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## EMPLOYMENT

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## SERIOUS MISCONDUCT DID NOT JUSTIFY DISMISSAL

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PARTNER

This month, the Employment Court found that the dismissal of an employee for admitted serious misconduct was nevertheless unjustified and upheld her reinstatement (*Secretary for Justice v Dodd* [2010] NZEMPC 84).

The decision examines both limbs of the statutory test of justification for dismissal under section 103A of the Employment Relations Act 2000 – the “what” and “how” of dismissal.

As to the “what” of dismissal, the Court confirmed that the objective fair and reasonable tests for justification applied not only to the employer’s decision that serious misconduct occurred, but also the employer’s decision about the outcome, in this case summary dismissal. Although serious misconduct would usually constitute grounds for a justified dismissal, it did not follow in every case. The Court held that this was one of the rare cases where it did not.

The Court also considered certain areas of the Ministry’s process which fell short of “how” a fair and reasonable employer would have acted.

Some employers consider that having justifiably found serious misconduct, the full range of sanctions should be available and a decision to dismiss should be beyond judicial scrutiny. This is not, however, the position adopted by the Court in the above case.

Last week, the Government announced plans to change the justification test under section 103A to what a fair and reasonable employer “could” rather than “would” have done in all the circumstances. Had this “range of reasonable responses” test applied in the above case, it is possible that the Court may have reached a different conclusion.

### **Practical implications for employers now**

When considering the appropriate outcome for serious misconduct, employers will be prudent to:

- Consider the employee’s conduct during the investigation, including any acknowledgement regarding the seriousness of their offence, offer to make amends and commitment not to repeat the misconduct;
- Consider whether trust and confidence in the employee has been lost. This requires gathering evidence concerning the relationship between the employee and individuals with whom they work at junior and senior levels; the individual’s past performance; and their prior handling of any similar situations in the past. What the employee actually did may be of less significance compared to whether they are likely to re-offend;

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- Consider possible alternative sanctions to dismissal and take steps to investigate their practicability. The Court commented that employers should think seriously and laterally about the most appropriate sanction in the circumstances before resorting to dismissal.

## The facts

Ms Dodd was a court manager and registrar. In conflict of interest and breach of Ministry policy and instruction, she became involved in her nephew's prosecution for assaulting his partner. With the prospect of her nephew's imprisonment, Ms Dodd telephoned the complainant to persuade her to submit a more favourable victim impact statement. Further, the Ministry employee repeatedly accessed information about the prosecution on the Court's computer database which she then passed on to her nephew's lawyer.

Ms Dodd conceded that these actions amounted to serious misconduct and misconduct respectively. She acknowledged her wrongdoing and committed not to repeat it. Prior to these events, Ms Dodd had achieved consistently high work performance assessments and was well regarded by staff and others involved in the court system.

## "How" the Ministry dismissed was unfair

Correspondence revealed that the Ministry had predetermined the issue of Ms Dodd's suspension pending the investigation. The Court held that such predetermination was unfair and suspension was an important element of the process that eventually led to her summary dismissal.

Further, the investigating manager had declined Ms Dodd's offer to provide certain character referees, including managers and

judges, who still maintained trust and confidence in her.

The Court held that the Ministry erred in excluding that information and wrongly minimised consideration of Ms Dodd's insight into her misconduct and her assurances not to re-offend. Views of others who knew Ms Dodd were of particular significance because the investigating manager had limited personal knowledge of her and her circumstances.

In the Court's view, had such evidence been allowed, a fair and reasonable employer would not have concluded that there was a loss of trust and confidence so that she had to be dismissed summarily.

## Summary dismissal unjustified

The Court found that the Ministry wrongly discounted the effects of what Ms Dodd had already been through in relation to the likelihood of her re-offending, following a police investigation carrying possible criminal charges, her suspension and adverse media publicity. She had acknowledged her serious error and been fully cooperative in both investigations by the police and Ministry.

Further, the Ministry had failed to properly consider alternatives to dismissal permissible under its own policies. The Court opined that temporary or permanent demotion or reassignment of duties with appropriate supervision and retraining would have been appropriate in this case. Consequent loss of remuneration and seniority would have given such sanctions real force.

The Court went on to comment that in appropriate serious misconduct cases, temporary demotion could be justifiable even in the absence of any express provision for such sanction in applicable employment agreements or policies.