



THEMES IN EMPLOYMENT LAW

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INCOMPATIBILITY IN THE WORKPLACE

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I INTRODUCTION

It is a fact of life that you probably will not get along with everyone you meet. In the same vein, you probably will not get along with everyone you work with.

Ideally, any problems between staff members will be resolved by the parties concerned discussing their respective concerns and issues and coming to a workable agreement. However, there will be rare instances where the problems are so severe that incompatibility has become "virtually chronic."¹ In those circumstances, where the employment relationship is "irreparable" and can be attributed substantially to the employee concerned, dismissal of that employee is a possibility if carried out in a procedurally fair manner.²

This editorial will briefly provide an explanation of the law surrounding dismissals for incompatibility and then summarise a recent Employment Court case: *Hayward v Tairāwhiti Polytechnic*³ which dealt with the issue of alleged incompatibility.

II A SUMMARY OF THE LAW

If the necessary level of incompatibility exists and is caused by the employee, an employer may be justified in taking action by way of a warning, or possibly dismissal. Any warning given, or dismissal made, must be both substantively and procedurally fair. It should also be noted that whether a dismissal or action which occurred after 1 December 2004 is justified must be determined on an objective basis (by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred).⁴

Cases involving a justified dismissal on the grounds of incompatibility are not common. As the Court in *New Zealand Fire Service Commission v Reid* held:⁵

It will be an unusual and rare case in which an employer may justify dismissal of an employee because of an irreconcilable breakdown of trust and confidence in the employment relationship.

The onus is on the employer to show that the dismissal is justified. Every case needs to be considered on its own merits.⁶

¹ *Ngata-Aerengamate v Attorney General in respect of the Chief Executive of the Department of Internal Affairs* unreported, RA Monaghan, 17 July 2001, AA 85/01, page 11.

² *Mabry v West Auckland Living Skills Homes Trust Board (Inc)* unreported, Travis J, 19 December 2001, AC 86/01.

³ *Hayward v Tairāwhiti Polytechnic* unreported, Travis J, 3 August 2005, AC 43/05.

⁴ Employment Relations Act 2000 s103A.

⁵ *New Zealand Fire Service Commission v Reid* [1998] 2 ERNZ 250, 280.

⁶ *Mabry v West Auckland Living Skills Home Trust Board (Inc)* unreported, Travis J, 19 December 2001, AC 86/01, para 33.

The case of *Mabry v West Auckland Living Skills Home Trust Board (Inc)*⁷ summarised the factors that need to be considered in determining whether dismissal on the grounds of incompatibility will be justified:

Whether the employer was entitled to come to the conclusion that the employment relationship was irreparable

If so, whether the irreconcilable breakdown was attributable wholly or substantially to the employee

Whether the manner in which the employer carried out the dismissal was fair.

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In determining whether the employer was entitled to conclude that the employment relationship was irreparable, the facts of each case will need to be looked at in detail. The facts will need to be "entirely convincing."⁸ This will involve looking at such things as relevant actions and communications by the employee and employer, for example, any abusive or aggressive behaviour or failure to communicate.

If it is concluded that the employment relationship was irreparable, it must then be shown that the employee was either wholly or substantially the cause of the incompatibility. There will often be more than one protagonist involved in the situations which led to the breakdown in relationship. An employer could not be justified in dismissing an employee if it was itself substantially the cause of the breakdown.

In *Marshall v Conway Shipping Ltd t/a Seatrade New Zealand*⁹ the Authority found that there was a sufficiently serious level of incompatibility between the employee and managing director to have the potential to justify dismissal. However, the Authority found that it was not prepared to find that the employer (through the managing director) was the cause of the breakdown and was also not prepared to find that the employee's actions were the cause of the breakdown. It was held that the dismissal was unjustified but no remedies were awarded.¹⁰

As well as proving substantive justification for the dismissal, the manner in which the dismissal is carried out must be procedurally fair, in the same way as for all dismissals. A procedurally fair process will include:

- a full and fair investigation;
- the employee being made aware that their employment is in jeopardy;
- telling the employee of the allegations against them;
- allowing the employee an opportunity to respond to allegations; and
- advising the employee of the right to have a representative at any disciplinary meetings.

III CASE LAW EXAMPLE – HAYWARD V TAI RAWHITI POLYTECHNIC

⁷ *Mabry v West Auckland Living Skills Home Trust Board (Inc)* unreported, Travis J, 19 December 2001, AC 86/01.

⁸ *Reid v New Zealand Fire Service Commission* [1999] 1 ERNZ 104, 107.

⁹ *Marshall v Conway Shipping Ltd t/a Seatrade New Zealand* unreported, RA Monaghan, 15 October 2003, AA 311/03.

¹⁰ *Marshall v Conway Shipping Ltd t/a Seatrade New Zealand* unreported, RA Monaghan, 15 October 2003, AA 311/03, 11.

It is useful to look at the most recent case law example where the Court considered dismissal on the grounds of incompatibility. In this case the Court found that the alleged grounds of incompatibility were insufficient to justify dismissal. However, as mentioned above each case needs to be considered on its merits.

A Introduction

In this case, the plaintiff was a senior salaries officer at the defendant's polytechnic. She was dismissed for incompatibility with her manager and other members of her team and for exceeding the salary cap. (The defendant alleged that the ground of dismissal regarding exceeding the salary cap was a moot point since they were able to rely solely on serious incompatibility).

The plaintiff alleged that she was unjustifiably dismissed. She also alleged that she was unjustifiably disadvantaged by a change to her job description and duties and failure to provide adequate support.

The Employment Relations Authority found that the plaintiff was not unjustifiably disadvantaged and that her dismissal was substantively and procedurally justified.

B Facts

The plaintiff had an employment history of nine years from 1993 until 2002 during which she was respected by her colleagues and generally got on well with them. However, from mid 2002 there were a number of incidents which led, ultimately, to the plaintiff's dismissal in February 2003.

In mid 2002, the plaintiff became concerned about the circumstances which had led to a colleague retiring (she blamed her supervisor). She also formed an adverse view about her supervisor's relationship with a member of the finance team.

In September 2002, the plaintiff's assistant made a complaint about her. The plaintiff was not initially given details of the allegations. The allegations included that the plaintiff had become possessive of her and made unkind comments about co-workers in an attempt to change her assistant's attitude about them. It was alleged that the plaintiff's nasty comments had become more frequent. As a result, the plaintiff's assistant was moved into a different office. The plaintiff was upset about this since it was done without consulting her.

The plaintiff's then-representative wrote to the defendant's CEO expressing concerns that the matter had escalated and that it was inappropriate for someone from the Employers and Manufacturing Association to be investigating the complaint since they were not independent.

The investigation report into the issues regarding the plaintiff contained critical comments from other team members, though specific examples were not given. The report recommended that management meet with the plaintiff and give her a warning.

In November the parties signed a mediated settlement and the plaintiff returned to work after a period of absence. After her return to work, the plaintiff sent a number of emails to her supervisor about how things were working between her and her co-workers plus numerous other concerns. The plaintiff also wrote to the HR manager about these issues. She also sought a competent assistant. She was advised of staff members who were available to assist her early the following year.

In December, the plaintiff was asked to attend a communication workshop, although she was not told that there was any special reason for this (such as to deal with her difficulties with other staff). A couple of days later, the plaintiff raised an unjustified disadvantage personal grievance.

There continued to be a number of issues between the plaintiff and her supervisor including issues with the plaintiff working overtime without consulting with her supervisor.

In February, a number of incidents occurred, ending with the plaintiff's dismissal, including:

- A meeting between the plaintiff and her supervisor about assistance available from other staff members. Both the plaintiff and her supervisor raised their voices during that meeting.
- The plaintiff raising a formal complaint about her supervisor and another staff member being in her office without her knowledge.
- The initiation of disciplinary action against the plaintiff regarding alleged overpayment beyond the salary cap.
- The plaintiff writing to the CEO and the HR manager complaining that her supervisor had removed her authority to manage salaries.

A few days later the plaintiff was invited to attend a disciplinary meeting to discuss a number of issues including incompatibility. As a result of the meeting, the plaintiff was dismissed.

C Alleged grounds for incompatibility

The defendant alleged there were multiple grounds for the finding of incompatibility in its letter explaining the reasons for the dismissal, all which were dismissed by the Court as being insufficient to amount to incompatibility.

The first reason was that the plaintiff had not used the monthly meetings as an opportunity to raise her concerns. The Court held that this did not provide a ground for finding incompatibility by the plaintiff since no other team member used those meetings to raise concerns and furthermore, the CEO accepted it could have been seen to undermine her supervisor if she had raised her issues in those meetings.

The second reason was that, instead, the plaintiff was raising her concerns by email to her supervisor, and continued to do so after he said that email was not acceptable when an immediate response was required whilst otherwise acknowledging that it was a means of keeping a good record. However, the Court found that the email

correspondence in the circumstances was not excessive and further that the volume of emails was largely because the plaintiff was not receiving replies.

The third reason was that the relationship between the plaintiff and her supervisor was not a healthy one and the plaintiff had said that she could not approach her supervisor because she did not trust him. The Court held that the plaintiff was not told that she was being viewed as the one solely responsible for the bad atmosphere, nor was she warned that unless her attitude changed, that could be viewed as serious misconduct. Instead, the defendant agreed to attempt to resolve the issues with the plaintiff whilst at the same time preparing disciplinary allegations:¹¹

The course conducted by the defendant in not advising the plaintiff of the concerns, which became evident to her for the first time in the course of the disciplinary process, constituted a breach of ... the [mediated] settlement.

Clearly there were difficulties between the plaintiff and [her supervisor] but they may well have been resolved with early intervention by [the HR manager] or by mediation with a frank exchange on the part of the defendant as to the views held by some members of the finance team. They could not be resolved when they were raised for the first time as the basis of the disciplinary proceedings. I find, in terms of *Reid*, that the defendant was itself substantially the cause of the breakdown in not bringing these matters to the plaintiff's attention in a timely fashion and in not endeavouring to resolve them, either by meetings or by the mediation process contemplated by the settlement. Had they been so addressed, as [the HR manager's] second 20 February letter contemplated, by weekly meetings involving him and [the plaintiff's supervisor] and the other disaffected members of the team, or by mediation, the incompatibility may well have been resolved. As the comments in the plaintiff's performance reviews demonstrate, there were 9 previous years of co-operative and helpful team service given by the plaintiff on which to build. Instead of dealing with those issues in such a fashion, the defendant moved first to a disciplinary process. This was not a ground for finding the plaintiff responsible for the breakdown in the relationship with [the plaintiff's supervisor] or others in the team.

The fourth reason was that the matters raised by the plaintiff's team showed that she was the one who was incompatible and their concerns regarding the working environment were legitimate. The Court found that there was only one incident where the plaintiff displayed aggressive behaviour towards other team members. Other statements from employees were general comments rather than about specific incidents:¹²

[I]f these matters had been brought to the attention of management, it was up to the management to resolve them with the plaintiff in a co-operative fashion. It would be only if the plaintiff had failed to co-operate, that the matters could then be pursued as an incompatibility issue. This could have led to a justified finding that the employment relationship had irretrievably broken down as a result of the plaintiff's actions. None of these matters, however, would have led to a finding that the plaintiff was guilty of serious misconduct which undermined the essential trust and confidence.

¹¹ *Hayward v Tairāwhiti Polytechnic* unreported, Travis J, 3 August 2005, AC 43/05, paras 109 - 110.

¹² *Hayward v Tairāwhiti Polytechnic* unreported, Travis J, 3 August 2005, AC 43/05, para 113.

The fifth reason given by the defendant was that there had been no “mind games” by management as the plaintiff claimed, but rather management had been genuinely trying to assist her in doing her job with offers of assistance from other staff members. The Court found that the defendant could not have relied on this reason to justify dismissal on the grounds of incompatibility.

The sixth reason given was that the plaintiff had gone directly to the HR manager and the CEO on issues that should have been dealt with by her supervisor and this undermined her supervisor. However, the Court accepted the plaintiff’s submission that she had not received a satisfactory resolution from her supervisor, and that the plaintiff acted in accordance with the defendant’s formal procedures in taking the issues to a higher level.

