PAYKEL LTD v MORTON

Employment Court, Christchurch (CEC19/94) 2 May; 24 June 1994
Colgan J

Dismissal — Health — Lengthy absence from work as result of accident — Procedural fairness requirements akin to redundancy — Contributory fault — Section 40(2) Employment Contracts Act 1991 — 25 percent reduction of award significant — Appeal against employment Tribunal decision — Manager.

This was an appeal and cross-appeal against a decision of the Employment Tribunal (unreported, 6 August 1993, CT99/93) upholding a personal grievance claim.

The respondent was a branch manager for the appellant in Invercargill and had been employed for 14 years. He suffered a serious back injury. He was away from work for a number of months, despite attempts to work part-time. The appellant considered that the absence was causing severe business problems. The appellant was advised of impending surgery and the likely extent of the absence. The appellant took steps to appoint a permanent replacement but did not mention this to the respondent. The appellant then terminated the respondent's employment on grounds of frustration of contract.

The Tribunal held that the termination was an unjustified dismissal and awarded lost remuneration plus compensation. The compensation amount ($6,000) was reduced by 25 percent (to $4,500) on account of the respondent's fault in failing to keep the appellant as well informed as he could have.

The appellant contended that the Tribunal erred in determining that the manager who dismissed the respondent should have travelled from Auckland to Invercargill to effect the dismissal in person; failed to give adequate weight to the commercial difficulty the absence caused; and erred in assessing the respondent's contribution at only 25 percent in the circumstances. The respondent cross-appealed against the compensation awarded.

Held, (1) on its own a finding of absence of justification for dismissal for the failure of the manager to fly to interview and dismiss the respondent in person might have been successfully challenged. Rather, aspects of the whole process breached the appellant's obligations of trust and confidence to the respondent. It decided to seek a replacement and did not tell the respondent of this significant development. It was remarkable that, while in Invercargill to appoint the replacement, management did not contact the respondent to tell him what was proposed. The appellant omitted to tell the respondent even after the replacement was appointed, but rather misled the respondent to believe that his job awaited him after surgery. Obligations of fair dealing with an employee of very long standing in a senior and responsible position required the appellant to communicate with the

respondent and to disclose to him their intentions and actions. The failure to do so rendered the dismissal unjustified. The mode of communication was not as important as the process leading up to that termination.

(2) The lengthy absence might have meant that the employer was entitled to say "enough". It was still obliged to act procedurally fairly. It was not possible to say what would have occurred had the appellant done so. The appellant acted without any effective communication with the respondent and without recourse to the specialist advice which the respondent invited it to obtain. In these circumstances the appellant was unable to say that it acted fairly and therefore with justification in dismissing the respondent as it did. The law expects compliance with minimum standards of fairness in such cases as it does in cases of redundancy. In most instances there is no fault or culpability by the employee causing termination, rather factors beyond the control of either party make termination an option.

(3) In the circumstances, including uncertainty, the timing of the warning, and ongoing communication between the parties, it was not equitable to allow the appellant to rely on its written advice of conditional consideration of termination of employment given some 3 months previously in circumstances which showed at least an acquiescence, if not acceptance, of a return to work after surgery.

(4) The sum of $6,000 compensation was not excessive and reflected a number of factors in the dismissal, including the respondent's long standing, seniority, and the insensitive manner and timing of the dismissal. The award may even have been a conservative or modest amount.

(5) The factors which caused the Tribunal to make a not insignificant reduction from an already modest award (the timing of the respondent's communications) were marginally and technically outside the requested timeframes, but for good reasons explained at the time. The Tribunal should carefully consider the exercise of its powers under s 40(2) Employment Contracts Act. Not every imperfection or peripheral fault by an employee should attract a deduction. A reduction of 25 percent is one of particular significance. The Tribunal was not warranted in making any reduction, let alone for the reasons it did.

Appeal dismissed; cross-appeal allowed. Compensation increased to $6,000.

Case referred to
Unkovich v Air NZ Ltd [1993] 1 ERNZ 526

G M Pollak counsel for appellant (Paykel Ltd)
M J Thomas counsel for respondent (Lindsay Alan Morton)

COLGAN J: These are an appeal and cross-appeal against a decision given by the Employment Tribunal on 6 August 1993 after hearings in Invercargill in April and June. The Tribunal found the appellant's dismissal of the respondent to have been unjustified. The remedies included the sum of $3,670 for lost income, compensation of $4,500 for injury to feelings, and $3,000 in costs.

Mr Morton, who was a branch manager of the appellant's heavy engineering business, had been off work for several months as a result of personal injury by accident suffered on 31 March 1992. At the time of his dismissal, on 27 August 1992, he was due to be operated on surgically and it was predicted that he would be off work for a further period of between 6 and 8 weeks after surgery.

The Tribunal concluded that the appellant's lack of sufficient personal inquiry about Mr Morton's prognosis before dismissing him and its failure to keep him advised of its intentions and to allow him to respond to these, meant that his dismissal (even with one month's pay in lieu of notice) was gone about unfairly and was therefore unjustified.

The following is a summary of the facts either found by the Tribunal and expressed in its decision or which otherwise emerge from the evidence.

Mr Morton had been employed by the appellant or its predecessor commercial entities for some 14 years. He was the manager of its second most significant branch in the country but nevertheless was required, in his day to day duties, to be able to undertake some lifting of heavy components and other physical work.

Following a back injury on 31 March 1992 that was accepted as personal injury by accident for the purposes of earnings related compensation that he was paid by the Accident Compensation Corporation, Mr Morton sought medical advice and treatment. He was referred by his general practitioner to two surgeons, the second of whom exhibited optimism as to his eventual recovery.

Although Mr Morton attempted, from time to time, to work part-time at the appellant's Invercargill branch, this was largely unsuccessful. As a result, at least in part, of Mr Morton's continued absence, the Invercargill branch experienced commercial and staff morale problems. These became of increasing concern to the appellant's senior South Island and national management personnel who were not unnaturally concerned whether and when Mr Morton might return to his branch management duties.

On 18 May 1992 the appellant's operations manager, Mr Roger Barnett, wrote to Mr Morton asking for "a full medical report outlining the nature of your injury and when you will be fit to resume full time work".

On 28 May 1992 Mr Morton advised Mr Barnett that his doctor was unable to confirm his return date as there had been delays with CAT scanning equipment at Invercargill's Kew Hospital. He confirmed that he had a date for a scan on 24 June and that he would then be seen in hospital 2 weeks later. Mr Morton's advice concluded with an indication that he would subsequently advise the company of an estimated return date. He enclosed a brief medical certificate from his general practitioner cryptically outlining the nature of his injury but being unable to specify a date by which the grievant would be fit to return to work.

On 5 June 1992 Mr Barnett again wrote to Mr Morton outlining the "severe difficulties" that this absence was causing the company and indicating that it was not able or prepared to have this situation continue indefinitely. Mr Barnett requested that Mr Morton provide, in writing and within 7 days, advice of the date upon which he would be able to resume full normal work. The letter concluded:

> ". . . if you cannot advise us of the date of your return or if that return is too far in the future we will have to consider termination of your employment."

Mr Morton's reply was brief and sent on 12 June. It advised Mr Barnett that the respondent was to shortly spend 2 days in hospital for a CAT scan. It advised that this procedure had been delayed for 3 weeks because of equipment breakdown. Mr Morton indicated that he would be able to advise the company in the week after the scan of his return and undertook to do so by telephone.

Mr Morton's explanation for the absence of a response to the letter of 5 June until 12 June was because he was awaiting allocation of a CAT scan date. He told the Tribunal that he wrote on 12 June immediately he was so advised.

In spite of his undertaking to this effect, Mr Morton did not contact Mr Barnett during the week ending 26 June. On 30 June Mr Barnett contacted Mr Morton but was told that the respondent was awaiting a doctor's report indicating when he would be able to return to full duties. In spite of a commitment to contact the operations manager on about 1 or 2 July Mr Morton did not do so. Contact was re-established by Mr Barnett on 6 July and Mr Morton told him of the prospective return to the country on 8 July of a specialist to whom he was to be referred by his general practitioner. Mr Barnett reiterated his concerns about the adverse effects of the respondent's absence on the business of the branch and on 9 July sought further advice when full duties could be resumed.

On about 7 July Mr Morton had made an inquiry of the appellant's company secretary as to his superannuation entitlements. This was not unconnected with the prospect of termination of employment that had been referred to in the company's letter of 5 June.

On about 14 July Mr Morton advised Mr Barnett that surgery had been, if not abandoned, at least postponed pending alternative programmes of treatment at a hospital during the following fortnight at the end of which there would be a reassessment of the surgical option.

On 31 July Mr Barnett spoke on the telephone with Mr Morton's general practitioner. The advice given by the doctor was that, without an operation, it was unlikely that Mr Morton would be able to return to full duties. The doctor expressed uncertainty as to Mr Morton regaining 100 percent fitness after an operation and opined that prognosis would be difficult if not impossible before such an operation.

On 3 August Mr Bradley, the South Island manager, had a conversation with Mr Morton that was conveyed by Mr Bradley to Mr Barnett on 5 August. It appears that this included advice of certain prospective surgery and the delay of up to 9 weeks including waiting for surgery, recovery, and physiotherapy. On the same day, 5 August, Mr Barnett spoke over the telephone with Mr Morton and confirmed those details. Mr Barnett's view was then that even if all went well, