IN THE EMPLOYMENT COURT
WELLINGTON

[2010] NZEMPC 84
WRC 52/09

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	SECRETARY FOR JUSTICE Plaintiff
AND	CATHERINE ANNE DODD Defendant

Hearing: 10-12 March 2010
(Heard at New Plymouth)

Appearances: Alastair Sherriff and Deirdre Marshall, Counsel for Plaintiff
Susan Hughes QC, Counsel for Defendant

Judgment: 2 July 2010

JUDGMENT OF CHIEF JUDGE GL COLGAN

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[1] This is a challenge by hearing de novo to the determination[1] of the Employment Relations Authority that Catherine Dodd was dismissed unjustifiably and reinstating her as manager of courts for Taranaki and registrar of the High and District Courts at New Plymouth.

[2] Ms Dodd became involved in a prosecution of her nephew for assaulting his former domestic partner by contacting the complainant about her victim impact statement. In connection with the same prosecution, Ms Dodd had accessed information about it on the Ministry's computer database at the request of her nephew's lawyer and supplied this to the lawyer.

[1] WA201/09, 17 December 2009.

[3] Ms Dodd now concedes that she was, thereby, guilty of serious misconduct and misconduct respectively in her employment. The Employment Relations Authority nevertheless found that she had been dismissed unjustifiably because a fair and reasonable employer would not have dismissed her in all the circumstances at the relevant time. The Authority directed Ms Dodd's immediate reinstatement in employment shortly before Christmas 2009. An application for stay of the Authority's order for reinstatement was heard urgently on 22 December 2009[2] but refused in reliance on a number of undertakings given to the Court by Ms Dodd as to how her work performance would be managed pending the hearing and decision of this challenge. Although Ms Dodd's reinstatement on the conditions given by her undertaking has worked satisfactorily, the plaintiff is entitled nevertheless to a rehearing of her contentions that Ms Dodd misconducted herself so seriously and the plaintiff's loss of trust and confidence in her was so significant, that she was nevertheless justified in law in dismissing the defendant summarily.

Relevant facts

[4] These are largely, but not completely, uncontroversial. They are nevertheless an important context in which summary dismissal took place and against which the justification for it must be assessed. They are also relevant to the remedy of reinstatement claimed by Ms Dodd.

[5] First, I set out some generalities about provincial courts and the way in which they operate. The High Court of New Zealand and the District Court at New Plymouth are co-located in that city's courthouse. High Court judges visit from time to time to conduct criminal trials and a variety of civil business. The District Court has two resident judges (including a Family Court judge) and sits more or less continuously (although for different periods) in its criminal, civil, family, youth and other miscellaneous jurisdictions. The District Court's resident judges are augmented from time to time by visiting judges and assisted as appropriate in their minor offences' work by justices of the peace.

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[2] WC28/09.

[6] The Taranaki Court's manager is also the registrar of the High Court, Sheriff, and registrar of the District Court at New Plymouth and its satellite court at Hawera. The courts' manager is a general manager in the sense that she heads the courts' administration across all jurisdictions although subordinate staff tend to specialise in one or more areas.

[7] In a line management sense, the Taranaki courts' manager is answerable to the Ministry of Justice's central regional manager for courts (at the time of Ms Dodd's dismissal, Terry Silcock, but now Sue Little).

[8] The predominance of the courts' work in Taranaki is in their criminal jurisdictions and in this connection and generally, the courts' manager must necessarily have close working associations with a number of others including Police, the New Plymouth Crown Solicitor, the Department of Corrections and local legal practitioners, not to mention the various judges, both resident and visiting. Accurate and timely record keeping is a very important function of the courts' manager and her staff. That is especially important in the case of persons appearing before the courts on criminal charges and who are remanded on bail or in custody, and whose custody or liberty depends on the accuracy of record keeping of judicial or quasi-judicial decisions affecting their cases.

[9] Taranaki, and New Plymouth in particular, are modestly sized entities. The latest census information available (2006) discloses that the population of New Plymouth city is approximately 42,000, of the New Plymouth District is approximately 69,000 and of the area generally known as Taranaki, is 104,000. Court staff and even some judges come from, or are connected to, Taranaki families and it is inevitable that relations or friends or acquaintances will, from time to time, be dealt with by the courts in circumstances that may raise at least perceived conflicts of interest among both judges and court staff. The potential for such situations arises more frequently and starkly in provincial courts such as New Plymouth, than in larger courts serving bigger populations.

[10] Another difference between such provincial courts as New Plymouth and their larger city counterparts is the greater informality of communications between

the various actors in the justice play. This enables the court process to move more smoothly than it otherwise might. So, for example, local legal practitioners can and do frequently inquire of court staff about the progress of their clients' cases, especially where there may be other courts involved as there frequently are. A defendant may face charges simultaneously in more than one district court or proceedings in other district courts may be transferred to the New Plymouth Court to be dealt with collectively and conveniently. There are similarly close informal mechanisms involving the Police and the local prison. The workability of these informal processes is dependent largely upon the personalities involved and, in the case of the Taranaki courts, of the manager/registrar.

[11] The District and High Courts (and the former's subsidiaries of the Youth Court and the Family Court) operate a computerised records system known as CMS. This consists of a number of databases maintained nationally into which information from original paper records on court files is transferred, updated and shared across the Ministry of Justice and also with relevant external agencies. Whilst the High Court's systems are on single nationwide databases within CMS, each district court maintains its own database although there is cross-referencing between these district court databases and what is known as 'read-only access' is possible between them.

[12] To use an example pertinent to this case, a defendant in criminal proceedings, bailed by a judge or registrar on specified conditions, should have a CMS electronic record of that originally paper-based transaction including any variations or other subsequent relevant details. This CMS record will constitute an electronic bail bond, the accuracy of which is important to both the defendant and to police charged with enforcing bail and any conditions attaching to it. As with any electronic database that depends upon multiple human inputs and updates, it is inevitable that some such records are out of date or otherwise inaccurate.

[13] In achieving a modus vivandi, the manner in which provincial courts in general, and the Taranaki courts in particular, have operated has sometimes been at the limits of, and occasionally beyond, how the Ministry expects, ideally or theoretically, its staff to operate these records systems. So, for example, although Ministry witnesses say that the CMS operating rules preclude Taranaki court staff

from accessing, for example, Whanganui courts' CMS records, even for proper purposes, this happens for reasons of operational expediency across numerous combinations of district courts across the country and for proper purposes of justice administration. Indeed, to use this example, purporting to restrict access to Whanganui District Court CMS records to approved staff only of that court, seemed to strain considerably the CMS operating guidelines as these were interpreted by Ministry witnesses.

[14] With that background which is important for an understanding of the context in which relevant circumstances occurred, I move to those events that led to the defendant's dismissal.

[15] Ms Dodd was appointed to her roles already mentioned in 2001 from a very different background in travel agency. She had not followed the traditional public service career path within the Ministry. The evidence establishes that Ms Dodd then inherited a court administration that was antiquated and, in some significant respects, dysfunctional. By any account, Ms Dodd's management of Taranaki courts has improved their performance and has transformed the dysfunctional to functionality. She has achieved consistently high work performance assessments and is well liked and well respected not only by her own staff, but by local (and visiting) judges, police officers, legal practitioners, and others integral to the operation of the justice system in Taranaki. Importantly, also, Ms Dodd's work performance has been consistently to the satisfaction of her line managers within the Ministry of Justice.

[16] In late 2006 Ms Dodd's nephew was a party in proceedings in the Family Court at New Plymouth with his domestic partner, whose identity is now the subject of a non-publication order and to whom I will refer as 'the complainant'. A Family Court judge minuted the Family Court file that Ms Dodd was not to have any dealings with it. There is, however, no evidence about how that minute was caused to be made or even whether Ms Dodd was aware of it.

