

**Attention is drawn to the order prohibiting publication
of certain information referred to in this determination.**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2021] NZERA 566
3132275

BETWEEN CLARE SINNOTT
Applicant
AND MINTER ELLISON RUDD
WATTS
Respondent

Member of Authority: Geoff O’Sullivan
Representatives: Applicant in person
Rob Towner, counsel for the Respondent
Investigation Meeting: 10, 11, 12, 13 August 2021
Submissions [and further Information] Received: 13 August, 16 September, 17 September and
20 September 2021
Date of Determination: 17 December 2021

DETERMINATION OF THE AUTHORITY

Introduction

[1] Clare Sinnott was employed as Special Counsel at Minter Ellison Rudd Watts Environment Law Team (Minters) based in Wellington. Initially, it seems there were differences of view between Ms Sinnott and Minters regarding the relationship and how it should work which ultimately resulted in the parties entering into a settlement agreement on 6 September 2019.¹ Ms Sinnott says that Minters breached that agreement by:

- (a) not working with her in a constructive and collaborative way; and

¹ BOD Doc 37, page 200.

(b) not acting in accordance with its good faith obligations.

[2] Initially, it was a major component of Ms Sinnott's complaint regarding the agreement, that she had been assigned a zero fees budget for 2021 which she felt significantly disadvantaged her. The agreement was arrived at through settlement of previous grievances.

[3] On the morning of 17 February Ms Sinnott was rung by Minters' employment partner, Aaron Lloyd, who advised her a complaint had been made against her. She was told that Minters would be appointing an investigator to investigate that complaint and in the meantime she was not to attend the office. Ms Sinnott says this was a suspension which was both substantively and procedurally unjustified.

[4] On 17 May 2021 Ms Sinnott was advised in writing that her employment was to end that day. In justifying the dismissal, Minters advised Ms Sinnott that the relationship between the parties had irreconcilably broken down. The notice of dismissal was accompanied by an *ex gratia* payment of a year's salary. Ms Sinnott says that her dismissal was unjustified.

[5] Ms Sinnott asks the Authority for reinstatement to her position and also remedies for:

- (a) the breach of the settlement agreement;
- (b) the hurt and humiliation she has suffered as a result of the unjustified suspension and unjustified dismissal; and
- (c) penalties.

[6] Minters do not accept Ms Sinnott's claims. They say they did not breach the settlement agreement. They say that the suspension of Ms Sinnott on 17 February 2021 was justified and so too was Ms Sinnott's dismissal on 17 May 2021. They say the relationship had irretrievably broken down and accordingly termination of employment was justified on the grounds of incompatibility. They say it was Ms Sinnott who was substantially responsible for the incompatibility which arose between the parties. Minters says it followed a fair procedure prior to terminating Ms Sinnott's employment and was extremely generous in the way it ended her employment because it made a substantial *ex gratia* payment to her in addition to paying Ms Sinnott in lieu of her contractual notice period.

[7] Following her dismissal, Ms Sinnott applied to the Authority for interim reinstatement pending a substantive hearing. That matter was heard by the Authority on 1 June 2021 and on

16 June 2021 Ms Sinnott's application for interim reinstatement was granted. It was made clear that the determination of the 16 June 2021 did not decide whether or not the 6 September 2019 settlement agreement had been breached, nor did it decide any of the substantive matters including whether or not Ms Sinnott's dismissal on 17 May 2021 was justified. The Authority stressed the interim nature of the orders.

The Authority's investigation

[8] The matter was heard over four days with evidence from Ms Sinnott, Christine Brotherton, Rachel Devine, Bianca Tree, Stephanie de Groot, Kerry Sullivan, Rachel Devine, Bianca Tree, Andrew Poole, Andrew Horne, John McCay, Kerry Sullivan, Jordan Cole, Sarah Sinclair, Jane Parker, Gerald Lang, Holly Hill, Aaron Lloyd. The issues for determination are as follows:

- (a) Have Minters breached the 6 September 2019 agreement and if so, what is the effect of this and what remedies should be awarded?
- (b) Was Ms Sinnott suspended on 17 February 2021 and if so, was it unjustified?
- (c) Was Ms Sinnott's dismissal on 17 May 2021 unjustified and if so, what remedies should flow?
- (d) Ms Sinnott seeks reinstatement. Is reinstatement reasonable and practicable under the circumstances?
- (e) How should payments already made to Ms Sinnott on an *ex gratia* basis be treated in respect of any award of lost salary and/or hurt and humiliation?
- (f) If Minters actions are unjustified was there any contributory conduct on behalf of Ms Sinnott which needs to be taken into account?
- (g) Should any breach (if any) by Minters attract a penalty?

[9] Pursuant to s 174E of the Act I make findings of fact and law and outline conclusions on matters to resolve the disputed issues and make orders but I do not record all evidence and submissions received.

[10] Although there were a number of witnesses who gave evidence before the Authority, in essence it was Mr Horne who made the decision there had been an irreconcilable breakdown of the employment relationship and who dismissed Ms Sinnott on the delegated authority of

the Minters Board. Most of the other evidence given by witnesses was relevant to the background to the employment relationship problem between Ms Sinnott and Minters. It was also directed at the nature of the relationship and whether or not reinstatement was a reasonable and practicable remedy should Ms Sinnott be successful in her claims.

Background

[11] Ms Sinnott has been employed as special counsel in Minters Environment Team since March 2017. The team also included two Minters partners, both based in Auckland. Ms Sinnott worked in Minters Wellington office. Ms Sinnott's supervising partner was Rachel Devine. In 2019 Ms Sinnott filed proceedings in the Authority in respect of relationship issues. The parties attended mediation and matters were resolved between them by way of a settlement agreement dated 6 September 2019 (the settlement agreement). As a result of the settlement agreement, Ms Sinnott's supervisor was changed from Ms Devine to Bianca Tree. A performance improvement plan that had formed part of the discussions was discontinued and a facilitated meeting between Ms Sinnott, Ms Devine and Ms Tree took place.

[12] There had also been discussions regarding Ms Sinnott securing an external secondment during 2021. It seems in anticipation of this occurring, her 2021 fee budget was set at zero. Ms Sinnott regarded this as a breach of the settlement agreement because the substantive external secondment proposal was not progressed nor was there any communication with her regarding zero budgeting her for firm budgeting purposes. She felt that the metric would be used to ensure a fairly even spread of work and as this would be related to the percentage of fee targets each member had, this would work to her disadvantage.

[13] Ms Sinnott had also made a further complaint against Ms Devine which had been dealt with by the firm but the complaint was not upheld.

[14] On 7 February 2021, Ms Tree wrote her letter of complaint to the Minters Chief Executive. Ms Sinnott was not copied into the complaint and remained unaware that it had been made. On the morning of 17 February 2021, Mr Lloyd rang Ms Sinnott, whilst she was in her office, and advised her there had been a complaint. Ms Sinnott was told that an independent investigator would be appointed to investigate that complaint. The end result was that Ms Sinnott was placed on suspension.

[15] On 2 March 2021 Ms Sinnott was provided with a copy of Ms Tree's complaint. On 24 March 2021 Minters engaged Andrew Scott-Howman, Barrister, who in his preliminary assessment of 13 April 2021² set out his role as:

Whether there are any findings of fact regarding the matters raised in Ms Tree's complaint that you can make having made these initial enquiries (and if not, provide us with an indication of what additional steps you would propose taking in order to do so);

[16] Further, Mr Scott-Howman described his task as:

As I apprehended it, this task amounted to an invitation by you for me to provide an objective view – based on my experience as an employment law practitioner – about any steps that might be taken in relation to the employment relationship.

[17] On 13 April Mr Scott-Howman presented his preliminary assessment to Minters where he hypothesised:

In my view, the present situation is capable of a simple summary. Clare has initiated a proceeding in which she alleges breach, by the firm, of a number of different obligations that she says that it owed her. She seeks a determination by the Authority which would serve to confirm those different allegations. In response, the firm takes issue with the validity of Clare's claims, and in addition invite the Authority to consider whether there is a serious breakdown in the relationship between Clare and the firm.

I have told each of Clare and Bianca that I cannot, and will not express a view about those different matters – nor should anything in this report be interpreted as such.

[18] Mr Scott-Howman suggested a way forward could be a process of facilitation. In saying the above, Mr Scott-Howman was focusing on the second task asked of him which he described thus:

Irrespective of whether you can make any findings of fact at this stage, whether there are any observations you can make about the employment relationship at this point in time that might assist us given your objective position and employment law background and expertise.

[19] Mr Scott-Howman accordingly did not investigate the complaints raised by Ms Tree against Ms Sinnott. However he did provide a preliminary assessment and gave his view as to a way forward through facilitation.

² Andrew Scott-Howman preliminary assessment BOD 120.

[20] Mr Scott-Howman had opined that should the parties wish to undertake facilitation then Ms Sinnott and Ms Tree would need to start from the point of view that the relationship between the two was irreparably broken down. Ms Sinnott and Minters then attempted to agree unsuccessfully on a facilitation process.

[21] On 7 May 2021 Ms Sinnott received a letter from Mr Horne inviting her to attend a formal meeting. The purpose of the meeting was said to be to allow her to provide feedback to a proposal that her employment come to an end on the grounds of incompatibility. The letter provided:

The incompatibility is due to the irreconcilable breakdown in the relationship between you and the firm. This is well documented in the evidence that has been filed by both parties with the Employment Relations Authority (the Authority). Interactions between you, the firm, staff and partners are described in the statements of evidence as chaotic, harrowing and with people left shaken and distressed. The health and wellbeing of your supervising partners and several staff members has suffered as a result.

[22] The 7 May letter listed difficulties Mr Horne believed existed in the working relationship.

[23] Ms Sinnott then met with Mr Horne on 12 May 2021. On 17 May Ms Sinnott was dismissed from her employment. The ground given was the finding by Mr Horne that the employment relationship was untenable and the situation irretrievable.

[24] At some time prior to the 7 May, Minters decided to stop its investigation into Ms Tree's complaint and took no further steps in respect of it. Rather, it took a different route in reaching a finding that the relationship between the parties had irreconcilably broken down. In terms of whether or not Ms Sinnott's dismissal was unjustified, the focus of the Authority is on the process and substantive justification Minters relied on in order to reach its conclusion that the employment should end.

Discussion and analysis

Breach of 6 September 2019 agreement

[25] Ms Sinnott says the agreement has been breached because:

- (a) Minters agreed to take steps to arrange facilitation between Ms Devine, Ms Tree and Ms Sinnott;

- (b) In supervising her work, Minters agreed it would work in a constructive and collaborative way with Ms Sinnott;
- (c) Minters would allow Ms Sinnott to work with a Wellington based public law partner; and
- (d) Minters would deal with any future issues that might arise between it and Ms Sinnott in accordance with its good faith obligations at law.

[26] Ms Sinnott's first complaint in respect of the settlement agreement, was that Minters failed to take steps to arrange facilitation as agreed. It is clear from the evidence that on 16 October 2019, there was a facilitation session. Ms Sinnott clearly expected more and this did not occur. From Minters perspective however, they were unaware that further facilitation was needed at that point. However I do not see the agreement as imposing an ongoing facilitation obligation on the parties. Accordingly I find Minters has honoured its obligation in regard to facilitation, at least in terms of the settlement agreement.

[27] A major complaint in respect of the alleged breach of the settlement agreement revolves around Ms Sinnott's concern that she was given a zero budget. What happened does not appear to be in dispute. Ms Sinnott's complaint relates more to the purpose of placing her on zero budget.