In the letter explaining the reasons for the plaintiff’s dismissal, the defendant’s CEO also set out other findings that he had made on other issues, although these were not explained at the time of the dismissal. The Court dealt with these findings in the following way:

- At one meeting the plaintiff had raised her voice, with other team members hearing this. She was demanding and her actions created a tense environment. However, the plaintiff’s supervisor also raised his voice. Furthermore, it was held that this should have been resolved earlier.
- The plaintiff was responsible for an unworkable atmosphere in the team and this prevented the team from doing their work. However, the Court found that there was no suggestion that there were any performance issues, or that the team could not have performed its work.
- The plaintiff had failed to extend the courtesy of introducing a temporary employee to the team, which allegedly showed that the relationship between the plaintiff and her team were strained. However, the Court found that the inference the defendant drew from this incident was unjustified.
- The plaintiff was allegedly the only team member who failed to tell her manager when she was leaving the office each day. For example she emailed to say she was taking sick leave without first consulting with her manager. This was found not to be a ground for concluding that the plaintiff was responsible for incompatibility in such a manner as would constitute serious misconduct.
- The plaintiff made no effort to explain her actions, acknowledge them or apologise for them at the disciplinary meeting. The HR manager said that the plaintiff’s demeanour at the disciplinary meeting was pivotal in their decision making process. However, this was never advanced as a ground for dismissal or put to the plaintiff for explanation. The Court was satisfied that the plaintiff dealt with her co-workers’ adverse statements as best she could in the circumstances.

D Conclusion of the Court

The Court held that the plaintiff had suffered material disadvantage in relation to having responsibilities removed and not having her concerns about her duties properly dealt with. The defendant had failed to justify both the disadvantage the plaintiff suffered and its failure to respond in a timely and effective manner. It was found that those failures had a direct causal link to the events that led to her dismissal.

The Court accepted that there was incompatibility. However, the Court concluded that:¹³

For this to amount to serious misconduct depended on whether the incompatibility was largely the plaintiff's fault and amounted to an undermining of the trust and confidence essential in an employment agreement. I have found all the matters should have been addressed at an earlier stage by the defendant and, if necessary, by the use of the mediation process contemplated in the settlement agreement. The failure to so intervene, and the addressing of the issues only in a disciplinary context, has led me to conclude that the plaintiff was not substantially responsible for any irreconcilable breakdown. The defendant has therefore failed to discharge the burden of justifying the dismissal on the grounds of serious misconduct based on incompatibility, largely or solely as a result of the plaintiff's actions.

The Court held that in view of its conclusions on substantive justification, it did not need to address the issue of procedural fairness in detail. However, it noted some procedural defects, which were linked to substantive issues:

- There was a failure to warn the plaintiff of the incompatibility concerns so that they could properly be addressed.
- The plaintiff received the rejection of her complaints and the disciplinary material at the same time.
- There was a failure to put matters to the plaintiff which were taken into account in deciding to dismiss her.

The plaintiff was awarded reimbursement of lost wages (quantum to be determined by the parties), compensation of \$25,000 for the unjustified dismissal, and \$5,000 compensation for the unjustified disadvantage. There was no contributory conduct because:¹⁴

It is difficult to see that there was blameworthy conduct in relation to either the finding of incompatibility or the exceeding of the financial cap by the defendant. The plaintiff was not aware of the effect she was having, if any, on her fellow employees as this was not addressed in a timely fashion by the defendant. If it had been, and she had persisted, then indeed there might be a finding of contributory conduct. No proper grounds have been made out for the reduction of the remedies to be awarded as a result of any blameworthy contributory conduct.

In regard to the compensation awarded, the Court noted the summary nature of the plaintiff's dismissal which prevented her from saying goodbye to her colleagues, and that it had a marked effect on her personally and socially after many years of employment.

IV CONCLUSION

¹³ *Hayward v Tairawhiti Polytechnic* unreported, Travis J, 3 August 2005, AC 43/05, para 121. The Court held that the defendant also failed to show that its decision to dismiss on grounds of overpayment was one that a fair and reasonable employer could have made.

¹⁴ *Hayward v Tairawhiti Polytechnic* unreported, Travis J, 3 August 2005, AC 43/05, para 139.

Where there is incompatibility in a workplace, it is likely that this will have resulted from a number of incidents occurring over a period of time. For example, in the *Hayward* case, the incidents occurred over a period of approximately nine months. The sooner an employer begins to deal with incompatibility issues, the more likely the issue will be resolved, hopefully saving the employment relationship.

Dealing with incompatibility issues might involve an employer talking to all parties involved, hearing their concerns and issues and seeking to resolve them. If the parties cannot resolve the issues by themselves, it might be useful to engage an independent third party, or go to mediation. If the employment relationship is irreparable, and this was at least substantially due to the employee, dismissal of that employee is a possibility only after a procedurally fair process is carried out.