[17] Unfortunately, non-publication orders made during the hearing of this case and affecting the complainant and her parents, one of whom I describe as "the other

Ministry [of Justice] employee", tend to make more enigmatic the identification of the persons just referred to and their relationships with the defendant.

[18] Ms Dodd is not the only courts' employee in Taranaki with family connections to parties in proceedings and indeed in this case. Her nephew is the former domestic partner of the daughter of the other Ministry employee in Taranaki. It is unclear from the evidence whether this other Ministry employee was answerable in a line management sense to Ms Dodd. Nevertheless, it is clear from the evidence that this other employee and her husband, at times independently and at other times in conjunction with their daughter, complained about Ms Dodd and about her nephew. Additionally, and in the course of events relevant to this case, a complaint was made about the conduct in her court role against the other Ministry employee. Ms Dodd referred that complaint to another relevant manager outside Taranaki to avoid any conflict of interest and although the outcome of that process was not clear from the evidence, it is apparent that the other Ministry employee remained resentful towards Ms Dodd.

[19] In these circumstances it is necessary to examine very carefully not only the allegations made against the defendant, but also the circumstances in which they were made and the interests of their maker or makers.

[20] In very early 2008 the defendant's same nephew was charged with a number of serious criminal offences in respect of the same complainant arising out of domestic disharmony between them. The prosecution was brought in the District Court at Hawera and, almost immediately (on 17 January 2008), the complainant wrote to Ms Dodd's immediate manager, the then central regional courts' manager, Mr Silcock. The letter complained in strong terms of anticipated interference in the prosecution by Ms Dodd although did not provide any particulars in support of that allegation.

[21] Mr Silcock responded to the complainant on 23 January 2008 expressing his confidence in Ms Dodd but leaving open the possibility for the complainant to provide further particulars if she wished to do so. No further communications were received from the complainant or her family at that time. Nevertheless, out of an

abundance of caution, on 5 February 2008 Mr Silcock arranged to have the prosecution transferred to the Whanganui District Court, away from Ms Dodd's sphere of influence and that of the complainant's mother (the other Ministry employee).

[22] Ms Dodd's nephew was represented by a New Plymouth solicitor, Paul Keegan. On 10 occasions, whilst the nephew's prosecution was before the District Courts, Mr Keegan asked Ms Dodd to report to him about the status of the court files which she did by accessing them on CMS, although by read-only access. At least some of these 10 occasions occurred after the transfer of the file to the Whanganui District Court so that Ms Dodd's access was on those occasions from a CMS terminal in the New Plymouth Court to what was then a Whanganui court record. Those 10 occasions of accessing her nephew's records on CMS formed the basis of the lesser of the two findings of misconduct in employment that led to Ms Dodd's dismissal. She accepts that doing so was wrong.

[23] There was evidently some uncertainty about the nephew's intended pleas to the charges he faced. At an early stage of the prosecution, the complainant made a victim impact statement (VIS) some of the substance of which the nephew disputed, regarded as unduly harsh, and which he was advised could well see him imprisoned if it was presented to a judge on sentencing following a guilty plea. Ms Dodd's nephew pleaded not guilty to the charges and a date for trial in Whanganui was fixed.

[24] Ms Dodd was on leave and part of a family group that travelled to Whanganui on the day of the scheduled not guilty hearing. As a result of negotiations between the nephew's solicitor and the prosecutor, which included agreement about the general nature of the VIS to be presented, the nephew changed his pleas and was remanded on continued bail for sentencing. It appears that it was agreed between the nephew's lawyer and the prosecutor that the content of the VIS would be such that the nephew would be unlikely to be imprisoned.

[25] At some point in the prosecution of the nephew (which point was not established in evidence, but before the conclusion of the prosecution), there was

another incident involving Ms Dodd, her nephew and the prosecution that subsequently featured in the plaintiff's decision to dismiss her summarily. The terms of the nephew's bail prohibited him from being in the same Taranaki town in which the complainant lived. To enable the nephew to attend a significant family birthday event, also attended by Ms Dodd, the nephew's bail terms were varied (with the agreement of the police) by a registrar or deputy registrar of the Whanganui District Court. This variation, however, was not recorded electronically on the CMS record that was accessible by the police. Someone, probably a member of the complainant's family, complained to the police that the nephew had breached the terms of his bail by both being present in the town where the complainant lived and in another unspecified way which would have breached the original terms of bail but was permitted by the variation.

[26] Police arrived at the family birthday event intending to arrest Ms Dodd's nephew who faced the prospect of spending two nights and more than a day in police custody before he could be brought before a court. Ms Dodd was aware of the terms of her nephew's bail. Her brother, her nephew's father who also employed him, was able to persuade police, by reference to GPS vehicle records, that the nephew could not have or at least was very unlikely to have been in the complainant's town in breach of his bail terms. It was a more difficult task, however, to persuade the police officers that their bail records were wrong. Ms Dodd was confident that even if her nephew's solicitor could have been contacted (despite her belief that this was highly unlikely), Taranaki police would not act on a solicitor's advice of bail record error alone in these circumstances.

[27] Accordingly, Ms Dodd telephoned the deputy registrar responsible for criminal matters at the New Plymouth Court and asked her to provide police with a copy of the CMS generated bail bond which included the variation and verified that her nephew was not in breach of his bail. This was a request of her subordinate by Ms Dodd, not a direction to the former by the latter. Ms Dodd's deputy, Sue Broughton, went to the New Plymouth courthouse in response to this request and a wrongful arrest of Ms Dodd's nephew was avoided when police were shown the correct bail record printed out by Ms Broughton. No alteration to CMS or other records was undertaken by Ms Broughton. Rather, the bail bond copied from read-

only access to CMS established that, as occurred not infrequently, the electronic record available to the police was not up to date and was therefore inaccurate.

[28] This incident was not known to the Ministry until it was referred to by Ms Dodd during the investigation of the allegations of impropriety against her. She revealed it when seeking to persuade the plaintiff of her appreciation of potential conflicts of interest and how to deal with and avoid them.

[29] In the period leading up to mid May 2009, Ms Dodd had a number of amicable personal dealings with the complainant whose child was, in effect, Ms Dodd's great-nephew or great-niece. Ms Dodd attempted to fulfil the role of go-between for the two extended families and considered, as a result of her own observations, that relations with the complainant had improved since the events that led to the prosecution more than a year previously, and that the prognosis was good. Her relationship with the complainant was, in these respects, purely personal and familial and was not conducted by her in her work role.

[30] On 12 May 2009, three days before Ms Dodd's nephew was due to be sentenced, his lawyer, Mr Keegan, ascertained that the prosecutor proposed submitting the earlier and, from the nephew's point of view, significantly unfavourable VIS, to the sentencing judge in Whanganui. Mr Keegan rang Ms Broughton at the New Plymouth Court to advise her of this fact and Ms Broughton communicated it to Ms Dodd who, I infer, was effectively a 'go-between' on many aspects of the prosecution between her nephew and his lawyer and vice versa. This advice and the prospect of the nephew's imprisonment upset Ms Dodd greatly and generated, over the course of about an hour and three-quarters on that morning of 12 May 2009, the acknowledged serious misconduct that led to her dismissal.

[31] During that period, Ms Dodd made three attempts to telephone the complainant about the matter of her VIS. She was successful in speaking with the complainant on the third attempt to do so. The best evidence before me of what transpired during that telephone call that occupied about two minutes and 33 seconds, is provided by Ms Dodd's subsequent statement to a police detective that can be summarised as follows.