[28] Following discussions with Ms Sinnott that Minters was looking at an external secondment for some or all of 2021, Minters decided that Ms Sinnott's 2021 budget should be set at zero. The effect of this was that she had no fee target. Accordingly from Ms Sinnott's perspective, there was no way to measure workload and in that regard ensure that work was distributed evenly amongst the team.

[29] Ms Sinnott however was not advised that her budget had been set at zero and only became aware of it through Minters computer system. She felt that there was an ulterior motive and had the impression she was not seen as a full member of the environment team or indeed the firm. She felt it could be evidence of a plan to exit her.

[30] The issue became a significant one for Ms Sinnott and she expressed strong views about Minters intent. During the investigation meeting when the subject was broached, it was apparent that Ms Sinnott remained unconvinced by the explanations put forward by Mr Poole and other witnesses on behalf of Minters.

[31] The explanation was simple; namely in the belief that Ms Sinnott would probably be on an external secondment for the 2021 year, Minters set her fee budget as zero. The simple reason for this was that it was setting its budget for the year ahead. If the secondment did not occur, it was a simple matter to set a fee budget for Ms Sinnott and the evidence I heard suggested this would not affect Minters budget as a whole.

[32] Minters should have advised Ms Sinnott it was setting a zero fees budget for her. However as soon as Ms Sinnott raised the issue, Minters apologised accepting a mistake had been made and rectified it. This was not enough for Ms Sinnott. She would not let the matter go and remained upset that a number of staff and partners were aware of her zero budget and would take inferences from this.

[33] I accept from the evidence given in respect of this matter that there was a legitimate purpose in setting a zero budget for Ms Sinnott, namely the belief she would be on secondment. The firm should have discussed this with Ms Sinnott so she was aware it was happening and didn't have to discover it for herself. That said, as soon as Ms Sinnott raised the issue Minters moved to fix it. There is no evidence of an ulterior motive and certainly no evidence that Minters were moving to exit Ms Sinnott and the zero budget was simply a first step.

[34] As indicated above, Ms Sinnott would not let the zero budget issue go. She did not accept the explanation that it was an innocent mistake. A reason why Ms Sinnott wouldn't let the matter go was because she felt that although the mistake had been apologised for, the fact that others in the firm had seen it amounted to a confidence breach because discussions regarding an external secondment were private and confidential. Ms Sinnott's concerns were set out in an email dated 28 January 2021.³

Suspension

[35] It is common ground that on the morning of 17 February 2021 Ms Sinnott was rung by Mr Lloyd whilst she was in her office at work. She was told that Ms Tree had made a complaint about her and that Minters would appoint an independent investigator to investigate that complaint. Mr Lloyd indicated he wished to discuss how matters would be managed until and whilst the investigation occurred. Ms Sinnott asked him whether that meant she would be placed on garden leave and she was advised that Mr Lloyd did not see the firm had a choice

³ Page 320 of the BOE.

other than doing that. He said that because of the claimed relationship problem, putting Ms Sinnott on leave was the only way he saw to manage the problem given that Ms Sinnott needed to be supervised by an environment law specialist partner which Ms Tree was. I accept Ms Sinnott's evidence that she was in shock and became distraught. She accepts she told Mr Lloyd that given what he had already said, there seemed little point in pausing the conversation until she had a support person present and that she would prefer just to finish the conversation. Believing, as it turned out incorrectly, that Mr Lloyd had hung up, she ended the call.

[36] Ms Sinnott's evidence was that she was very upset and left the office crying. When she tried to log in to the work computer from home at approximately 9.30 am she received a message that her work account had been blocked.

[37] The fact that Ms Sinnott was upset was confirmed by a number of witnesses although the evidence was presented in a way to suggest Ms Sinnott should not be at work and was perhaps somewhat unstable. I reject that inference. For reasons which will shortly become clear, it was entirely foreseeable that Ms Sinnott would have such a reaction to being suspended over the telephone with no warning.

[38] Indeed, as I will shortly allude to, Minters was fully aware that Ms Sinnott was likely to react adversely to Mr Lloyd's approach. John McCay, a partner in the Wellington corporate and commercial team of Minters gave evidence that the day before the suspension on 16 February 2021 he was part of a national partners lunch time meeting which was a video conference meeting between the Auckland and Wellington partners.

[39] He gave evidence that the main agenda item was Ms Sinnott. He says that Andrew Poole, the Chief Executive talked about Wellington's specific issues and that the discussion was totally dedicated to the situation with Ms Sinnott and the impact on the office of recent events. Mr Poole explained that the decision was made to put Ms Sinnott on leave as this was seen as the most appropriate course of action in the circumstances to protect both her and the staff generally.

[40] Mr McCay gave evidence that they then discussed the best way to convey the decision to Ms Sinnott. It was agreed that Mr Lloyd would advise Ms Sinnott of the decision. Mr McCay gave evidence that they knew that Ms Sinnott was likely to find it upsetting and that it would trigger a further outburst. He said they were so concerned that Ms Sinnott might

be at risk of self-harm, they agreed that the “least worst” option would be for Mr Lloyd to contact Ms Sinnott whilst she was at home hopefully with support from her husband.

[41] I find this evidence damning. When Mr McCay’s evidence was put to Mr Lloyd, he said that from his perspective the firm had delegated the decision as to whether or not to suspend Ms Sinnott to him. Accordingly he said he had an open mind and had not predetermined the matter. This may however simply mean that Mr Lloyd did not have as much freedom of choice as he thought he had. It is clear from Mr McCay’s evidence, which was supported by others at that meeting, that the decision to suspend Ms Sinnott was made prior to the conversation. Further, it fully expected a destructive reaction from Ms Sinnott to the extent that Minters were concerned about her wellbeing.

