A penalty may be ordered for a breach of contract*

[135] Section 134 of the Act provides that a party that has breached an employment agreement is liable to a penalty under the Act; for the University the penalty for any breach is a sum not exceeding \$20,000.<sup>54</sup>

*A penalty may be recoverable for breach of the statutory obligation of good faith*

[136] Associate Professor Wiles seeks both a penalty and damages for the alleged breaches of the duty of good faith set out in s 4 of the Act. This claim is separate from her claim for breach of contract.

[137] Certainly, it is open to Associate Professor Wiles to claim a penalty for any breaches of the statutory duty of good faith by the University that come within the criteria in s 4A of the Act. In the context of these proceedings, that would be if the failure to comply with the duty of good faith was deliberate, serious and sustained, or if it was intended to undermine an employment relationship.<sup>55</sup> Again, for the University the penalty for any breach is a sum not exceeding \$20,000.

[138] The bar in s 4A is a high one. The first test requires all three elements – deliberate, serious and sustained. For a failure to be deliberate it must be intentional or done on purpose.<sup>56</sup> Whether a failure is serious requires a value judgement, but it is a high test; to be serious, a failure must be grave with potentially important

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<sup>52</sup> *Attorney-General v Gilbert*, above n 27, at [94].

<sup>53</sup> *Cronin-Lampe v Board of Trustees of Melville High School (No 2)*, above n 23, at [225].

<sup>54</sup> Employment Relations Act, s 135(2)(b).

<sup>55</sup> Employment Relations Act, s 4A(a) and (b)(iii).

<sup>56</sup> Lesley Brown (ed) *Shorter Oxford English Dictionary* (6th ed, Oxford University Press, Oxford, 2007) at “deliberate”.

consequences.<sup>57</sup> To be sustained, a failure must be “maintained continuously or without flagging over a long period”.<sup>58</sup> The second test also requires intention.

[139] In support of her claim for damages for a breach of s 4, Associate Professor Wiles relies on *Farmers’ Holdings Ltd v Faber*, where the Court found that the employer had breached the employee’s “employment agreement that incorporated the statutory obligation of s 4 of the Employment Relations Act 2000”.<sup>59</sup> That finding followed the acceptance by the employer that the obligation in s 4 “had become contractual so that failing or refusing to meet the standards prescribed by s 4 would amount to a breach of contract”; its defence was that it had acted in good faith.<sup>60</sup> The court therefore did not have to consider whether damages were available for a breach of the statutory duty, absent that duty being incorporated into the employment agreement.

[140] Damages for breach of the duty of good faith, however, are not contemplated by the Act. The Act prescribes remedies for breach of s 4. These are set out in s 4A and, in respect of collective bargaining, in s 50J. Notably, when the Act was amended in 2004, and s 4A was added, Parliament did not add other remedies for a breach of the duty of good faith. It would be inconsistent with the statutory scheme to include a further remedy for breach of s 4 of the Act; there is nothing in the Act that indicates that Parliament intended for damages to be available.<sup>61</sup> Indeed, the legislative history points away from that being the intention.

[141] In my view, the legal position with respect to financial remedies for a breach of good faith is that:

- (a) Breaches of the implied term of trust and confidence can be answered in damages. That would cover some breaches of good faith, but given the obligation of good faith is wider in scope than the obligation of trust and confidence, there will be matters covered by the duty of good faith

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<sup>57</sup> At “serious”.

<sup>58</sup> At “sustained”.

<sup>59</sup> *Farmers’ Holdings Ltd v Faber* [2006] ERNZ 208 (EmpC) at [42].

<sup>60</sup> At [8].

<sup>61</sup> *Hally Labels Ltd v Powell* [2015] NZEmpC 92, [2015] ERNZ 940 at [134]; and *Johnston v Fletcher Construction Co Ltd* [2019] NZEmpC 178, [2019] ERNZ 498 at [110].

that are not covered by the implied term requiring parties to act towards each other with trust and confidence.