[32] Ms Dodd obtained the complainant's agreement to ask her a question. Ms Dodd asked whether the VIS intended to be produced had been written by the complainant or by a detective responsible for the prosecution of the nephew. The complainant confirmed that she had written the VIS. In response to Ms Dodd's question when the VIS had been written, the complainant said that this had been in February 2008 shortly after the nephew's offences had first been committed and then more than a year previously. Ms Dodd then asked the complainant why she had changed her mind following advice at the hearing in Whanganui that she would provide a more favourable VIS. The complainant responded that the nephew had hurt her, that she had taken a long time to get over it, and that the nephew deserved to be punished. Ms Dodd told the complainant that she was surprised that she (the complainant) had changed her mind as she had understood that the complainant and her nephew were getting on well. The complainant was reported by Ms Dodd to have said that she (the complainant) did not know why she had done so. The telephone call then concluded.

[33] Almost immediately Ms Dodd appreciated that she should not have made the call and although there is some suggestion of a series of text messages between the nephew and the complainant and vice versa following Ms Dodd's call, these did not form any part of the plaintiff's decision to dismiss the defendant.

[34] On the following day, 13 May 2009, the complainant's father made an official complaint against Ms Dodd in writing to the Ministry's national manager of district courts, Anthony Fisher. The complaint against Ms Dodd alleged very serious misconduct by her. The complainant's father asserted that the defendant had made telephone contact with the complainant for the purpose of, and did remonstrate in highly inappropriate terms about, the contents of the VIS. There was no evidence to support this serious allegation about the purpose or content of the telephone call. The Ministry's investigator (Graeme Astle) concluded eventually that Ms Dodd had not "remonstrated in highly inappropriate terms" about the contents of the VIS when she spoke to the complainant. It follows also that her intention in telephoning the complainant was not to do so.

[35] Mr Fisher alerted Mr Silcock to the complainant's father's complaint and Mr Silcock took the matter up with Ms Dodd who responded both verbally and in writing.

[36] There was an initial error in the communications between Messrs Silcock and Fisher about whether Ms Dodd had spoken to the complainant by telephone on 12 May 2009. Although it is clear that she did so and so admitted to Mr Silcock orally on 13 May 2009 and subsequently in writing to him, Mr Silcock conveyed to Mr Fisher that Ms Dodd had not spoken to the complainant on 12 May 2009. In the absence of evidence from Mr Silcock, it is not possible to explain why this error occurred but I am satisfied that it did. Mr Fisher conveyed that erroneous advice from Mr Silcock to the complainant who, perhaps understandably, rejected this as a lie by the defendant in a subsequent e-mail communication to the Ministry on 7 June 2009. I am satisfied that this error and Ms Dodd's response to it contributed to the Ministry's decision, taken on 25 June 2009, to investigate formally the complaint. Although not then known, the seriousness of the complaint had been overstated by the complainant. Also not then known to have been in error, the complainant asserted that in her initial response to the complaint, Ms Dodd had lied. This was not an auspicious start to the Ministry's investigation that led eventually to Ms Dodd's dismissal.

[37] Also by a process which the evidence does not clarify, the Crown Solicitor at Whanganui assembled a comprehensive complaint against Ms Dodd that he forwarded to the Ministry on 20 July 2009. Again, in circumstances that are not explained in the evidence, by 14 July 2009 the complaint against Ms Dodd had been referred to the police and an inquiry commenced, probably related to the serious criminal offence of attempting to pervert the course of justice. The Crown Solicitor's complaint reiterated the allegation that Ms Dodd had made contact with the complainant "to remonstrate in highly inappropriate terms about the contents" of the VIS. The similarity of this language and the complainant's father's complaint may tend to indicate the origin of the complaint to the Whanganui Crown Solicitor.

[38] Ms Dodd was made aware of this complaint through Mr Silcock and responded to it both orally and in writing. Mr Fisher then responded formally to the

complainant's father on 25 May 2009 but on 7 June the complainant herself wrote to Mr Fisher re-emphasising her complaint. Mr Fisher advised the complainant by letter of 25 June 2009 that he would investigate formally her complaint. On the same day, Ms Dodd was interviewed by a police detective who both made an analysis of relevant telephone calls and took a detailed written statement from her. This was part of a thorough police investigation into whether Ms Dodd may have committed any criminal offence, but no prosecution against her ensued.

[39] Following the complainants made to the Ministry about Ms Dodd's misconduct, an investigation was begun into these allegations. Except as is necessary to deal with particular allegations of unfairness or unreasonableness of the plaintiff's investigative and decision making process, I do not propose to set it out in detail. Much of the plaintiff's investigative methodology was careful, deliberative, and well recorded so that there can not be, and indeed is not, any challenge to its methodic fairness and reasonableness. Ms Dodd, with the benefit of legal representation, participated in the process and was generally kept informed and provided with appropriate opportunities to contribute.

[40] There are, however, some elements of the Ministry's investigation and decision-making process that are seriously challenged by Ms Dodd and so these must be examined.

[41] Before it was appreciated that the regional manager, Mr Silcock, was potentially a witness and otherwise involved in the background, he was the Ministry's designated preliminary decision maker. Mr Silcock appointed the Ministry's Graeme Astle to be its investigator of the events leading to and of the allegations of misconduct. In so appointing Mr Astle in writing, Mr Silcock disclosed his decision to suspend Ms Dodd from her roles during the course of the investigation although before she had been notified of it or, in particular, had any opportunity to address her employer about the proposal to suspend her.

[42] On 30 July 2009 the Ministry's formal terms of reference of its investigation into allegations of misconduct by Ms Dodd were published. These called upon Mr Astle to investigate and report on three serious allegations of misconduct. These

included not only the fact of Ms Dodd's telephone call to the complainant on 12 May 2009 and the repeated CMS access to her nephew's prosecution file but, potentially most seriously, an allegation that Ms Dodd had in effect intimidated the complainant. That reflected the complainant's father's complaint and also that of the Whanganui Crown Solicitor.

[43] Following a series of meetings with Ms Dodd and her counsel and exchanges of lengthy correspondence, the plaintiff's decision to dismiss the defendant summarily was taken and communicated to her on 21 September 2009.

[44] Ms Dodd lodged her personal grievance claim, including an application for interim reinstatement, with the Employment Relations Authority on 23 September 2009. Following an unsuccessful attempt to resolve matters by mediation on 16 October 2009, the Authority undertook its investigation on 1 and 2 December 2009, issuing its determination upholding Ms Dodd's claim and reinstating her on 17 December 2009.

[45] Ms Dodd was paid for the period of her suspension from early August until her dismissal on 21 September 2009 and immediately thereafter sought reinstatement. She was out of work from 21 September to 17 December 2009, a period of almost three months but did not qualify for an unemployment benefit. Because Ms Dodd sought reinstatement from the outset (and the plaintiff did not replace her other than on an interim basis), she felt unable to apply for a "permanent" position elsewhere in mitigation of her losses of income. Given all the circumstances, it is unrealistic to think that Ms Dodd could really have done so by taking temporary employment for that period.

The issues

[46] These are:

- whether, given Ms Dodd's concession that she had misconducted herself seriously in employment, her summary dismissal was unjustified;

- whether, in determining justification, the manner in which the plaintiff went about investigating and dealing with Ms Dodd was how a fair and reasonable employer would have done so in all the circumstances;

- whether summary dismissal was, in all the circumstances, what a fair and reasonable employer would have done;

- if dismissal was unjustified, whether Ms Dodd should have any or all of the remedies of reimbursement of remuneration and other benefits lost, compensation for distress and humiliation under s 123(1)(c) of the Employment Relations Act 2000 (the Act), and reinstatement to her former positions or to ones no less favourable to her;

- whether either party should be awarded costs and, if so, how much.

[47] Although both parties drew my attention to a number of previous cases and attempted to support their positions by analogies to the facts in those cases, for the most part these are so fact specific that little of value can be taken from them. An exception, however, is the litigation in which relevant principles were restated, which began in the Employment Relations Authority, progressed to this Court,[3] continued in the Court of Appeal,[4] and went to the Supreme Court in *Buchanan v Chief Executive of the Department of Inland Revenue.*[5]

[48] In *Buchanan*, two employees with otherwise unblemished service whose duties included accessing confidential computerised information about taxpayers' affairs did so but not for performance of duty reasons. The employer had a policy prohibiting expressly staff from accessing such information relating to family, friends and acquaintances and although it had been drawn to the grievants' attention, neither employee had read the code. A compliance audit disclosed that a number of employees had accessed and extracted information about family members.