[42] Notwithstanding these concerns, Minters rang Ms Sinnott whilst she was in her office at work, with no support and no warning of what was to come. Such an approach is difficult to justify and bearing in mind Minters’ concerns it is difficult to understand why Minters acted as it did.

[43] Mr Lloyd gave evidence that he had tried to contact Ms Sinnott the evening before the suspension but had not been able to reach her. I cannot accept however that despite the clear predetermination to suspend, that there were not better ways to deal with the issue. Suspension is a serious matter and bearing in mind the knowledge of the impact it would have on Ms Sinnott, Minters needed to do better. At the very least the discussion should have been face to face or Ms Sinnott been given fair warning of the discussion and been offered support.

[44] Further, it was clear from Mr McCay’s evidence that the suspension was because of the complaint from Ms Tree. The complaint was clearly influential in the decision to suspend. Mr Lloyd’s letter of 17 February 2021 stated at paragraph 19:

I never got the chance to conclude my conversation with you about the firm’s proposal for you to take paid special leave (the practical effect being akin to a suspension from work on full pay) whilst the investigation of Bianca’s concerns was undertaken.

[45] Mr Lloyd then confirmed that the decision to suspend was made on 16 February 2021 as Mr McCay said, when he stated:

... and would have said that if you did not agree to take paid special leave, then the interim decision of the partnership (which power had been delegated to me) was that we would require you not to carry out any work (or attend the

workplace), to treat your absence from work as paid special leave, and agree any messaging with you (such as suggesting we say you are on annual leave).

[46] Mr Lloyd then gave evidence that a primary driver behind the suspension was that because of the complaint Ms Tree could not supervise Ms Sinnott, and there was no one else who could do so, Ms Sinnott could not be in the office until the matter was resolved.

[47] The suspension and the way the decision was conveyed to Ms Sinnott was not the action of a fair and reasonable employer. It was reckless. The suspension was conveyed to Ms Sinnott in the worst possible way under the circumstances and in a way Minters knew was undesirable and likely to cause a reaction. The suspension was predetermined and unjustified under the circumstances. She was extremely upset and broke down in front of colleagues and staff. Ms Sinnott gave evidence of the embarrassment this caused her and says it took a considerable time for her to get over what happened.

Dismissal

[48] It is accepted by both parties that Ms Sinnott was dismissed from her employment by Minters' letter of 17 May 2021. The decision was made by Mr Horne on behalf of Minters. His letter provided:⁴

As indicated above, your employment ends today pursuant to clause 17.1 of your employment agreement. The firm wishes to assist you to move to a new role external to the firm, in particular, by providing you with a generous financial support package. The firm has therefore decided to make you an ex gratia payment of \$195,000 gross (less the appropriate deductions), which represents 12 months' salary, inclusive of a sum equal to your salary for your eight week notice period. This will be paid on Wednesday 19 May 2001.

[49] The grounds on which the decision was based is contained in the second paragraph of Mr Horne's letter.⁵ Mr Horne noted:

Having carefully considered what we discussed, along with the note you provided and the emails and other evidence available to me (which comprises the evidence that is before the Authority), I have concluded that the relationship between you and the firm has irreconcilably broken down and that as a result the parties are incompatible. ...

⁴ Page 185 of the BOD

⁵ Page 181 of the BOD

[50] As the dismissal is accepted as having happened, the onus falls on Minters to justify it in the face of Ms Sinnott's challenge.

[51] In terms of the dismissal itself, the chronology is clear. Following the decision to suspend Ms Sinnott, Minters engaged Mr Scott-Howman to investigate.

[52] Having familiarised himself with the matters contained in Ms Tree's complaint, Mr Scott-Howman became concerned that he may have to make findings of fact on matters that were already before the Employment Relations Authority which could well make findings of fact on the same matters. Mr Scott-Howman noted:

There is a proceeding currently before the Employment Relations Authority in which many of these matters will need to be considered. Further the Authority may be required to make findings of fact in relation to some of them. In addition the matters which are raised by Clare in her pleadings are, in my view, directly related to Bianca's complaint – such that I would also need to consider them, and also make findings of fact in relation to them – in order to undertake an appropriate investigation of this matter.

[53] For these reasons, Mr Scott-Howman decided it would be inappropriate for him to proceed to investigate or make findings about those matters which were before the Authority.

[54] For these reasons amongst others, Mr Scott-Howman explored with Ms Tree and Ms Sinnott as to whether there was an appetite to consider a process as an alternative to the proceedings Ms Sinnott already had before the Authority. He proposed a process of facilitation as an alternative to litigation. Although Mr Scott-Howman did not give evidence before the Authority, his preliminary assessment indicates that he saw the problem between Ms Tree and Ms Sinnott as a relationship problem. Subject to agreement by the parties, he noted that facilitation should start from the premise of a breakdown in the relationship between Ms Tree and Ms Sinnott and that an attempt should not be made to retrieve it. He went on to say:

There are two important parts to this:

- Neither Clare nor Bianca should be expected to accept any blame or responsibility for this breakdown; but both should accept that the relationship is no longer tenable.
- There is no useful purpose served in Bianca participating in the facilitated process – and, indeed, my view is that it could be counterproductive to her health for her to do so. It is the firm that would need to participate, in good faith, with Clare.

[55] Ms Sinnott and Minters communicated with each other regarding the possibility of facilitation, however, could not reach agreement as to the basis on which it should proceed. It is worth noting that both were willing for a facilitation to occur, but each retained a non-negotiable stance. In Ms Sinnott's view, while she was prepared to continue facilitation without Ms Tree being present, she was not prepared to accept that her relationship with Ms Tree had broken down irretrievably.

