

**YOUR ATTENTION IS DRAWN TO  
THE SUPPRESSION ORDER AT PARAGRAPH  
98 OF THIS DETERMINATION**

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

WA 201/09  
5281288

BETWEEN                      CATHERINE ANNE DODD  
Applicant

AND                              SECRETARY FOR JUSTICE  
Respondent

Member of Authority:      Dzintra King

Representatives:            Susan Hughes QC, Counsel for Applicant  
Alastair Sherriff, Counsel for Respondent

Investigation Meeting:      1 and 2 December 2009

Determination:                17 December 2009

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1]     The applicant, Ms Catherine Dodd, was employed by the respondent as Manager for Courts, Taranaki on 23 April 2003. Her employment was summarily terminated on the grounds of serious misconduct on 21 September 2009.

[2]     Ms Dodd seeks reinstatement, compensation and reimbursement of lost wages.

[3]     The respondent says the dismissal was justified.

**Background**

[4]     On 12 January 2008 a number of charges relating to his conduct towards his former partner were laid against Mr Y, a relative of Ms Dodd's. The charges were laid in the Hawera District Court which came under the aegis of the Taranaki Courts.

[5] On 17 January 2008 Mr Terry Silcock, then the Regional Manager, Central Region District Courts (now retired after forty four years' service), received a letter from Ms X, the victim, asserting that Ms Dodd might behave inappropriately should the matter remain in one of the Taranaki Courts. Mr Silcock spoke to Ms Dodd who denied the allegation and said her relative had only been arrested recently. She told Mr Silcock that a relative of Ms X was also employed within the Taranaki Courts. Mr Silcock considered Ms X's letter and decided there was no substance to the complaint. He replied to Ms X's letter on 23 January.

[6] Mr Silcock had worked with Ms Dodd for about nine years and she reported directly to him.

[7] Because of concern regarding the family connections Mr Silcock consulted a member of the judiciary and the case was transferred to Whanganui on 5 February 2008. He phoned Ms Dodd and told her this had taken place.

[8] Ms Dodd had ongoing contact with her relative and his ex-partner, who had a child. On 28 March 2009 Ms Dodd's daughter was getting married. Ms X's daughter was to be a member of the wedding party and Ms X went to Ms Dodd's home to assist with the wedding arrangements. Ms X mentioned that she would not be giving evidence against Mr Y.

[9] On 30 March 2009 Ms Dodd received a text from Mr Paul Keegan, Mr Y's lawyer, notifying her that the trial was set to commence in the Whanganui Court the following day. As Ms Dodd was on leave, she attended the proceedings at the Whanganui Court as a member of the extended family. She was accompanied by Ms Sue Broughton, the Criminal Case Flow Manager at the New Plymouth Court, who was also on leave.

[10] A plea bargain was entered into which resulted in the Crown Solicitor advising the presiding Judge that a favourable victim impact statement was expected and that all sentencing options were open, which was understood to mean that a non-custodial sentence was expected.

[11] On 12 May 2009 Ms Dodd was advised by Ms Broughton that Mr Keegan had rung to say that a victim impact statement had been received and that it was expressed in adverse terms. Ms Dodd was not present when the call was received. Mr Keegan asked Ms Broughton to contact Mr Y; and also to contact Mr Y's father. He asked

Ms Broughton to tell them about the victim impact statement and that they were not to contact the victim.

[12] When Ms Dodd returned she gave Ms Broughton Mr Y's new cell phone number. Ms Broughton telephoned Mr Y and his father. The call was made in Ms Dodd's office in her presence. Ms Dodd did not speak to either person.

### **Phone Call to Ms X**

[13] Ms Dodd left the Court and then attempted on three occasions to ring Ms X. The first call to her cell phone switched through to voice message, the second was to her place of work where a colleague advised that she was unable to come to the telephone. Later a third call was made where a brief discussion of about two and a half minutes duration ensued.

[14] Ms Dodd said she was concerned that a mistake had been made and that an earlier unfavourable victim impact statement had been tendered in error. She had not seen the victim impact statement or read it, although, strangely, Mr Keegan had had a copy delivered to Ms Broughton, who, once she realised what it was, sensibly arranged to have it returned.