- (b) The duty of good faith may be incorporated into an employment agreement, either with express words or as a result of a term in the employment agreement that encompasses the obligation to act in good faith.
- (c) The actions of an employer that are in breach of the obligation of good faith that it owes an employee, and which cause disadvantage to the employee, would found or support a personal grievance, for which compensation may be payable.
- (d) The Act, however, does not provide for or contemplate damages or compensation being payable for a breach of the statutory duty of good faith, per se.
- (e) A penalty may be available if the failure to comply with the duty of good faith meets the criteria in s 4A of the Act.
- (f) The Court may order that the whole or any part of any penalty be paid to an affected person, rather than to the Crown.<sup>62</sup>

### **The University's response was problematic**

[142] The context in which the University and its staff were operating during this time was very difficult. There were pressures on everyone in multitudes of areas. The University faced enormous issues as a result of the pandemic, dealing with courses, staff, students, and finances.

[143] The Vice-Chancellor is the employer of Associate Professor Wiles, although obviously she exercises her duties largely through delegation. However, as she acknowledges, the buck stops with her.

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<sup>62</sup> Employment Relations Act, s 136(2).

[144] Professor Freshwater was appointed as the Vice-Chancellor from 16 March 2020. This meant she immediately stepped into the storm of COVID-19. I acknowledge how difficult that would have been for her personally.

[145] I acknowledge too that the abuse some academic staff received over this time was intense. It made a challenging time even more difficult for these academic staff. The University also acknowledges that Associate Professor Wiles was the innocent victim of a relentless campaign of vile hate and vitriol from a sector of society that was strongly opposed to lockdowns and vaccination mandates, something no employee should be subjected to for doing their job.

[146] The Vice-Chancellor's personal engagements with Associate Professor Wiles and her colleagues, in particular Professor Hendy and Mrs Hannah, included email responses to emails sent by them. The Vice-Chancellor did not always respond, but their emails were usually sent to multiple addressees, so this was understandable; the Vice-Chancellor would leave responses to the appropriate personnel.

[147] Accordingly, I accept that it was neither a breach of contract nor of good faith for the University to encourage Associate Professor Wiles to meet with the personnel that the University had appointed as the Vice-Chancellor's representatives for the purposes of dealing with Associate Professor Wiles's concerns. That approach was understandable, particularly after Associate Professor Wiles had raised her personal grievance. I also accept that Mr Phipps and Ms Boyer were sympathetic to Associate Professor Wiles and wished to assist her and her colleagues. I accept too they had no ill will or malice towards Associate Professor Wiles.

*The health and safety response was insufficient and too slow*

[148] Mr Skelton, counsel for the University, warns against hindsight bias, noting that it is always easy to say, with the benefit of hindsight, that an employer could have done more or acted sooner than it did. I acknowledge that risk. The evidence from the University, however, was that abuse of academics is not new. Professor Freshwater gave evidence that such abuse has become a reality in recent years for many people in public roles. She referred to her own experiences in receiving toxic emails and other harassment, including being followed home. As noted, SRIT was preceded by a

working group established sometime before the COVID-19 pandemic because of increased gender-based harassment towards women. Therefore, while the harassment Associate Professor Wiles and others were receiving because of their commentary on COVID-19 may well have been worse than that previously experienced, the risk was already well-recognised.

[149] There was not, however, a well-developed strategy for dealing with the issues that arose; such a strategy might have been expected given harassment was a known risk for academic staff, especially women. The potential scale of the issue should have been apparent at least from August 2020, when Mrs Hannah alerted the University to the high levels of harassment being received, with the expectation of an increase as the pandemic response went on. Certainly, by January 2021, when Associate Professor Wiles was doxed, the situation was clearly serious.

[150] The University should have moved more quickly to put measures in place to protect and support Associate Professor Wiles and her colleagues, obtaining expert assistance as required. While it was expected and reasonable for the University to have consulted with Associate Professor Wiles over steps that she might wish the University to take, the onus was on the University to obtain the right advice and put in place a plan proactively. Instead, while University personnel were sympathetic, they still seemed reliant on Associate Professor Wiles and her colleagues to suggest actions they would like the University to take. The University did take steps, but as counsel for Associate Professor Wiles submits, in some cases measures that were not deemed reasonably practical before events occurred became reasonably practicable afterwards. As Associate Professor Wiles and her colleagues said, they are not experts in security or public relations responses; it was not for them to determine what actions were appropriate.