[56] As this point it is worth considering the nature of Ms Tree's complaint of 7 February 2021. It was this letter that started the chain of events which led to Ms Sinnott's dismissal.⁶

[57] Ms Tree's letter which was not forwarded to Ms Sinnott for some two weeks after her suspension, comprised 51 paragraphs. They set out Ms Tree's issues in respect of her relationship with Ms Sinnott. It also commented on interactions between Ms Sinnott and other staff and in essence ended with a plea to Minters for assistance, put this way: "*I can't see a way forward and need help for the wellbeing of me, Clare, and our team*".

[58] For reasons already given, Mr Scott-Howman did not investigate the accuracy or otherwise of Ms Tree's 7 February letter. He reached an obvious conclusion that there was a serious relationship issue between the two that needed to be resolved.

[59] Although Minters had not reached a conclusion regarding the accuracy or otherwise of Ms Tree's letter, it nonetheless decided to proceed in an effort to resolve the problem it was confronted with by changing tack and rather than investigating Ms Tree's complaint, focused instead on its relationship with Ms Sinnott. The evidence it gave before the Authority was that it did this because if it went down the path of Ms Tree's complaint, a potential outcome was dismissal for misconduct whereas if it went down the path of an irreconcilable breakdown in the relationship, it saw this as impacting in a less negative way on Ms Sinnott who cross examined Minters on how it could reach such a conclusion. It is fair to say Minters could not provide a satisfactory answer.

[60] In changing tack, Minters then wrote on 7 May 2021 advising:⁷

You are required to attend a formal meeting. The purpose of the meeting is to obtain your feedback on a proposal that may affect the future of your

⁶ Page 73 of the BOD

⁷ Page 397 of the BOD

employment with Minter Ellison Rudd Watts (the firm). The proposal is that your employment comes to an end on the grounds of incompatibility.

[61] It is worth noting that Ms Sinnott had no input into the proposal. In other words, the process started with the proposal already in place.

[62] The 7 May letter listed eleven difficulties Minters said were being experienced in the working relationship. These included:

- (a) In 2019 and 2020 you raised two formal complaints against your former supervising partner, Rachel Devine.
- (b) The 2019 complaint was resolved by a settlement agreement (agreement) after you filed proceedings in the Authority. An outcome of the agreement was to change your supervising partner in late 2019 from Rachel to Bianca Tree.
- (c) The 2020 formal complaint against Rachel was made by you to Christine Brotherton, HR Director and David Gilbert in his role as the head of the division in which you work. This formal complaint was investigated by HR by Vanessa Syme (with your agreement as to Vanessa being the investigator) and was carefully considered by Andrew Poole, Chief Executive as decision maker. His decision was that your complaint was not substantiated. The allegations made and subsequent investigation continued to have a profound negative effect on Rachel.
- (d) When the draft investigation report into your 2020 complaint against Rachel was provided to you, you responded, in part, by making a formal complaint against Vanessa.
- (e) In February 2021 your then supervising partner, Bianca, wrote to Andrew Poole seeking his assistance as Chief Executive because of the significant distress her engagement with you was causing her. Bianca said that she could not continue to work with you, as the effects on her mental health and wellbeing are unacceptable.
- (f) At this time, you filed proceedings with the Authority, alleging breaches of the agreement. We have attempted mediation in respect of this matter, but as you know, no resolution was achieved.
- (g) After mediation the firm instructed barrister Andrew Scott-Howman to independently review the letter Andrew Poole received from Bianca, to interview both you and Bianca, and to provide a preliminary assessment in respect of two issues
 - (i) First, whether Mr Scott-Howman was in a position to make any findings of fact in respect of the matters raised with him by Bianca and you (or whether he would require more time if we wished him to do so); and
 - (ii) Second, given his independence and expertise as an employment law practitioner, whether he could provide us with any preliminary comments regarding the employment relationship between you and the firm.

- (h) Mr Scott-Howman considered he was not in a position to make any findings of fact. However, he did suggest that both parties consider facilitation. His proposal was to see if an alternative working arrangement could be identified through facilitation as an alternative to litigation. This proposal was on the basis that, in his objective view, the working relationship has irretrievably broken down and that as a result, Rachel and Bianca would not be involved in the facilitation.
- (i) You have rejected the facilitation proposal put forward by Mr Scott-Howman.
- (j) Your view is that facilitation should occur involving you, Rachel and Bianca.
- (k) Given the serious negative impacts on both Rachel and Bianca from their interactions with you, and the view of Mr Scott-Howman that they should not be involved in the facilitation, the firm does not consider your suggestion is reasonable or viable.

[63] The letter went on to provide a chronology summarising key incidents and events that were the source of Minters' view that the relationship has irreconcilably broken down.⁸

[64] On 12 May 2021 the parties met to discuss the 7 May letter. On 17 May, Minters moved to terminate Ms Sinnott's employment on the grounds of incompatibility. The letter from Mr Horne set out just how Minters reached its conclusions ([49] above).

[65] It then said:⁹

It is also my view based upon the information to which I refer above, that the breakdown in the relationship between you and the firm has been caused by your conduct particularly your communications with and conduct towards partners and staff of the firm, as summarised in my letter to you of 7 May.

[66] In answer to questions from the Authority and in cross examination, Mr Horne was open. He said he did not regard the onus on Minters in dismissing for incompatibility being as high as the onus it would have faced in respect of misconduct. He confirmed he took things at face value. He simply considered the evidence that had been filed and he considered what other witnesses had said, and even relied on Ms Sinnott's descriptions. He says he simply read the evidence that had been filed in the Authority, and he went through the chronology of events.

[67] When he was asked in cross examination, he said he had not done a matching exercise. By this he meant he had not attempted to resolve any conflicts in the evidence because he felt he did not need to. He said he could see nothing wrong with that. He confirmed he was the

⁸ Page 400 of the BOD
⁹ Page 181 of the BOD

investigator and decision maker and reaffirmed he simply needed to review the information that was before him which, other than the chronology, essentially comprised the briefs of evidence filed in the Employment Relations Authority.