[3] [2004] 2 ERNZ 392.
[4] [2005] ERNZ 767.
[5] [2006] NZSC 37; [2006] ERNZ 512.

[49] The Employment Relations Authority found that dismissals in these circumstances were justified on the basis that there had been serious misconduct but ultimately were unjustified because of disparate treatment of other employees in similar circumstances. In the Employment Court, the employer challenged the finding of disparate treatment and the former employees challenged the finding of serious misconduct. The Employment Court held that because the employer had accepted the employees' explanations that they were ignorant of their obligations, this acceptance rendered their actions less culpable and that they were therefore not guilty of serious misconduct. The Authority's finding of disparity of treatment and its decision to reinstate the former employees was also upheld. The case was determined on pre-s 103A principles so that questions of justification were governed by the judgment of the Court of Appeal in *W & H Newspapers Ltd v Oram.*[6]

[50] The Court of Appeal emphasised, in determining the seriousness of misconduct, the employer's obligations of secrecy and impartiality and of the employees' obligations to not only acquaint themselves with requirements but to comply with these. The Court held that it was open to the employer to conclude that the employees' actions had deeply impaired its confidence in them as employees.

[51] In declining leave to appeal, the Supreme Court noted that "the test for serious misconduct is now contained in s 103A of the Employment Relations Act" and concluded that any reconsideration of the *Oram* test would be of limited general importance in terms of s 13 of the Supreme Court Act 2003.

[52] I feel bound to note with respect, however, it is not "the test for serious misconduct" that is set out in s 103A as the Supreme Court assumed but, rather, the test of justification for dismissal which is broader than, although in some cases incorporates, serious misconduct in employment.

The case for the plaintiff

[53] Mr Sherriff began his closing submissions with a general proposition that encapsulates the plaintiff's case. Counsel said:

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[6] [2000] 2 ERNZ 448; [2001] 3 NZLR 29.

> Some employee errors are so egregious as to be irremissible; some conflicted conduct so fundamentally flawed as to irremediably destroy an employer's trust and confidence. That is what happened here.

[54] As with all general propositions, that may be so in some circumstances but the trick is to determine whether it is in the particular case in issue. No ringing statement of principle can substitute for the application in the case of the statutory tests of justification for dismissal under s 103A of the Act, namely whether summary dismissal was what a fair and reasonable employer would have done in all the circumstances and whether how that was done was what a fair and reasonable employer would have done.

[55] The plaintiff's case is that in addition to having acted fairly and reasonably in her investigation into and decision of the allegations against the defendant, she made the decision to dismiss summarily as would have a fair and reasonable employer in all the circumstances.

[56] Although this was expressed at length and in a number of different ways in submissions by her counsel, it comes down to this. The plaintiff says that the defendant's actions amounting to serious misconduct (the telephone call) and misconduct (the CMS access) were sufficient to cause such a loss of trust and confidence in the defendant that, irrespective of any other factors, summary dismissal was unjustified. Further, the plaintiff says that even if such explanations and/or other surrounding circumstances as have emerged at trial are taken into account, the defendant's failure to appreciate conflicts of interest in her role and to avoid or manage these do not restore sufficient trust and confidence in the plaintiff that the defendant should be given a second chance.

[57] Mr Sherriff submitted that this employer should not be required to be "divine" and to forgive serious misconduct by allowing the defendant a second chance. The plaintiff says that the integrity that is fundamental to the operation of the judicial system was compromised by the defendant's actions. She says that the defendant had to remain impartial and professional at all times and to be seen to be so. In particular, the plaintiff says that it was fundamental that there could be no

perception that family, friends, or others associated with court staff received more favourable or different treatment because of that relationship.

[58] The plaintiff says that the defendant created a conflict of interest between her roles as impartial court official and the partial aunt of an accused person. She says that the defendant received information in her role as a court manager at the courthouse and acted upon this as an aunt. The plaintiff says that this conflict and the defendant's failure or refusal to avoid or manage it, was particularly significant because she had been warned or instructed previously not to be involved with the case which had been transferred to another court for that very purpose, that is to avoid the involvement of two family members who were both court employees. Mr Sherriff emphasised that this was not a case of an honest but mistaken belief that the employee would not do any wrong, nor a case of insufficient training about the employee's obligations.

[59] Mr Sherriff emphasised the significance of the fact that in the course of the Ministry's inquiries and spontaneously, the defendant offered the experience of her management of another potential conflict of interest in an attempt to establish her understanding of such situations and capacity to deal with them appropriately. To the contrary, however, the plaintiff says that this disclosure reinforced Mr Hampton's concern that Ms Dodd would be unable to do so. It is more significant, Mr Sherriff emphasised, that this disclosure came after the Ministry's factual investigation had been completed but before a decision had been made about the consequences for the defendant.

[60] Mr Sherriff emphasised that this was not a case about the defendant's previous work performance or integrity and that it was about more than an error of judgment on the part of the defendant. Counsel submitted that Ms Dodd's employment agreement required that she comply with both the Department for Courts and Ministry and Justice Codes of Conduct including that she should not bring her employer into disrepute.

[61] Counsel submitted that a single act of misconduct can destroy an employer's trust and confidence in an employee even if the employee asserts that the conduct is unlikely to be repeated.

[62] Counsel for the plaintiff submitted that the consequence of the breach of the rule prohibiting appropriate access to information about family or friends is more serious than was the same conduct in the *Buchanan* case. In that case the employer was not brought into disrepute by the conduct because it was discovered by a systematic audit process. In this case, however, Mr Sherriff submitted that the Ministry had been brought into disrepute because the matter was generated by complaints by the complainant, her family, and a Crown solicitor.

[63] That is, however, not accurate in relation to the CMS information which was the analogy with the *Buchanan* case. Access by Ms Dodd to CMS in respect of her nephew's case was revealed only in the course of investigation into the other complaint of misconduct by the defendant.

[64] There is a further distinguishing factor in this case as compared to *Buchanan* in that the information was accessed in 'read only' form at the specific request of the nephew's solicitor for proper purposes of ascertaining the progress of the prosecution of the solicitor's client. To the extent that factual comparisons can be important, access to restricted records in the *Buchanan* case included that it was for purely voyeuristic reasons and included, in some cases, the creation of false records. That is not comparable with this case.

[65] Nevertheless, Mr Sherriff emphasised, correctly I think, the principle to be extracted from the *Buchanan* case that the Authority and the Court must consider not only the nature of the breach but also of the relevant circumstances of it.

[66] Mr Sherriff submitted that although Ms Dodd could not have controlled what happened to her (the advice from her nephew's solicitor of the erroneous or inappropriate VIS), she could and should have controlled her response to that unsolicited information. Counsel submitted that Ms Dodd acted emotively rather

than thoughtfully and, as was the case in *Williams v The Warehouse Ltd*,[7] put her personal concerns before her professional responsibilities. Mr Sherriff submitted that the defendant's telephone call to the complainant after other attempts to do so over a more than nominal period, amounted to serious misconduct which, alone, justified the defendant's summary dismissal.