[15] Ms Dodd asked if she could ask Ms X a question. She asked when the victim impact statement had been written and was told it was February 2008. Ms Dodd asked why she had changed her mind about tendering a positive statement. Ms X said she did not know, it had taken her a long time to get over it and he deserved to be punished. Ms Dodd said she thought they had been getting on well. Ms X said they had and she didn't know why she had done it. At that stage Ms Dodd terminated the call.

### **Complaint by Ms X's Father**

[16] On 13 May 2009 Mr X, the father of the victim, emailed Mr Tony Fisher, General Manager, District Courts, complaining regarding the contact. Mr Fisher contacted Mr Silcock and asked that the allegation be put to Ms Dodd.

[17] Ms Dodd was advised on 14 May that a complaint had been received from the victim's family and she responded that day. Mr Silcock sent her response to Mr Fisher who replied to the family 25 May, providing Ms Dodd's explanation, asking

for any comments and saying that if any matters were disputed he would investigate further.

[18] In the Ministry of Justice's document "Managing Employee Conduct and Performance" the section headed "Employment Investigations" provides:

*When an allegation/complaint of non compliance with Ministry policy and practice or legislation by an employee of the Ministry is identified and is made known to the employee's manager, they should begin an investigation into the facts of the matter. From that point on they become the investigating manager*

It is clear that the allegation was made known to the Ministry when the victim's father contacted Mr Fisher in May. However, no action was taken against Ms Dodd at this stage.

[19] On 7 June Mr Fisher received a reply to his 25 May email from Ms X, saying she felt the matter should be investigated thoroughly and that she was happy to provide more information.

[20] On 25 June Mr Fisher contacted Mr X, stated that further investigation was required and asked for a phone number.

[21] Ms Dodd was interviewed by Police on 25 June 2009.

[22] On 14 July Mr X contacted Mr Fisher saying his daughter had been asked to direct any further correspondence through police channels.

### **Complaint by Crown Solicitor**

[23] On 20 July 2009 Mr Lance Rowe, the Crown Solicitor for Whanganui wrote complaining about Ms Dodd's contact with Ms X. The letter was received by Mr Fisher on 24 July. Ms Dodd was not told of this letter until Mr Silcock commenced his inquiry on 30 July.

[24] On 30 July Mr Silcock received a phone call from Mr Fisher who asked that a formal investigation be conducted in response to Mr Rowe's letter. Mr Fisher drew up a Terms of Reference dated 30 July. This referred only to the complaint from the Crown Solicitor; no mention was made of the earlier complaints from Ms X and her family.

[25] Mr Silcock met Ms Dodd, who was in Wellington at the time, on 30 July and told her that an investigation was to be conducted. He referred to the letter from Mr Rowe. Ms Dodd asked for details about the letter and was told she would be provided with a copy as soon as possible. He also told her suspension was a possibility, although the Terms of Reference, addressed to Mr Graeme Astle, National Operations Manager District Courts (who was to be the Investigator), stated:

*I advise you that Catherine is suspended on full pay pending your investigation.*

[26] On 31 May Mr Silcock emailed Ms Hughes, Ms Dodd's representative, saying he intended to suspend subject to any submissions she might want to make. In response to a request from Ms Hughes he emailed her a copy of the Crown Solicitor's letter.

[27] Ms Dodd was interviewed by Mr Silcock on 3 August 2009. She was accompanied by Ms Hughes. Ms Dodd provided Mr Silcock with a copy of the Police statement together with a medical certificate excusing her from work for a week and promised she would not attend the Court during that time. She also said she would co-operate fully with the inquiry. Mr Silcock handed Ms Dodd a letter setting out two allegations:

- *[T]hat you have in your personal capacity contacted the victim of serious domestic violence to discuss her victim impact statement tendered to the Court under the Victims' Right Act 2002.*
- *Further, that the contact was clearly to remonstrate in highly inappropriate terms about the contents of the statement*

*and that in doing so you have abused your position as a Court Manager and an Officer of the Court by failing to recognise the fundamental professional boundaries.*

[28] On 4 August Mr Silcock advised that Ms Dodd would be suspended. This was nearly three months after the initial complaint made by Mr X had been received and Ms Dodd had apparently been continuing to work without any problems.

[29] On 10 August Ms Dodd was advised that the Police would not take any action against her.

## Investigation

[30] On 20 August Ms Dodd was interviewed by Mr Astle. A number of issues including CMS access were discussed. Mr Astle produced a spreadsheet showing that Ms Dodd had accessed the CMS records for her relative's case on a number of occasions.

[31] The Document Security and User Guidelines for CMS Users provide at page 2:

*CMS records – accessing*

*CMS is provided for the purpose of the effective record keeping in 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 relating to celebrities and/or their families, obtain details of proceedings where the media had 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 eg search CMS for a person's address for personal reasons or for use in other unrelated proceedings.*

*Note, inappropriate access to CMS records could constitute misconduct under the provisions of the Ministry's code of conduct.*

[32] There is no express prohibition on family members accessing CMS. What is prohibited is improper access for non-work related purposes. That is not to say that accessing details of family members on CMS could not fall within the categories of improper, non-work access.

[33] Ms Dodd explained that the access had been made at the request of Mr Keegan, who often had difficulty accessing the Whanganui Court. He would ask for information regarding next appearance dates, CRN numbers, adjournments and bail variations. She said Ms Broughton usually supplied the information. She gave an example of the circumstances under which she had supplied information when Ms Broughton was on leave.

[34] Mr Astle asked if Mr Keegan would be able to verify that all the cases where access had occurred had been as a result of a query made by him. Ms Dodd said he would but Mr Astle did not follow up.

[35] On 26 August Mr Astle provided his draft report dated 21 August. He accepted Ms Dodd's version of the friendly relationship with Ms X and her rapport with Ms X; and that she had not applied any pressure to alter the statement. He noted he was satisfied that Ms Dodd was concerned that a mistake had been made and that she had not remonstrated in inappropriate terms.

[36] He found that the CMS access was "unwise"; however access had been "read only" and there had been no attempt to alter any information.

[37] In his "Findings and Reasons" he concluded she had demonstrated a serious lack of judgement as a result of her concerns that a mistake had been made; and that in regard to accessing CMS there was a failure to recognise professional boundaries.

[38] Pursuant to the Ministry of Justice Code of Conduct he had been asked to consider if her conduct had brought the Ministry into disrepute; and whether she had breached the Code and was guilty of misconduct or serious misconduct.

[39] He found that the phone call had brought the Ministry into disrepute and that the CMS access was a breach of the Code and the Security Guidelines but had been careless and a misjudgement.

[40] Ms Hughes noted that Mr Keegan had not been interviewed.

[41] On 31 August Ms Dodd replied to the draft report contending that her conduct in contacting Ms X was not serious misconduct but by implication misconduct; and disputing that access to the CMS records was misconduct.

### **Decision Making**

[42] On 3 September 2009 Mr Andrew Hampton, General Manager, Higher Courts, introduced himself as the decision maker in the investigation and provided his draft report as to penalty, which included, *inter alia*:

*I consider that Catherine Dodd's actions raise an issue of trust and confidence for the Ministry. As the Manager and Registrar of the New Plymouth Court, Catherine Dodd has a significant role in*

*modelling the Ministry's values and standards. She also has a key role in upholding the integrity of both her Court and the Ministry in the public eye.*

*Because Catherine Dodd works in the field at geographic distance from her direct manager, the Ministry has to trust she is acting in accordance with her Manager's instructions and the Ministry's expectations and is ensuring that her staff understand what is expected of them too. It appears that Catherine Dodd has failed to acknowledge that her actions constitute a conflict of interest and had the potential to bring into question the integrity of the justice system. This must, therefore, raise the issue of whether or not Catherine Dodd is a trustworthy guardian of staff conduct and ethics in her Court.*

*I appreciate that Catherine Dodd has acknowledged that her actions constitute an error of judgment, however, I am not satisfied that she has appreciated the seriousness of the matter, from the Ministry's perspective. She had been made aware that she was not to be involved in her relative's case, yet still failed to avoid two types of action that conflicted with this instruction in her duties to the Ministry. I consider there is a very real risk that this kind of situation could arise again.*

*For these reasons I consider the appropriate penalty for the Ministry to take against Catherine Dodd is summary dismissal.*

[43] Mr Hampton explained during the hearing that the reference to a failure to acknowledge that her actions constituted a conflict of interest applied to the CMS access.