[68] He confirmed that people could have different views, but also confirmed he did not speak to witnesses or interview them. He also confirmed he accepted the accuracy of the chronology at face value. None of the evidence relied on was tested. When this was put to Mr Horne, he stated he felt there was no need, as the evidence spoke for itself so in other words he felt because there was no conflict, he could rely on it. He seemed to overlook a need to make findings of fact through a more rigorous and robust process.

[69] As noted by the Employment Court in *Alistair Ross Gordon Humphrey v Canterbury District Health Board Te Paori Hauora o Waitaha*¹⁰ the Court of Appeal have made it clear in *Reid v New Zealand Fire Service Commission*¹¹ it is open for an employer to dismiss an employee on the basis of incompatibility, however a dismissal for incompatibility will only be rarely available. The Employment Court had noted in *Reid* that the employment relationship between the parties had broken down and become dysfunctional, and that this could be attributed substantially to the appellant. That cannot be said in this case, because the investigation did not focus on this aspect.

[70] Section 103A of the Act comes into play and dismissal must be an option that a fair and reasonable employer could take for it to be justified. Any finding by an employer must be thoroughly based on the facts. That is not the case here. Minters reached a conclusion that there was an irreconcilable breakdown providing a basis for dismissal first, on the basis it thought such an approach was an easier one for it to take (see Mr Horne's evidence); and secondly, on the basis of facts it gleaned from the evidence filed by the parties in the Employment Relations Authority prior to the hearing and on inferences taken from a chronology. The evidence was not tested, with Mr Horne reiterating he felt it spoke for itself.

[71] The 7 May letter also referenced matters prior to the settlement agreement, despite the settlement agreement being designed to draw a line and to start a relationship afresh. Further, it must be said that almost all the information Mr Horne relied on in reaching his conclusions comprised information given of the type protected by s 121 of the Act which provides:

¹⁰ [2021] NZEMPC 59

¹¹ [1998] 2ERNZ 250 at [280]

Any statements made or information given in the course of raising a personal grievance or in the course of attempting to resolve the grievance or in the course of any matter relating to a personal grievance are absolutely privileged.

[72] Not only did Mr Horne rely on such information to justify his decision, he made no attempts himself to verify their accuracy or otherwise. He did not speak to the authors of the briefs filed in the Authority, he did not in any way question the accuracy or veracity of the chronology, nor did he drill down behind as to why it may be Ms Sinnott was occupying a significant portion of human resource time. He had no answer when it was put to him in cross examination if the chronology covered the times HR had contacted Ms Sinnott enquiring about her wellbeing.

[73] In these circumstances, Ms Sinnott's dismissal on the grounds of incompatibility must be unjustified. She gave evidence of significant hurt and humiliation. She said the whole situation was extremely stressful for her and her family. She was very upset and the significant distress she gave evidence of was entirely foreseeable. She said she was truly shaken, hurt and embarrassed. Ms Sinnott gave evidence she was worried about the impact on her relationships with external and internal clients and found it difficult to explain what was happening to her family. She felt she could not hang out with friends and stopped walking the dog or visiting local shops.

Remedies

[74] As Ms Sinnott has been successful in her personal grievances, I need to determine what remedies are appropriate under all of the circumstances. Ms Sinnott seeks:

- (a) Reinstatement;
- (b) Compensation for hurt and humiliation;
- (c) Penalties.

I deal with those in that order.

Reinstatement

[75] The Authority heard significant evidence from the parties both for and against the remedy of reinstatement. S 123(1)(a) of the Act provides for the remedy of reinstatement of an employee to his or her former position, or placement to a position no less advantageous to that employee. S 125 of the Act provides that reinstatement is to be the primary remedy and

the Authority or Court must provide for reinstatement wherever practicable and reasonable, irrespective of whether it provides for any other remedy as specified in s 123.¹²

[76] The difficulty I face, is that Minters switched from investigating a complaint by Ms Tree to instead considering a proposal to terminate Ms Sinnott's employment on the grounds of irreconcilable breakdown of the relationship. That is, the relationship between Minters and Ms Sinnott. However, significant evidence was presented by Minters providing the background to Ms Tree's complaint.

[77] The evidence from both parties is that although complaints regarding Ms Sinnott's alleged behaviour were clearly made to HR, Minters accepted that those complaints weren't progressed but rather HR attempted to repair the relationships. When Ms Brotherton was cross-examined by Ms Sinnott, she confirmed she never told Ms Sinnott the complaints had been made.

[78] Ms Brotherton noted that one of her responsibilities was to address and resolve staff issues in a timely, direct and constructive manner. She stated that Ms Sinnott's interactions and behaviours did not come from a place of trust and confidence. She felt that Ms Sinnott overreacted to comments or took offence to something in correspondence. She was confrontational and unwilling to work collaboratively or constructively with others. Again, there was no evidence that these views were ever shared with Ms Sinnott. She also noted that Ms Sinnott would not accept the apology that Ms Brotherton gave her on behalf of Minters regarding the issue of the zero fee budget. Rather, she noted that Ms Sinnott's reaction was to complain about others and escalate tension.

[79] Ms Brotherton stated she was astounded that Ms Sinnott could not see that her relationship with the Environment team had irreconcilably broken down and could not be revived. She noted that since Ms Brotherton had joined the firm in 2019, Ms Sinnott had raised multiple informal or formal complaints and that there was virtually never a time when she did not have some sort of complaint on foot against one or other of the team. She felt that Ms Sinnott did not acknowledge the degree of very real concern that others had in working with her. She said that she herself felt worn down by Ms Sinnott. She said working with Ms Sinnott made her reflect upon and question her role in the firm. She said she had prided herself on building and maintaining positive working relationships with others but had failed

¹² S 125 Employment Relations Act 2000

to be able to do this with Ms Sinnott. She felt Ms Sinnott was chipping away at her confidence and worried that she would be unable to cope should Ms Sinnott succeed in her personal grievances and be reinstated. She felt her relationship with Ms Sinnott was beyond reconciliation or management.