[67] Turning to the requirement for procedural fairness and reasonableness under s 103A, Mr Sherriff submitted correctly that there is no challenge to the findings of relevant facts by Mr Astle but only to Mr Hampton's role in determining the consequences of these. Counsel for the plaintiff submitted, correctly also, that the defendant was represented at all material times by senior counsel and was provided with all relevant information. This included Mr Hampton's assessment that these events amounted to misconduct and serious misconduct. In a detailed letter to Ms Dodd's counsel dated 3 September 2009, Mr Hampton set out what he described as his preliminary view of the outcome of the complaints, namely that Ms Dodd should be dismissed. Before doing so, however, Mr Hampton received and considered written submissions made to him by Ms Dodd's counsel on 11 September 2009 and then also met with the defendant and counsel in person on 17 September 2009 to discuss these matters and to consider further representations on the defendant's behalf. Mr Hampton's was neither a hasty nor cursory decision to dismiss Ms Dodd. He took the period of about 2½ weeks from 3 to 21 September 2009 to reach that conclusion.

[68] I agree with the plaintiff also that Ms Dodd was provided with ample opportunities to furnish whatever information she wished Mr Hampton to have including information about her character from so-called "stakeholders". I accept also that such information as was only disclosed to the plaintiff after the dismissal cannot affect the justification of it. However, if the plaintiff ought reasonably to have inquired of those persons requested of Mr Hampton by Ms Dodd what would have been ascertained upon some inquiry is relevant to what the employer should have decided. This is not the same situation as arose in *Tamarua v Toll NZ Consolidated Ltd*.[8] Mr Sherriff emphasised that Mr Hampton accepted that Ms

[7] (2008) 6 NZELR 32.
[8] [2007] ERNZ 52.

Dodd had performed well in her roles previously and was held in high regard by so-called "stakeholders".

[69] The object of Mr Hampton's consideration ought, however, to have been the predictable future based on a number of criteria including not only her past impeccable performance but, importantly, the assessment of knowledgeable others of whether her misconduct would be likely to be repeated in all the circumstances. I am satisfied that Ms Dodd asked Mr Hampton to undertake those inquiries but that he declined to do so, preferring his own assessment of the future prognoses.

[70] Ultimately, it was for Mr Hampton to have made that assessment for himself. Such other input as he may and indeed should have sought, as a matter of fair and reasonable process, could not have made that decision for him. But it was incumbent on Mr Hampton to make his decision with the best information available. He did not do so. That information has been put before the Court by the defendant and in these circumstances, if the Court is satisfied that Mr Hampton ignored it erroneously and the information, viewed by the employer acting fairly and reasonably, would have affected the decision to dismiss, then dismissal may thereby be found to have been unjustified.

[71] Finally, the plaintiff's case is, nevertheless, that it could have been inappropriate, if not in breach of the law, for Ms Dodd to approach unilaterally so-called "stakeholders" to request comment about the defendant. Mr Sherriff did not elaborate on how doing so would be in breach of the law and although I accept that the law might not go so far as to require an employer in these circumstances to 'cold call' others working with the defendant, any request by her that Mr Hampton do so would address adequately any issues of appropriateness about speaking of her.

Codes of conduct

[72] Following the emphasis by the Court of Appeal in the *Buchanan* case on employee obligations to be familiar and comply with particular obligations imposed reasonably upon them by employers, it is necessary to consider the relevant codes of

conduct which governed Ms Dodd's employment, both generally as to conflicts of interest and, more particularly, in relation to CMS access and use.

[73] Remarkably in my view, it appeared that the plaintiff relied on two separate codes of conduct for employees within her Ministry although one, the Department for Courts code, may have been superseded by the Ministry of Justice's subsequently promulgated code. When, shortly after the conclusion of the hearing, I raised this apparent inconsistency with counsel for the parties by memorandum, the defendant accepted that both codes were applicable so it is necessary to address them both.

[74] The starting point for such an analysis must, however, be the defendant's individual employment agreement. The latest version of this was entered into by the parties in mid 2008 but took effect from 1 January that year. Clause 1 provided that "Other Ministry policies ,including the Ministry's Code of Conduct also apply to your employment." Clause 1.3 ("Your Responsibilities") provided that "In recognition of the Ministry's commitments to you to act as a good employer, you are expected to … [c]omply with the Public Service and Ministry of Justice Codes of Conduct."

[75] The relevant provisions of the 1998 Department for Courts code of conduct which, as already noted, is agreed to have been applicable, included the following.

[76] Among the "[f]irst principle" of behaviour was a requirement of confidentiality and security including to "prevent unauthorised accessing of files (electronic or otherwise)."

[77] Among the "[s]econd principle" of behaviour were requirements to "be impartial" and to:

> … ensure that any personal relationships you have in the workplace – such as having a family member or partner working in the same office – do not affect your work or that of others. Talk to your manager/supervisor about any relationship that has the potential to affect your work or that of others. Your manager will consider the degree and impact of the relationship on both yourself and the workplace and take appropriate action to resolve the matter.

[78] Under a subheading "Conflicts of Interest and compromising of integrity" the code provided:

> You must perform your duties honestly and impartially and avoid any personal, financial or professional situations which might compromise your integrity or otherwise lead to a conflict of interest.
>
> A conflict of interest could occur when:
> …
> - your private interest could be seen to influence or compromise the performance of your duties.
>
> You must discuss any likely, potential or current conflict of interest situation. Your manager/supervisor will determine if there is conflict of interest and decide the best course of action to resolve it.

[79] Under the code's "[t]hird principle" of behaviour "Employees should not bring their employer into disrepute through their private activities" and "You should avoid any activity (work related or private) which could reflect badly on the Department or jeopardise its relationship with Ministers, stakeholders or the general public."

[80] Part 4 of this code provided for "two main levels of misconduct", misconduct and serious misconduct. In this regard, "… a single instance or occurrence of serious misconduct will make an employee liable for a severe penalty, which could include dismissal, without the need for any further warning to be given." The code sets out some examples of misconduct and serious misconduct although these are not complete lists and "[t]he seriousness and consequences of the given action will depend on the circumstances in which it occurs." The only example given that may have included the serious misconduct of Ms Dodd was the catch-all "any behaviour which seriously undermines your working relationship with the Department."

[81] Part 5 of this code sets out a range of consequences of disciplinary action for misconduct or serious misconduct including a requirement to undertake training, reference to work or personal counselling, the implementation of formal warnings, final warnings, transfers and/or demotion, and dismissal.

[82] The next relevant document is the Ministry of Justice's code of conduct issued in November 2002. One of the three key principles of this code is:

"Appropriate Personal Conduct Outside Work – employees must not bring their employer into disrepute through their private activities."

[83] Employee responsibilities include "[t]o maintain appropriate standards of behaviour …", "[t]o ensure that you do not make or allow any unauthorised use of, or access to, the Ministry's property or resources, or information about its business or clients." Under a subheading "Conflict of interest", this code provides:

> You should avoid any activity or behaviour (work-related or private) which could reflect badly on you as an employee of the Ministry or on the Ministry in its work, and its relationship with the Government, other Public Service agencies and/or the general public.
>
> The fundamental principle is that you are expected to act honestly, impartially and without prejudice in performing your duties (ie you must act in the public interest) and use public resources for the purposes intended. You have a duty to avoid situations that might compromise you and/or the integrity of the Ministry.
> …
> In all your dealings with members of the public, clients and colleagues you must be fair and reasonable and avoid any appearance or suggestion of preferential treatment, favouritism, bias or discrimination. You are not permitted to engage in any activity that may place you in a position of conflict with your duty as an employee.

[84] In this Ministry code, "[a]ny action which would bring the Ministry into disrepute" and "[b]ehaviour that has undermined your working relationship with your employer or colleagues beyond repair" are two examples of a non-exhaustive list of unacceptable behaviours constituting misconduct or serious misconduct but not differentiating between these concepts.

[85] The State Services Commissioner's code of conduct ("Standards of Integrity and Conduct") published in June 2007 includes under the requirements to be "trustworthy" to "ensure our actions are not affected by our personal interests or relationships."