[44] Given the emphasis placed on the concept of "conflict of interest" it is useful to consider the meaning of that concept; and then whether the actions fit within that.

[45] A conflict of interest arises when a public official's decisions are influenced by the official's personal interests. It is a situation in which a person is in a position to exploit a professional or official capacity in some way for his or her personal benefit. It arises when competing professional obligations and private interests make it difficult to fulfil duties fairly and impartially. The presence of a conflict of interest is separate from any impropriety enacted as a result of that conflict.

[46] Ms Dodd had a conflict of interest in that she held a position in the Ministry of Justice at the same time that a relative was facing charges. That in itself is not blameworthy. It is how the situation is dealt with that is critical. Whether a person's private interests improperly influence the way duties are carried out or decisions are made needs to be assessed.

[47] The issue is how, in the context of a request for access to her relative's details on CMS by her relative's lawyer, was it appropriate for her to act given her position and the fact that her relative had been charged with offences.

[48] It is difficult to see how the accessing of CMS and providing information which Mr Keegan would have been able to obtain from Ms Broughton or the Whanganui Court or another Court has the potential to bring the integrity of the justice system into question.

[49] Mr Hampton said the reason for the access was not relevant. He said the file had been moved to another Court and he would have been concerned that someone from the Taranaki Court had accessed the file and all enquiries should have been directed to the relevant Court. He said the access opened the Ministry up to the perception that Court staff freely accessed information about a case when it had been moved to another Court. Mr Hampton said that the Ministry needed to manage the perception that someone would get an advantage.

[50] Mr Hampton asserted that by accessing the CMS records Ms Dodd was providing services to or in respect of family members. Mr Hampton suggested that by providing that access Ms Dodd saved her relative legal costs but as Ms Hughes noted Mr Keegan's time would be charged at precisely the same rate whether inquiry was made of New Plymouth or Whanganui.

[51] One of the aspects of an improper manner of dealing with a conflict of interest is that the person obtains some sort of benefit or advantage. In this case, that would not necessarily be for Ms Dodd herself but for her relative and this is what Mr Hampton's remarks touch upon. Ms Dodd provided access to CMS at the request of her relative's lawyer. There was no benefit or advantage for Ms Dodd or her relative. There was no decision making or influencing taking place.

[52] I accept that it would have been wiser for Ms Dodd to have told Mr Keegan that he should deal with the Whanganui Court, regardless of how inconvenient it was for him. That would have created a very clear boundary. However, it is drawing a very long bow to say that providing the information has the potential to bring the integrity of the justice system into question.

[53] On 11 September Ms Hughes responded, making a number of submissions. Significantly, she offered references. This offer was not taken up.

[54] Ms Dodd met Mr Hampton on 17 September.

[55] Mr Hampton confirmed his decision to summarily dismiss Ms Dodd on 21 September. Part of the dismissal letter reads:

*I accept that Ms Dodd is remorseful for her actions which are then characterised by you and her as a single error of judgment that would never be repeated. I have found, however, there has been a series of 'errors of judgement', including the telephone contact with Ms X, the several instances of access of CMS regarding her relative's case, and the example given at our meeting referred to above. In discussing these matters with Ms Dodd I was not reassured that Ms Dodd would recognise a conflict of interest in the future and take appropriate steps to avoid it.*

...

*Given the serious breaches of the Ministry's Code and Conduct and expected standards, I am not confident that Ms Dodd can now be effective in the role of Court Manager. I am also not satisfied that a similar breach could not happen again. For these reasons, as well as those outlined in my letter of 3 September 2009, I have determined that termination of employment is the appropriate course of action.*

[56] The example Mr Hampton refers to was Ms Dodd's telling him of a situation where she believed she had avoided a conflict of interest. Ms Dodd told Mr Hampton of an occasion where her relative had been at a family gathering and the police had arrived to arrest him believing there to have been a breach of bail conditions. In fact, the time had been extended and the Ministry's data base had not been updated to reflect that. Ms Dodd contacted Ms Broughton and asked her to deal with the matter rather than doing it herself.