[80] Ms Devine's evidence also set out the difficulties she said she had experienced working with Ms Sinnott. She stated she was not thriving because of Ms Sinnott's behaviour and said she had become less and less able to withstand her outbursts and behaviour. She gave evidence that when Ms Sinnott succeeded in her interim reinstatement application, she was shocked and upset. She didn't want to be at work and felt a need to seek professional guidance. Her evidence was that Ms Sinnott's behaviour towards her had hardened, with her becoming more vehement, forceful, cynical and bitter in her interactions.

[81] Ms Devine said this was impacting on her resilience in withstanding this behaviour. She presented her view that reinstatement was not practicable. She said the Environment team was a small group of individuals. She reiterated that she and no-one else in the team felt they would be able to work with Ms Sinnott. She felt that Ms Sinnott's relationship with her, the team and indeed Minters, was significantly and permanently damaged. She did not think it realistic to expect Ms Sinnott to change her way of operating and had very real fears that if Ms Sinnott was reinstated, matters would end in frustration and dislike. She said her stomach turned to dread when she thought about Ms Sinnott's return and gave evidence that she was at a loss to know how Ms Sinnott could think the relationship was retrievable.

[82] Ms Devine was of a view that the team would not be able to avoid interacting with Ms Sinnott. However she went to lengths to praise Ms Sinnott's skills.

[83] Ms Tree gave evidence of her complaint and the background to it. She explained that from the moment Ms Sinnott had joined the firm, she found her difficult to work with. She found her defensive, angry, undermining and disrespectful. She noted that although she and the rest of the Environment team were based in Auckland, and Ms Sinnott was in Wellington, the physical separation in no way lessened the impact of the complained behaviour. Ms Tree said it was hard to describe the content, force and rage directed at her by Ms Sinnott. She said her relationship with Ms Sinnott was broken beyond repair and she could not and would not work with her again.

[84] Ms Tree gave evidence that leading up to her complaint letter of 7 February 2021 she felt drained and exhausted. She felt Ms Sinnott was constantly challenging her and engaged an executive coach to assist. However, she said at the end, she was at the end of her tether and on 7 February 2021 wrote her letter to Mr Poole explaining her position and asking for help.¹³

[85] Ms Tree said she did not accept that Ms Sinnott would put in the work and improve relationships. She said that Ms Sinnott consistently denied her actions and the impact it had on others. She confirmed that from her perspective the relationship had unquestionably broken down and was irreconcilable. She felt Ms Sinnott suffered from a complete lack of self-awareness in respect of the relationship and felt that there would be unacceptable health and safety risks to her to the extent she would not be able to stay with the firm should Ms Sinnott be reinstated.

[86] Others gave similar evidence including Ms Sullivan.

[87] Mr Poole gave evidence that his view was that it would not be safe, healthy or reasonable to expect Ms Devine or Ms Tree to work with Ms Sinnott. He stated he firmly believed those relationships were broken beyond repair. He said that although Minters was a large national firm, that did not mean it had the resources to fit Ms Sinnott back into the firm regardless of the obstacles. He stated that rather than viewing Minters as a single large entity, it was more realistic to view it as a number of smaller specialist firms operating under the same name. He noted that Ms Sinnott was a specialist environmental lawyer and said she could not work in other areas of the law at that level of seniority. He gave evidence that transferring her to another team in the firm would impose an impractical and unreasonable burden on the firm.

[88] Ms Sinnott made the telling point that she had been unaware of the relationship concerns. It was common ground that although HR was receiving complaints in respect of Ms Sinnott's interaction with others, these were not escalated or brought to Ms Sinnott's attention. Accordingly, she could not fix relationship issues she did not know existed. Ms Sinnott said she was unaware of the significant effect the way she behaved was having on others, especially Ms Devine and Ms Tree. She said now being aware, she would have something to work on.

¹³ CB 073.

[89] It is clear from the evidence, that Minters have let down all parties, including affected partners and Ms Sinnott, and therefore must take a significant portion of the blame for allowing matters to develop as they have, but that does not change the legal principle that reinstatement must be both practicable and reasonable. The dismissal is unjustified and the decision to terminate employment was both procedurally and substantively unfair. No proper investigation was conducted, with the decision maker simply relying on documentation filed in the Authority and/or other statements, including the chronology, prepared in defence of Ms Sinnott's earlier application to the Authority.

[90] As said above, in order for there to be reinstatement it must be both reasonable and practicable. In *Angus v Ports of Auckland Limited* a full Court of the Employment Court looked at the meaning of reasonableness, stating that it requires the Authority to consider the effect of the order on both parties involved as well as affected employees or anyone else who may be affected.¹⁴

[91] In *New Zealand Education Institute v Board of Trustees of Auckland Normal Intermediate School* the Court of Appeal noted:¹⁵

... Whether ... it would not be practicable to reinstatement Mr Bell involves a balancing of the interests of the parties and the justices of their cases with regard not only to the past but more particularly to the future. It is not uncommon for this Court or its predecessor, having found a dismissal to have been unjustified, to nevertheless conclude on the evidence that it would be inappropriate in the sense of being impracticable to reinstate the employment relationship. Practicability is capability of being carried out in action, feasibility or the potential for the reimposition of the employment relationship to be done or carried out successfully. Practicability cannot be narrowly construed in the sense of being simply possible irrespective of the consequence.

[92] The Court also summarised the principles to be considered in *Campbell v Commissioner of Salford School*:¹⁶

- The onus is on the employer to establish that reinstatement is not practicable.
- Practicability is not the same as possibility. What is possible is not necessarily practicable.
- The interests of the parties and the justice of their cases are to be balanced with regard to the past but also and in particular the future.

¹⁴ [2011] NZEmpC 160

¹⁵ [1994] 2 ERNZ 4141 (CA)

¹⁶ [2015] NZEmpC 122 at para 305.

- Practicability involves considering whether the employment relationship can be successfully re-imposed on the parties.
- The Court may consider matters that were outside the reasons for a dismissal when assessing whether the employment relationship can be re-imposed. A broad approach is to be taken.

[93] It is Minters' responsibility that Ms Sinnott's relationships with others in Minters and with Minters itself has reached the stage it has. Having said that, I conclude that because of the effect on affected employees it is not reasonable or practicable to order reinstatement. The relationship between the parties and key people within the firm has now broken down and the evidence leads me to conclude a successful employment relationship cannot now be reimposed on the parties. There is no likelihood of reconciliation. As said above, Minters' decision not to deal in a proper way with the emerging difficulties between Ms Sinnott and others in no small part has led to the current circumstance. Ms Sinnott cannot be expected to fix matters when she was given no notice of the difficulties.

[94] I have referred to earlier to the evidence Ms Sinnott gave in respect of the hurt and humiliation she has suffered as a result of the suspension. It should not come as any surprise to Minters that the suspension would have had the effect it did. Ms Sinnott's reaction to the suspension had been foreseen. I consider taking into account the Court's guidance in respect of awards a sum of \$20,000 appropriate under this heading.

[95] In respect of the dismissal, I have found the dismissal on the grounds of irreconcilable breakdown of the employment relationship to be unjustified. Ms Sinnott gave harrowing evidence regarding the effect the dismissal had on her. There is no doubt she was truly shaken, hurt and embarrassed. I have taken into account the Court's guidelines in assessing remedies under this heading and consider an award of \$25,000 appropriate under the circumstances.

Contribution

[96] As I have found both Ms Sinnott's suspension and dismissal were unjustified, I must consider whether Ms Sinnott has contributed to the situation which gave rise to her personal grievances.¹⁷ Section 124 of the Act states that I must consider the extent to what if any Ms Sinnott's actions contributed to the situation which gave rise to her personal grievances and then assess whether any calculated remedies should be reduced.

¹⁷ Section 124 of the Act.

[97] I have considered the relevant factors summarised by the Employment Court in *Maddigan v Director-General of Conservation*.¹⁸ Significant evidence was placed before the Authority regarding Ms Sinnott's interaction with others. Whilst I have found Ms Tree's and Ms Devine's evidence compelling, I have considered it against the background of the impact on them which can be subjective.

[98] As no investigation was ever carried out into any allegations against Ms Sinnott and because any issues with her behaviour were not brought to her attention and addressed, whilst there may be a link between Ms Sinnott's alleged actions and the situation which gave rise to her dismissal, I do not consider that her behaviour could be culpable or blameworthy when any concerns regarding it were never brought to her attention in a proper way despite staff complaints to Minters' HR. Ms Sinnott likewise could not be considered to have behaved in a way where her behaviour could be culpable or blameworthy in respect of her suspension. The suspension was procedurally unfair and in any event, the basis of the suspension, i.e. Ms Tree's complaint, was never investigated.

[99] Further, although in considering the remedy of reinstatement I have found that the employment relationship between the parties had broken down, I found that this could be attributed substantially to Minters not Ms Sinnott on the basis she could not address issues that had arisen in the workplace unless she was aware of them. As I have said earlier in this determination, Minters was aware of allegations and concerns regarding Ms Sinnott's behaviour, but did not formally investigate these matters.

[100] It had the opportunity to investigate Ms Tree's complaint, but on its own admission because it felt there was a lesser onus on it if it did so, Minters chose to go down the path of dismissal, and attempting to justify it on the grounds of the irreconcilable breakdown of the relationship.

[101] It follows therefore that I do not find Ms Sinnott guilty of any blameworthy conduct which would cause me to reduce any of the remedies granted.

¹⁸ *Maddigan v Director-General of Conservation* [2019] NZEmpC 190 at [71]-[76]

Orders

[102] Ms Sinnott has been unsuccessful in obtaining reinstatement for the reasons previously given. However, she has succeeded in her personal grievances in respect of her suspension and dismissal. Minter Ellison Rudd Watts must pay the following sums to Ms Sinnott:

- (a) In respect of the suspension, a sum of \$20,000 pursuant to s 123(1)(c)(i) of the Act.
- (b) In respect of the unjustified dismissal a sum of \$25,000 pursuant to s 123(1)(c)(i) of the Act. No penalty has been awarded for what would have been essentially claims of breaches of good faith. The matters that Ms Sinnott complained of under this heading have already been compensated for in terms of the awards made above.

Penalty

[103] Ms Sinnott has claimed a penalty for essentially breaches of good faith. However, the matters she complains of under this heading have already been compensated for in terms of the awards made above.

Costs

[104] Ms Sinnott is entitled to a reimbursement by Minters of her filing fee of \$71.56 together with the hearing fees she has incurred of \$766.65. Although Ms Sinnott was successful in her grievances, she represented herself (whilst remaining on the Minters payroll) throughout the investigation meeting. I assume therefore that costs are not an issue. If that is not the case, Ms Sinnott has 14 days from the date of this determination in which to make a written submission on costs, Minters has a further 14 days to provide a response. I will then determine what costs are appropriate.

Non-publication

[105] At the commencement of the investigation meeting I considered Minters' prior application for non-publication of certain material. Minters did not seek name suppression of any of its witnesses but rather the suppression of personal evidence which was presented in support of the statements made by some of the witnesses. An order prohibiting publication of the evidence referred to in Minters application dated 3 August 2021 is made.

Geoff O'Sullivan
Member of the Employment Relations Authority