[86] Turning to the Ministry's "Security and Usage Guidelines for CMS Users", this appears to treat the District Court as a jurisdictional entity (albeit in its separate criminal and civil divisions) rather than each district court as a separate entity. Under the heading "CMS Records – Accessing", the following appears:

> CMS is provided for the purpose of effective record keeping and the administrative functions of the supported Courts and Tribunals.
>
> You should only access CMS records for purposes associated with your role at the Court or Tribunal in which you work.
>
> It is not appropriate to use CMS to obtain information about matters that you would not normally be able to acquire as part of your role. For example, it is not appropriate to use CMS to:
> - Obtain details of court hearings or proceedings in relation to celebrities and / or their families
> - Obtain details of proceedings where the media have widely reported that name suppression has been granted in respect of certain proceedings in a nominated court
> - Obtain information about an individual for some other purpose e.g. search CMS for a person's address for personal reasons or for use in other unrelated proceedings

[87] The guidelines note that inappropriate access to CMS records "could constitute misconduct under the provisions of the Ministry's Code of Conduct."

[88] So it may be seen from the foregoing that a conflict of interest on the part of a Ministry employee bringing the employer into disrepute might amount to misconduct or serious misconduct by that employee. Further, improper access to and use of CMS records might amount to misconduct by a Ministry employee. There was also a range of consequences or sanctions available to the employer for misconduct or serious misconduct that the plaintiff was bound to consider fairly and reasonably if satisfied to the requisite standard that there had been misconduct or serious misconduct.

The 'how' of dismissal

[89] This relates to the part of the statutory test for justification of s 103A dealing with "… whether … how the employer acted, [was] what a fair and reasonable employer would have done in all the circumstances at the time the dismissal … occurred."

[90] The defendant identifies several events which she says were, or were illustrative of, an unfair or unreasonable process having been employed in the investigations by the Ministry that led to the decision to dismiss her.

[91] First, the defendant says that relevant decisions were predetermined without regard to her accounts or explanations. This is said to have illustrated the absence of a fair and open-minded consideration of relevant events. Although Ms Dodd has not advanced, as a separate personal grievance, the justification for her suspension from duties on 4 August 2009, she says that this important procedural decision was clearly predetermined in breach of the rules of natural justice and of the obligation under s 103A that her employer was to treat her fairly and reasonably.

[92] It is difficult to disagree with that contention. In the absence as a witness of Mr Silcock who made that decision, his documentary records must speak for themselves. It is significant that the plaintiff did not really seek to contend otherwise in the presentation of her case.

[93] Mr Silcock's letter to Mr Astle of 30 July containing the terms of reference of the latter's investigation, referred to the fact that Ms Dodd had been suspended. That was incorrect. Suspension did not occur until about five days later and, I find, after Mr Silcock had gone through the pretence of telling Ms Dodd that he was considering suspending her and inviting her to make submissions to him before he made that decision. That indicates an unfair and unreasonable predetermination of an important element of the process that led eventually to Ms Dodd's summary dismissal.

[94] In these circumstances the Court must be careful to consider whether other important elements of the process were not similarly predetermined or otherwise considered by already closed minds and irrespective of Ms Dodd's explanations or promises for the future. Ms Dodd's case is that such a blatant predetermination makes more probable other unfairnesses and predeterminations later in the process.

[95] Next, the defendant says that, again in breach of natural justice and the statutory requirements of fair and reasonable treatment, the plaintiff did not consider, either at all or at least sufficiently, the context in which she misconducted herself. That includes, in particular, Mr Hampton's refusal to consider Ms Dodd's personnel file before he made the decision to dismiss her. More significantly, however, was

his narrow focus on her past work performance, in determining the crucial question of whether the plaintiff as employer still had trust and confidence in Ms Dodd.

[96] In his consideration of this question I am satisfied that Mr Hampton did not take into account the relevant views of others in the best position to know and confirm Ms Dodd's commitment to avoid such misconduct in the future. Ms Dodd, herself and through her counsel, acknowledged her wrongdoing and repeatedly committed not to repeat it. However, Mr Hampton did not take into account, as he should have, the views of others including Ms Dodd's immediate managers and others within the court system such as (but not restricted to) judges whom the evidence now shows retained their trust and confidence in her. Mr Hampton, as the plaintiff's delegated decision maker, had not ever been a registrar although Ms Dodd's line manager, Mr Silcock, had been and, of all senior managers in the Ministry, probably knew her best. It is remarkable that Mr Silcock, at least, was not consulted about an important consideration of which he was better informed than Mr Hampton and other Wellington based senior managers.

[97] To the extent that this finding requires preferring the evidence of one witness to another, I conclude that although Ms Dodd, herself and through counsel, offered to Mr Hampton to provide character referees, by his demeanour and expressly, Mr Hampton responded by indicating that there was no point in doing so because he accepted the fact of Ms Dodd's past good work performance. But I conclude that this conflated two separate issues. Whilst past work performance was of some relevance, of more importance to Mr Hampton's task were matters of Ms Dodd's insight into her misconduct and an assessment of the future reliability of her assurance that she would not act similarly again. I conclude that Mr Hampton wrongly excluded, or at least significantly minimised, that consideration. In particular, he declined to consider the views of others who were best qualified to provide information for that assessment.

[98] In determining the important matter of the defendant's assurances of future conduct, Mr Hampton relied significantly on Ms Dodd's appreciation or view of the incident related earlier in this judgment where she was instrumental in her nephew avoiding being unjustifiably arrested for breach of bail. In the course of a discussion

between Ms Dodd and Mr Hampton, the former, apparently spontaneously offered her account of this incident as an example of how she was able to both recognise and manage a potential conflict of interest. Mr Hampton's view was that this amply confirmed for him that Ms Dodd was still unable to identify and manage such conflicts of interest and her recounting of this event was a significant factor in his conclusion of his loss of trust and confidence in the defendant. In Mr Hampton's view, the most that Ms Dodd could have done justifiably in those circumstances was to have tried to contact her nephew's lawyer so that he could liaise with the Police about the question of bail. Mr Hampton believed that, even although Ms Dodd asked Ms Broughton to deal with the matter, this was still an unacceptable conflict of interest, giving her nephew improperly favourable treatment not available to others without the same family connections.

[99] In the Employment Relations Authority it was even suggested for the plaintiff that it would have been better for Ms Dodd's nephew to have been detained unlawfully in custody rather than for her to have confirmed his correct bail position as she did. Perhaps understandably in light of its elevation of cynical utility over human rights justice principles, that position was modified for the plaintiff in this proceeding. Mr Hampton suggested in his evidence before me that other ways of achieving the same result ought to have been tried, including contact with the nephew's lawyer.

[100] I find, however, that Ms Dodd's assessment of the unlikelihood of doing so on a Saturday night was probably correct. So too was her judgment, based on experience, that even if her nephew's lawyer had been contactable, it is unlikely that the Police would have accepted the lawyer's uncorroborated assertion of the incorrectness of their information in the same way that they accepted that position upon production to them of an electronic copy of the bail bond obtained by Ms Broughton. So Ms Dodd was faced with the stark alternatives of permitting a known unlawful imprisonment on the one hand, and asking another court employee to intercede by establishing the correct position on the other. Even if the latter might have been perceived to have provided preferential treatment for a relative, I do not think Ms Dodd could be condemned for the choice she made. That was not, the stark

choice the plaintiff believed Ms Dodd to have made, however, and for which she was thought to have been beyond redemption.

[101] There is another important factor that could not have been taken into account by Mr Hampton because of his failure or refusal to seek the views of other knowledgeable persons. Although, to someone in a main centre busy court or within the bureaucracy, it may seem unlikely, I am satisfied nevertheless that it is probable that Ms Dodd would have done the same thing for someone who was not her nephew but in the same circumstances. Put another way, I think it is unlikely that Ms Dodd's nephew was afforded favourable treatment as compared to others by her intervention on this occasion.

[102] The evidence revealed an earlier not dissimilar incident involving someone who was unrelated to Ms Dodd which occurred on a Christmas Day. In this incident Ms Dodd delayed going to Christmas lunch by attending the courthouse to correct a defendant's erroneous bail record to ensure that he was not detained in custody for longer than was necessary after his arrest on the previous evening. So, put shortly, the nephew's treatment that figures prominently in Mr Hampton's assessment of Ms Dodd was not more favourable than would have been anyone else's without family connections.

[103] I also consider that Mr Hampton, in his assessment of the nephew's alleged bail breach incident, over-emphasised the perceived conflict of interest and had insufficient regard to the paramount justice principle of avoiding wrongful imprisonment.

[104] This event, volunteered by Ms Dodd as evidence of her ability to recognise and avoid conflicts of interest in the course of Mr Hampton's investigation, weighed significantly with the plaintiff in concluding that even after these matters had been drawn to her attention, Ms Dodd could not be trusted to identify and deal properly with any future conflicts between her roles with the Ministry and involving family or friends in the court system. I have concluded that a fair and reasonable employer in the circumstances of the plaintiff would not have reached the conclusions that she

did about this incident and its consequences for the future. That is for the following reasons.

[105] The relevant circumstances over which Ms Dodd had no control, but in light of which she was obliged to identify and deal appropriately with a potential or actual conflict of interest, were as follows. She was at a private social function at which her (then) bailed nephew was also present. Ms Dodd was aware that the terms of her nephew's bail had been varied to permit him to be at the function. Police arrived, acting on a complaint that the nephew was at the function in breach of his bail. Ms Dodd knew that her nephew's lawyer was probably uncontactable on a Saturday evening but, even if he had been contactable, police would probably not have acted on the lawyer's say so that the terms of the nephew's bail had been varied to permit him to be at the function.

[106] In these circumstances, what was Ms Dodd to do? She was aware that she should not use her position to advantage her nephew in a manner in which others would not have been similarly advantaged. She was aware that if arrested, her nephew would probably spend two nights and a day in custody before being brought before a court and, because of a record keeping error, this would be an unlawful and unjustified imprisonment of him.

[107] In these circumstances, Ms Dodd referred the issue to another senior and responsible employee of the Ministry. She did not direct that other employee to do anything but, rather, asked her to assist the nephew by establishing the correct bail position from the Ministry's CMS records. The evidence establishes that if the same circumstances had arisen but the person concerned had not been her nephew or otherwise related or known to her, Ms Dodd would probably have done the same thing, that is, she would probably have taken the same steps to avoid the unlawful and unjust imprisonment of a person by establishing and confirming to the police the correct bail position. It follows that what Ms Dodd did on that occasion, by asking another member of the court staff to attend to this, was no more or less than would have been done for anyone else. In this way, Ms Dodd acted so that she neither advantaged nor disadvantaged improperly her nephew. I find that she was and is correct that she recognised a conflict or a potential conflict of interest and avoided,

or at least minimised, this in a reasonable manner that preserved her employer's interest in both systemic impartiality and in the avoidance of serious injustice.

[108] Other than to have done nothing which would have resulted in a wrongful imprisonment of a person on bail for a period of two days and a night and may have exposed the Crown to a claim for damages (as the plaintiff appeared to have said in the Employment Relations Authority was the preferable outcome), no alternative responsible action by Ms Dodd was suggested in the plaintiff's case.

[109] The plaintiff, through Mr Hampton, was wrong to have concluded otherwise. A fair and reasonable employer would not have reached the conclusion on this important issue that Mr Hampton did. It follows that a fair and reasonable employer in the circumstances could not have concluded thereby that Ms Dodd was incapable of recognising, and acting appropriately in circumstances of, conflicts of interest in her role. It follows, also therefore, that a fair and reasonable employer would not have concluded that she had lost trust and confidence in Ms Dodd by reason of this incident and the circumstances of its recounting which were a very significant factor in the plaintiff's decision to dismiss summarily and remain so in her opposition to reinstatement.

[110] Mr Hampton was alerted to the need to make broader inquiries of other persons knowledgeable about Ms Dodd, her performance of her duties, and especially about the trustworthiness of her assurances of future conduct. Had Mr Hampton considered the views of knowledgeable other persons with whom Ms Dodd worked about her insight into her misconduct and commitment not to re-offend, a fair and reasonable employer in the circumstances of the plaintiff (by her delegate) would not have concluded reasonably and objectively that there was such a loss of trust and confidence, both present and prospective, that Ms Dodd had to be dismissed summarily.

[111] Although in many respects the process of investigation and decision making that led to Ms Dodd's dismissal was how a fair and reasonable employer would have dealt with the serious allegations made against her, the foregoing departures from that standard are not insignificant, and especially when viewed in conjunction with

the conclusions I reach on the second leg of the s 103A test. It follows that, for the reasons set out above, I do not consider that the plaintiff acted as a fair and reasonable would have done in all the circumstances leading to, and at the time of, Ms Dodd's dismissal.

The 'what' of dismissal

[112] I deal first with what the plaintiff found was the more minor element of misconduct by Ms Dodd, her access to the CMS record system about her nephew's prosecution undertaken at the request of her nephew's lawyer.

[113] I am satisfied from the evidence that it was commonplace for court staff, including the defendant, to access information on CMS records relating to prosecutions at the request of persons with a proper interest in that information including, but not limited to, police officers, probation officers, and lawyers. I am likewise satisfied that this practice applied between different district courts in the circumstances outlined earlier in this judgment where proceedings were in multiple courts or transferred between them. Although the plaintiff's strict interpretation of the CMS operating rules may not have allowed for these practices, there was nothing sinister in them and indeed they contributed to the smoother flow of complex information necessary to the efficient operation of the court system.

[114] I do not consider that the plaintiff's rules for the use of CMS specify, at least sufficiently, what the plaintiff now wishes them to be interpreted to specify. Cases such as this, whatever their outcome for the individual employee concerned, almost inevitably generate an institutional reflection on the adequacy of such procedures following their close scrutiny. If the plaintiff wishes the CMS operational rules to prohibit what Ms Dodd did in this case, the plaintiff should so specify clearly and unambiguously.

[115] I do not consider that a fair and reasonable employer, in the circumstances of these parties in September 2009, would have dismissed Ms Dodd based substantially on a belief that she could not subsequently and sufficiently recognise similar conflicts of interest and avoid or at least manage these as expected by her employer.

Mr Hampton discounted too readily and too absolutely, the effects of what the defendant, as an intelligent, perceptive, and contrite employee, had already gone through. This had included a painstaking police investigation with the attendant risk of serious criminal charges, a suspension from her positions by her employer for a period of about seven weeks, publicity in local media about her plight, and other similar sobering events which, as Ms Dodd herself said and I accept, she would never wish to repeat. There was no suggestion that any other member of her family than this particular nephew, nor any other friend or acquaintance, would probably compromise the defendant's position in future. Almost immediately after the telephone call to the complainant concluded, Ms Dodd acknowledged her serious error illustrating her insight into the importance of the employer's concerns. The defendant was fully co-operative with both the police investigation and the Ministry of Justice's. These are all indicators of future non-repetition of past misconduct of which the plaintiff took no, or at least insufficient, notice in deciding to dismiss for the reasons she did.

[116] No, or at least insufficient, consideration was given by the plaintiff to alternative outcomes permissible under the relevant conduct policies and thereby contractual. In particular, it would have been entirely appropriate for the plaintiff to have considered and applied the sanctions of demotion, temporary or permanent, or reassignment of duties coupled with appropriate supervision and retraining as the consequences of her conclusion of serious misconduct by Ms Dodd.

[117] A fair and reasonable employer in all the circumstances would certainly have considered those options seriously including an investigation of their practicability. Such sanctions would have had real force. They may, for example, have included loss of remuneration, loss of seniority with its myriad implications for a senior civil servant, and would have marked publicly, including for other Ministry employees, the seriousness with which the plaintiff regarded the misconduct.

[118] This is not the first case in which this Court has noted a reluctance and sometimes an inability to consider alternatives to the extremes of dismissal on the one hand and complete exoneration of a misbehaving employee on the other.

Although in some cases the question of entitlement in law to tailor such an outcome may cause employers to shy away from its imposition, in this case (and on the evidence in the case of Ministry of Justice employees generally and probably other public servants), there is no question of the ability in law to do so. That reluctance or perceived inability by employers to think laterally about an appropriate sanction for misconduct less than dismissal also ignores the ability of it to be discussed with an employee and potentially agreed to. This Court sees many cases of employees who have misconducted themselves accepting that there should be some sanction that also gives an opportunity for rehabilitation but is short of the ultimate consequence of dismissal. The evidence suggests that had such an outcome been explored by the plaintiff with Ms Dodd, this proceeding might have been avoided entirely.

[119] The other assurance that employers nervous of doing so may have is that the ultimate test of justification for unjustified disadvantage in employment is not whether a sanction less than dismissal is mandated contractually. Rather, it is whether what was done was, in all the circumstances of the case at the time, what a fair and reasonable employer would have done; s 103A. So, even if, unlike the position in this case, a collective agreement, an individual employment agreement, or an employer's policies do not address explicitly an outcome for misconduct such as temporary demotion, the Authority or the Court may nevertheless, in an appropriate case, determine that to have been a fair and reasonable disadvantage to an employee in his or her employment and therefore justified.

[120] In this case, if Ms Dodd had been demoted for a period, perhaps including being transferred to another location where supervision and retraining could have taken place, such sanction, although a disadvantage to her in her employment may nevertheless have been well justified. As will be noted, that is reflected in the remedies allowed to the defendant in this judgment.

[121] Although serious misconduct, even what is effectively a single incident thereof, may usually constitute good grounds for a justified dismissal, that does not follow necessarily in every case. As the judgment of the full Court in *Air New*

Zealand Ltd v V[9] confirms, the test for justification does not only apply to the employer's decision that there was serious misconduct leaving the consequences of this entirely to the employer. Section 103A requires the Court (and the Authority) to apply the objective fair and reasonable employer tests also to the employer's decision about the consequences of serious misconduct, in this case summary dismissal.

Decision – Unjustified dismissal

[122] I have concluded that this is one of those rare cases where, although there was serious misconduct, the employer was nevertheless not justified in summarily dismissing the employee in all the circumstances. I am satisfied that the plaintiff's decision to dismiss Ms Dodd summarily was not a decision that a fair and reasonable employer would have taken in all the circumstances at the relevant time, and was not how a fair and reasonable employer would have investigated complaints of serious misconduct that led to summary dismissal. The s 103A tests not having been met, I find, as did the Employment Relations Authority, albeit not for precisely the same reasons, that Ms Dodd's dismissal was unjustified.

Remedies - Reinstatement?

[123] This is the primary remedy for unjustified dismissal and has been sought by Ms Dodd from the outset and also strenuously resisted by the plaintiff.

[124] The test is one of practicability and a very broad range of factors may be relevant in determining whether there should be an order for reinstatement. These include not only the events relied on by the employer to have dismissed but, more broadly, the particular nature of the employer's enterprise and the role performed by the employee, the employee's past performance of that role, events which have occurred since dismissal, and, to the extent that this can be predicted, the parties' likely future employment relationship including working relationships with other employees and those with whom the enterprise works more broadly.

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[9] [2009] ERNZ 185.

[125] The evidence in opposition to reinstatement comes from senior managers within the Ministry, including the plaintiff's most relevant senior deputy secretary responsible for its operations. Support for Ms Dodd's reinstatement is both broadly based and impressively intense. It comes from judges, other Taranaki court staff, the local bar, and police.

[126] I should emphasise that this is not some sort of popularity contest. Rather, even the unchallenged evidence of witnesses called for the defendant must be analysed by reference to the practicability of reinstatement, that is the re-establishment of a harmonious and successful working relationship.

[127] It is really inarguable that, since about 22 December 2009, when Ms Dodd returned to work as directed by the Employment Relations Authority, this has both resumed and subsequently continued well, even taking account of the artificiality of some of the temporary mechanisms in place.

[128] Mr Sherriff criticised Ms Dodd for keeping notes and records of her interactions with her supervisors over that period. Counsel submitted that this indicated a fundamental lack of trust and confidence in her employer on the part of Ms Dodd. I do not agree. As this Court's judgment of 22 December 2009, declining to stay the Authority's reinstatement order, confirms, her reinstatement was subject to a number of conditions including making frequent reports to her manager and avoiding use of CMS. Although there is no suggestion of breach by Ms Dodd of these requirements, they were nevertheless both temporary and constrained somewhat artificially the usual performance of her various duties by the defendant. I accept, also, that Ms Dodd's record keeping followed the advice of her counsel that was understandable in the circumstances. Nor has Ms Dodd been alone in taking this cautious approach. Ministry senior managers have also been careful (including by record keeping) to ensure that Ms Dodd has adhered to the undertakings she gave this Court about how her reinstatement would be undertaken and it is only natural that notes and other records have been kept for that purpose.

[129] I am satisfied that, given finality of reinstatement, these somewhat artificial conditions will dissipate in time as greater trust is re-established between the parties.

[130] Despite what I accept are the genuine concerns of senior Ministry managers, I consider that the Taranaki community and its court users can have confidence that the defendant will continue to perform her roles as she did before dismissal. In particular, I consider that the plaintiff can be assured that all persons will be treated fairly and equitably irrespective of their personal relationships with court staff and that any conflict of interest, actual or perceived, will be able to be identified and avoided, or at least managed, in future.

[131] I am satisfied that reinstatement is a practicable and appropriate remedy for unjustified dismissal and I make an order reinstating Catherine Anne Dodd in her positions as Taranaki courts' manager and registrar of the High and District Courts at New Plymouth with retrospective effect to the date of her unjustified summary dismissal, 21 September 2009. That will mean that all benefits of employment (including salary lost between 21 September and 22 December 2009 which will now have to be reimbursed by the plaintiff) are to be regarded as continuous.

Other remedies?

[132] Although Ms Dodd has incurred other losses as a result of her dismissal, that does not necessarily mean that she must be compensated in full for these. Section 124 of the Act requires that Ms Dodd's contributory fault that led to her dismissal be reflected in the remedies granted. Although I consider that her reinstatement which I have ordered should not be affected by this requirement, other remedies to which she might otherwise have been entitled must reflect her significant contributory fault, the nature of which is both admitted and clear from this judgment.

[133] As did the Employment Relations Authority, I consider that a refusal to grant monetary remedies for distress and similar non-economic losses will meet that obligation. By my calculation, Ms Dodd went without approximately three months' salary, somewhere in the region of $24,000. Even although the terms of the reinstatement order will require payment for that period, its loss at the time was not insignificant. I accept, also, that these events and their outcomes distressed and humiliated her significantly. Had she not been culpably responsible for the circumstances that led to her dismissal, she might have expected substantial

monetary compensation for these consequences under s 123(1)(c). But to reflect that culpability under s 124, I am not prepared to award compensation for such non-economic losses. In monetary terms, that might be seen as a reduction of perhaps as much as $30,000 that Ms Dodd might otherwise have expected, in addition to what will now be the temporary deprivation of income of about $24,000.

[134] So there must be and are significant reductions in remedies to reflect the defendant's culpable contributory conduct that led to her dismissal.

Costs

[135] The defendant has been substantially successful in both the Employment Relations Authority and in this Court and is entitled to costs. If these cannot be settled between the parties within two calendar months from the date of this judgment the defendant may apply by memorandum in the usual way with the plaintiff having the further period of one month to respond by memorandum.

GL Colgan
Chief Judge

Judgment signed at 2.30 pm on Friday 2 July 2010