[57] Mr Hampton's view was that Ms Dodd should not have contacted Ms Broughton. Upon a quick consideration, based on the information Mr Hampton had elicited, this seems like a reasonable conclusion; although Ms Dodd also told him that she had acted in a similar manner with respect to other people and referred to a wrongful arrest that had taken place on Christmas and that she had been able to sort the matter out. She told him he could contact ex Area Commander of Police for New Plymouth, Ms Anne Knox. I also note that Judge Bidois, in his evidence to the Authority, makes reference to Ms Dodd going out of her way after hours to remedy incorrect warrants or bail bonds. I am aware that Mr Hampton did not have the Judge's evidence at the time he made the decision to dismiss.

[58] When Ms Dodd provided a fuller explanation the matter became far less clear cut. The consequences of the relative being arrested on a Saturday evening would have been that he would have been incarcerated until Monday morning and that would have been as a result of the Ministry's failure to maintain its records appropriately. Mr Silcock, when asked about this situation during the hearing, was sympathetic and understood the situation. Mr Hampton said in his view it would have been preferable to pay compensation to the relative rather than have Ms Dodd involve herself by contacting Ms Broughton.

[59] This is one of the reasons Mr Hampton decided that Ms Dodd's employment could not continue as it demonstrated that she did not comprehend the concept of a conflict of interest. This was clearly a very difficult dilemma for Ms Dodd. If she did nothing her relative would have been wrongly incarcerated and the Ministry laid open to proceedings. By acting as she did – contacting Ms Broughton – the situation was able to be resolved so that no wrongful detention took place and the Ministry was protected.

[60] Ms Hughes submitted that at all times Ms Dodd had used the expression “error of judgement” in describing her contact with the victim and that it appeared that the Ministry had interpreted that as a failure to accept that she had breached the standards of the Ministry as set out in its code. That was not so. She accepted that her conduct did breach the code but did not accept that summary dismissal was the appropriate outcome.

[61] Ms Hughes noted that Ms Dodd did not claim that the circumstances excused the contact (as Mr Hampton seemed to believe) but rather that they provided a context and explanation for it. At no time had Ms Dodd disputed that she made the contact, nor that she was wrong to do so, nor that her contact amounted to at least misconduct. She accepted that at least a warning was justified and would attend any additional training which the Ministry thought was necessary as a condition of her return to work.

[62] I am disturbed by the fact that Mr Hampton maintained throughout his consideration of the matter that the circumstances and motivation were irrelevant. He maintained this position at the hearing. A disciplinary process is an opportunity for a person to provide an explanation. In the provision of an explanation the circumstances are clearly relevant.

[63] I asked whether the Ministry provided any training regarding the matter of conflicts of interest. Mr Silcock said there was no specific training – people learnt on the job.

[64] Ms Hughes noted that regarding the CMS records, Ms Dodd had undertaken to handle any comparable situation differently.

[65] She submitted that Ms Dodd had not appreciated that Mr Silcock's decision to shift the file to Whanganui meant that she could not access the CMS records for her relative. Clearly Ms Broughton did not appreciate that the matter should be dealt with only by the Whanganui Court as she also responded to requests by Mr Keegan for information. Access to the records was part of Ms Dodd's role at the Court. On each occasion her access arose at the request of Mr Y's lawyer. There was no evidence she interfered with the records in any way. Her access to the file was in "read only".

[66] Had the Ministry intended that there be no access to files of family, then the code should have explicitly have said so. If the Ministry regarded CMS as a tool to be deployed only in the specific Registry the fire walls should have been in place or an instruction included in the code that no access was to be made to Courts other than the user's base Court. Ms Hughes' submissions are sensible.

### **Decision to Dismiss**

[67] In deciding to summarily dismiss Ms Dodd, Mr Hampton based his decision on her contact with the victim, the access to the CMS records and the explanation given by Ms Dodd as to the circumstances in which she had asked her colleague Ms Broughton to update Mr Y's bail records to ensure that he was not incarcerated overnight.

[68] However, Mr Hampton's brief of evidence shows that he appears to have supported his decision by reference to other matters of which Ms Dodd had no knowledge. These are that Ms Broughton attended Court with her when her relative's case was called, the issuing of swipe cards to the legal profession and the fact that she had not told her Manager or the relevant Judge of her relative's arrest.

[69] These are matters of which Ms Dodd had no notice and therefore no ability to respond. I agree with Ms Hughes that the addition of these matters, affects the integrity of the process and the subsequent decision to dismiss.

[70] When I him asked about these issues, Mr Hampton said he would have made the decision to dismiss in any event based on the cumulative effect of the phone call and the CMS access. He said he thought he would have got to the same point without relying on those issues. The problem is that he did rely on them.

[71] Also of concern is that Mr Hampton referred to Ms Dodd's accessing of CMS as "snooping" and seemed unconvinced that access had been made on each occasion in response to a request by Mr Keegan. It should be noted that Mr Astle had chosen not to interview Mr Keegan and that Mr Hampton chose not to do so either.

[72] In his evidence Mr Hampton expressed the view that the victim did not consider that she had a positive relationship with Ms Dodd, yet no inquiry regarding that was made.

[73] Mr Silcock was not spoken to before the decision to dismiss was made although he had been Ms Dodd's direct manager for several years. Mr Hampton had had limited contact with Ms Dodd. In a situation where a person's judgment and integrity are called into question, and an unfavourable view of these is instrumental in the decision to dismiss, it would have been wise to have made further enquiries regarding these matters. Mr Silcock said her actions were out of character and that she was a person who could be taken at her word and relied up. He said he could understand why she did what she did regarding the arrest. He had never had any reason to doubt her word.

[74] As for the failure to advise her Manager of her relative's arrest at the earliest opportunity, Mr Silcock was on leave when Mr Y was arrested and contact occurred shortly thereafter. Furthermore, Ms Dodd had told the Judge in the matter about the situation.

### **The Law**

[75] The test to be applied is set out in s.103A of the Employment Relations Act 2000:

*The question of whether a dismissal was 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 occurred.*

[76] In *Air New Zealand v. Hudson* [2006] ERNZ 415 Shaw J set out the test to be applied in para. [141]. At paras. [142] and [143] she stated:

*All the circumstances of the case includes not that the employer's reaction to the misconduct which it honestly believes has occurred, but also the circumstances under which the misconduct occurred and the circumstances of both the employer and the employee. In other words a return to the test as articulated by Williamson J.*

*Therefore a particular employer having followed proper investigative process is justified in dismissing for misconduct it reasonably believes has occurred if the Authority or Court finds that a fair and reasonable employer would have dismissed in all the circumstances.*

[77] Mr Hampton failed to give any consideration to the context of the misconduct. He concluded that Ms Dodd did not accept responsibility for her misconduct when she clearly did. He added additional concerns to justify the final decision without first having offered Ms Dodd an opportunity to respond to those. More note should have been taken of her exemplary employment record. Mr Hampton should have spoken to Mr Silcock to obtain a first hand assessment of Ms Dodd's judgement, credibility and trustworthiness. He would have learned that her action in contacting the victim was an aberration and out of character.

[78] Mr Hampton formed the view that Ms Dodd acted as the conduit between Mr Keegan and her relative. However, Ms Broughton's interview notes with Mr Astle indicate that that she felt Mr Keegan used her as a middle person and that when the matter had arisen Ms Dodd had made efforts to tell her family members to keep her out of it because her professional boundaries needed to be respected. Mr Keegan would often contact her so she could communicate with Mr Y regarding matters such as court dates.

[79] Accessing CMS was done in the course of her employment for the purposes of her employment. It was not a breach of the User Guidelines.

[80] The contact with the victim was a stupid out of character action carried out at a time of emotional distress. She acknowledged the wrongfulness of her action, regretted it and apologised for it and undertook that it would not be repeated.

[81] Even though the contact with the victim constituted serious misconduct dismissal was not the inevitable outcome of that.

[82] Mr Hampton ignored the fact that people are capable of learning from experience and Ms Dodd should not have to suffer irrevocably from an isolated unwise and emotionally charged reaction.

[83] She acknowledged herself and through her counsel the wrongfulness of her action, her regret and that it would not be repeated. Once the Ministry's difficulty with access to CMS was pointed out she undertook not to access CMS again should similar circumstances arise again.

### **Decision**

[84] While I accept that a single instance of serious misconduct can justify termination of employment, the issue is whether this case is one where that applies.

[85] It is important that matters be looked at in context and in all the circumstances. This is the legislative requirement.

[86] Ms Dodd had a praiseworthy work record. Her contacting the victim was acknowledged to be wrong. It was an aberrant action for which she expressed regret and took responsibility. She did not seek to excuse it but to provide an explanation for why it had taken place.

[87] The access to CMS was not in breach of the Security Code. There was a general practice that Registry staff accessed CMS details for other Court registries. Ms Broughton accessed the relative's file when requested to do so and she was aware also that the case had been transferred to another Registry.

[88] Ms Dodd's action in contacting the victim did constitute serious misconduct. Ms Dodd's actions in accessing the CMS records did not constitute misconduct.

[89] Given that Mr Hampton had made his decision based in part on factors that had not been put to Ms Dodd, that he should have spoken to Mr Silcock about Ms Dodd, that he formed a view about Ms X's and Ms Dodd's relationship without checking it, that he formed an adverse view of her access to CMS (snooping), that he did not interview Mr Keegan although he appeared to doubt the veracity of Ms Dodd's assertion that all CMS access had been at his instigation, and that he failed to

acknowledge that the circumstances and motivation were relevant, the decision to dismiss was not one that a fair and reasonable employer would have made.

### **Remedies**

[90] Reinstatement is the primary remedy and to be effected wherever practicable. That means looking at the past employment and towards the future.

[91] There has been a stable and positive employment history. It is clear that Ms Dodd is highly regarded in the legal community

[92] None of the respondent's witnesses had referred to the issue of reinstatement in the briefs. When I asked Mr Hampton to tell me about the impracticability of reinstatement, Mr Hampton in effect simply repeated that it was his opinion that Ms Dodd should not be reinstated. He did not comment on the practicability of reinstatement. He said "*I would need to be satisfied that the decisions I have taken are wrong, that would be the first thing*". He then went on to talk about the blurring of roles and that there was a fundamental thing that she did not get.

[93] Ms Dodd provided evidence and references from a large number of people who are very supportive of her position and her return to her position. These include Justices of the Peace, members of the Police, District Court Judges, a Probation Officer, lawyers including the Deputy Crown Solicitor. Ms Dodd told me that colleagues had come to see her the day before the hearing started to wish her well and hope that they would see her back at work shortly.

[94] I accept that the judiciary, members of the legal profession, the public, litigants and victims of the offences must all be confident, not only that Ministry staff are and remain impartial and professional at all times, but also that they are manifestly seen and perceived to be so; and that it is fundamental to the integrity of the justice system that these people do not perceive that relatives or friends of the Ministry staff receive or appear to receive more favourable or different treatment from others.

[95] Ms Dodd is to be reinstated in her previous position. The timing of a reinstatement was discussed during the hearing and there was agreement that a reinstatement order would not take place until two days after the date of the determination. Ms Dodd's reinstatement is to take place on Tuesday 22 December 2009.

[96] Ms Dodd has sought compensation for humiliation and distress and reimbursement of lost remuneration. I accept that Ms Dodd has been very severely affected by the termination of her employment. However, given that that it was a direct result of her action in the circumstances I decline to award any compensation. Ms Dodd made no effort to mitigate her losses and I cannot make a reimbursement award.

### **Suppression Order**

[97] The names of Ms X, Mr X and Mr Y are permanently suppressed.

### **Costs**

[98] If the parties are unable to resolve the issue of costs the applicant should file a memorandum within 42 days of the date of this determination. The respondent should file a memorandum in reply within 14 days of receipt of the applicant's memorandum.

Dzintra King  
Member of the Employment Relations Authority