[151] Although the University was monitoring social media and recording issues of external harassment through SRIT, such monitoring and recording is not an end in itself, but a tool to assist in assessing and managing such risks. The University took some steps beyond that, such as sending messages to Associate Professor Wiles and her colleagues to advise them of the times and locations of any high-risk events, such as anti-vaccination protests, offering guidance on setting up email inboxes and configuring social

media accounts, and offering general guidance on responses to safety issues. However, the steps taken were insufficient. It was not until February 2022 that the University emailed Associate Professor Wiles to say it was willing to meet with her to discuss her request for an individual risk assessment, which was then conducted between March and June that year.

[152] The approach of the University at the meeting of 28 June 2021 was unfortunate. The advice given was that providing commentary on the pandemic did not form part of Associate Professor Wiles and her colleagues' jobs and that they might need to stop doing this work. The University now accepts that the commentary undertaken by Associate Professor Wiles was part of her work for the University. Simply telling her and her colleagues they should stop doing it was not reasonable. Again, the University should have been putting in place a proper strategy so that the affected academic staff were sufficiently supported to continue with their public activities on the pandemic.

[153] A key engagement from the Vice-Chancellor was her letter of 9 August 2021 to Associate Professor Wiles, Professor Hendy, and Mrs Hannah in which she urged them to keep any public commentary to a minimum until the Quantum report was completed and raised the possibility that they take paid leave. Although neither remark is a direction, such comments from the Vice-Chancellor would, no doubt, have been taken very seriously.

[154] I accept the Vice-Chancellor's intention was to urge a course that she hoped would reduce the risk of adverse consequences to the relevant staff. It may have been a reasonable instruction in the absence of alternatives, but having been approached a year earlier by Mrs Hannah raising concerns over online harassment, the University should have developed a strategy for dealing with these concerns.

[155] It was problematic for other reasons. The advice ignores the context in which Associate Professor Wiles and her colleagues were providing commentary. The University suggested the situation was comparable to that of an academic staff member wishing to go on to Whakaari when there was a heightened risk of a volcanic eruption, but I do not accept that comparison. The COVID-19 public commentary could not be delayed.

[156] Further, although the University suggested that the urging was directed towards social media commentary, the letter does not explicitly say that. In any event, although Associate Professor Wiles and her colleagues did engage on social media, as noted, the difficulties were primarily in respect of their mainstream public commentary. The harassment was also stemming from information being published by the University about the work of Associate Professor Wiles. As a result, even if Associate Professor Wiles had pulled back, it is probable that the harassment would have continued through other sources.

[157] It was for the University to determine how it identified and managed the risks, provided what it did was sufficient. One of the University's key actions was arranging and facilitating the security and safety audit from Quantum Security. That was commendable but was not commenced until mid-2021 and completion and implementation has been slow. The situation that existed, at least from the beginning of 2021, required urgent measures to be put in place, including pending the completion and actioning of the audit.

[158] However, not all of the matters raised by Associate Professor Wiles were in breach of the University's health and safety duties. The situation that arose in Wellington in August 2021 was a chance encounter. I do not accept the criticism of Ms Boyer. Her response was to Professor Hendy when he contacted her. That response was brief but sent very quickly as a matter of urgency. Ms Boyer later followed up with Associate Professor Wiles and offered further support. There was no breach of any legal obligation the University owed Associate Professor Wiles.

[159] The University acknowledges there were delays in installing home security enhancements, largely due to availability and installation issues with the external supplier. That was regrettable but does not amount to a breach of the University's legal duties to Associate Professor Wiles.

[160] Similarly, although the University originally committed to carrying out an internal security review, that commitment was overtaken by the University's subsequent engagement of Quantum Security to carry out an external review, thus the University's failure to complete its commitment on that point was reasonable.

[161] The University made a considered decision, following advice from Police, not to issue a pre-emptive trespass notice against known harassers; that decision was open to it at the time it was made.

[162] Further, while I have found the University's response was insufficient, I do not accept its communications (or lack thereof) regarding the implementation of the steps it was taking amounted to an unjustifiable disadvantage, as pleaded by Associate Professor Wiles.

*Conclusion on health and safety*

[163] I find that the University's approach to dealing with the circumstances of Associate Professor Wiles breached its health and safety obligations to her in that it failed to provide adequate protection and support to her.

[164] I also find the approach adopted by the University in the period leading up to the lodging of Associate Professor Wiles's personal grievance on 12 July 2021 amounted to an unjustifiable disadvantage. Associate Professor Wiles was entitled to expect the University to have put together a plan to keep her safe as she went about her work and to have supported her as she did so.

[165] On the other hand, although the University's approach was deficient in that it was reactive and not expansive enough, I accept that the University did make efforts to comply with its health and safety obligations within the confines of its existent health and safety framework. It should be commended for the actions it did take, even though that was ultimately insufficient.

*The focus on alleged outside activities was misplaced*

[166] In opening submissions before the Court, the University accepted that when Associate Professor Wiles was commenting publicly on COVID-19 matters, that constituted work. The University went on to say that its position was that when Associate Professor Wiles was undertaking other non-COVID-19 activities in her private capacity, that was not work for which the University had any health and safety responsibility. I accept both propositions but make three points.

[167] First, the University's view on what constituted outside activities appears to have evolved. Professor Fraser's correspondence seemed to be premised on the assumption that the abuse Associate Professor Wiles was receiving was a result of her outside activities, in respect of which the University did not consider it had any obligations. Professor Fraser also distinguished between what he saw as "normal academic discourse through meetings and other engagements" and some of the activities Associate Professor Wiles engaged in. His reference to "Brand Siouxsie" and to her being a "celebrity speaker" reinforces the sense that, in his view, Associate Professor Wiles was making herself a target for abuse because she was undertaking public discourse outside her work for the University and in ways that were not in accordance with "normal academic discourse".

[168] Second, his implied criticism of the way Associate Professor Wiles presented publicly – that she was not commenting in a scholarly manner – was misplaced. The evidence was that Associate Professor Wiles's communication style was very valuable with audiences that may not otherwise have been reached. For completeness, there is no suggestion that any of the issues that arose for Associate Professor Wiles related to activities that might be regarded as "outside activities". Whichever interpretation of "outside activities" was adopted (externally paid versus not; COVID-19 related versus non-COVID-19 related) the issues for Associate Professor Wiles did not arise from her outside activities; the abuse was directed to her public commentary for which she received no external payment. It was directed to her work for the University. It was not, for example, because of her relatively short appearances on entertainment television programmes or her private paid presentations.

[169] Third, the University seemed to focus on Associate Professor Wiles's social media presence when that was not the primary issue. It is correct that Associate Professor Wiles (and her colleagues) made some social media posts, which is understandable given social media is now widely used to reach people who may obtain most of their news and other information from social media. However, while most of the abuse she received may have been on social media, it mainly was responding to her commentary on mainstream media. Mainstream media maintains a social media presence, and it was often comments made in response to, for example, Facebook posts or tweets from mainstream media outlets that were problematic. In addition, there

were problematic posts from some of the players on alternative social media platforms that Associate Professor Wiles and her colleagues did not post on. The University's own engagements on social media that referred to Associate Professor Wiles also attracted adverse comments about her.

[170] In short, the view that seemed to permeate the University's approach to the issues was that a good deal of the abuse Associate Professor Wiles was receiving arose from outside activities on social media that were not her work. That view was wrong. It was clear throughout that it was her public, COVID-19 commentary that caused her to be a target for abuse. As the University acknowledged in court, this commentary was part of Associate Professor Wiles's work.

[171] Professor Fraser's correspondence marked a shift in attitude from the University. It might have been understandable for Professor Fraser and others to be kept advised of external work undertaken by academic staff and for them to wish that to be done in a systematic way, but the correspondence from the University was quite aggressive and focussed on matters that were not relevant. There is a strong sense that Professor Fraser's views were affected by Associate Professor Wiles's popularity and by the fact that some of her activities were not directly relevant to academic work and/or were not 'scholarly' in nature.

[172] The letter from Mr Phipps to Associate Professor Wiles on 20 April 2022 was similarly unnecessarily aggressive. The letter spoke to various legitimate concerns, but the raising of various tweets was entirely unnecessary. Mr Phipps' explanation of how the tweets came to his attention was unsatisfactory and was not supported by corroborating evidence. I consider that the manner and tone in which the issues were raised was not reasonable.

[173] Further, despite Mr Phipps and Professor Fraser's assertions to the contrary, I am satisfied that the University's shift in attitude led to the increased scrutiny of Associate Professor Wiles's activities. It was as part of investigating Associate Professor Wiles's concerns that the University came to focus on alleged outside activities and to Associate Professor Wiles facing more scrutiny over her conduct than other staff. The University produced no evidence of other academic staff being

questioned about their paid activities or about their public comments on University matters.

*Conclusion on treatment of Associate Professor Wiles*

[174] Actions and inactions of the University in the period from October 2021 to April 2022 were not in accordance with its obligation to be active and constructive in its employment relationship with Associate Professor Wiles. They also were in breach of the contractual term to act as a good employer. Here, I am referring in particular to the correspondence from Professor Fraser and to the shift in focus from Mr Phipps that led to his letter of 20 April 2022.

[175] Despite promoting Associate Professor Wiles’s public work on COVID-19 matters, there is a sense in the correspondence it sent to her that the University considered that she bore some of the responsibility for the negative backlash that her work produced. Rather than assisting Associate Professor Wiles to deal with the situation she was in, the correspondence from the University exacerbated her distress. In evidence, Associate Professor Wiles expressed it as:

I feel like I’m in a constant war zone and the people who I thought would support me, my employer, have instead acted almost like the enemy. The threats, harassment, and abuse that I’ve had as a result of doing my work has been awful enough, but the response from the University has been worse. I thought that my employer would stand by me in my genuine efforts to help the public with the pandemic, I even thought they might be proud. Instead of this, my raising concerns about my safety has led to an ever-increasing trail of allegations against me where I feel they are out to get me somehow – accusing me of breaching policies, denigrating me as a “*freelance celebrity*”, trawling through my social media to find evidence of “*breaches of the Code of Conduct*”, scrutinising my hours of work and singling me out for all manner of things they say I’m doing wrong.<sup>63</sup>

**Academic freedom only tangentially engaged**

[176] While it was suggested that academic freedom was key to this case, I do not agree. The University was not attempting to suppress new ideas, or controversial or unpopular opinions; the opinions Associate Professor Wiles and her colleagues were expressing were mainstream at the time they were being given, and it was not

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<sup>63</sup> Emphasis in written statement of evidence.

suggested those opinions should or could be kept from public view. Associate Professor Wiles's commentary was consistent with the advice being provided by the Government and many other sources.

[177] The actions of the University, including in the letter from the Vice-Chancellor of 9 August 2021 urging Associate Professor Wiles to keep any public commentary to a minimum, were not directed to suppressing that commentary but to diverting attention from Associate Professor Wiles and her colleagues so as to protect them in the circumstances that had arisen. Such an approach by a university may engage academic freedom, for example, if the opinions being promulgated by the academic staff member were otherwise not readily available to the public. I am not persuaded, however, that the intent or the effect of the University's actions substantively impeded that right in the circumstances that existed. There were multiple sources of the advice available to the public and other ways in which Associate Professor Wiles and her colleagues could, and did, promulgate their advice; their views were not being suppressed.

### **Te Tiriti claim not made out; findings consistent with tikanga obligations**

[178] I also am not persuaded that Associate Professor Wiles's claim regarding Te Tiriti is made out. Although any Te Tiriti obligations that the University may have can only be discharged by its staff on behalf of the University, I am not satisfied that those Te Tiriti obligations devolve to obligations on individual staff members. In any event, Associate Professor Wiles was engaging with Māori and was not prevented from doing so. If she had Te Tiriti obligations, she was fulfilling them both through her work with the Matakaoa community and more generally.

[179] In considering whether the University has acted unreasonably, unlawfully, or not in good faith, I accept that the University is bound to act consistently with tikanga insofar as it applies to the employment relationship. Counsel for Associate Professor Wiles has highlighted four principles: manaakitanga, whanaungatanga, kotahitanga, and kaitiakitanga. I did not, however, receive assistance from pūkenga or detailed submissions on particulars, which limits my ability to apply those principles in a tikanga consistent manner. As the Law Commission explained recently, tikanga is "a

coherent, integrated system of norms not a mere ‘grab bag’ of principles or values.”<sup>64</sup> The law is presently developing in this area, and where issues of tikanga are raised late and are insufficiently supported in evidence and submissions, it is appropriate for the Court to exercise restraint.<sup>65</sup> Nevertheless, I consider my findings to be broadly consistent with those obligations, particularly in relation to the four principles identified: manaakitanga, whanaungatanga, kotahitanga, and kaitiakitanga. I do not, however, consider it necessary or appropriate in these circumstances to make separate findings of breach in relation to those obligations.

### **Remedies are due**

[180] I make a declaration that the University has breached its (express and implied) contractual obligations to protect Associate Professor Wiles’s health and safety.

[181] Further, I find that the University breached its statutory duties of good faith and to be a good employer by failing to engage constructively regarding Associate Professor Wiles’s safety, and especially in the way it dealt with her alleged non-compliance with the University’s policies.

[182] Its obligation to be a good employer was also a term of the Collective Agreement and encompassed the University’s obligation to act in good faith towards its employees. Therefore, I also make a declaration that the University breached its contractual obligations to be a good employer, including as a result of its failure to act in good faith.

[183] Associate Professor Wiles is due compensation for the unjustifiable disadvantage she suffered and general damages for breach of contract. These awards overlap, with general damages covering the full period and therefore encompassing the distress caused by the unjustifiable disadvantage.

[184] As noted, general damages are to reflect the damage caused to the wronged party by the breach; the University is only responsible for the harm caused by it. There

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<sup>64</sup> Law Commission *He Poutama* (NZLC SP24, 2023) at 45.

<sup>65</sup> See principles and case-law cited in *He Poutama* at 223 and 241.

was a conflict in the evidence as to whether the abuse Associate Professor Wiles received would have been reduced if the University had, for example, spoken out more publicly against it, and it be speculative to conclude that a reduction would have been the result. Nevertheless, I accept that the conduct of the University made the situation Associate Professor Wiles was in worse and that the whole situation was stressful and distressing to her. Her case, however, is not comparable to the cases Ms Stewart referred to, where the actions of the employer caused long-term if not permanent psychological problems and the end of the employee's working life. Associate Professor Wiles is still employed and continues to undertake her work; there is no medical evidence of any serious or ongoing health consequences. None of that is a criticism of Associate Professor Wiles; her stoicism and resilience are admirable. But, as I am sure both parties appreciate, those factors limit any damages or compensation due to Associate Professor Wiles. I assume that the main drivers for Associate Professor Wiles in pursuing this case were matters of principle and the potential for non-financial remedies.

[185] I do not, however, agree with the University that this case falls within the most modest level of cases. The situation was ongoing for a significant period, and the insufficient action and perceived lack of support caused considerable distress to Associate Professor Wiles.

[186] On balance, I award general damages of \$20,000 (also encompassing compensation under s 123(1)(c)(i) of the Act) to Associate Professor Wiles. That sum is to be paid to her by the University within 28 days of the date of this judgment.

[187] While there was a breach of Associate Professor Wiles's employment agreement, I accept that it was not intentional and that the University continues to take steps to improve its response to situations such as the one Associate Professor Wiles found herself in. Those factors, together with the circumstances in which the breach occurred, mean I do not consider this case is one for which a penalty for breach of contract is warranted.<sup>66</sup>

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<sup>66</sup> See also *Pyne v Invacare New Zealand Ltd* [2023] NZEmpC 179, (2023) 20 NZELR 59 at [63]–[64].

[188] Further, while I have found the University breached its statutory duty of good faith, I do not find that it was a breach to which s 4A of the Act applies; it was not deliberate, serious, and sustained, or intended to undermine the employment relationship between the Vice-Chancellor and Associate Professor Wiles.

[189] I have considered whether formal recommendations are due. Certainly, there are lessons for the University on how such risks ought to be managed but, given it has moved forward with recommendations from its security advisors and the situation is different from that which existed in the period covered by the personal grievance, I do not consider it appropriate for me to make recommendations at this stage.

**Costs are reserved**

[190] The parties are encouraged to agree on costs, but if that is not possible and an order is sought from the Court, then an application may be filed and served within 28 days of the date of this judgment. Any response then is to be filed and served within a further 21 days, with any reply to be filed and served within a further seven days.

J C Holden  
Judge

Judgment signed at 2.25 pm on 8 July 2024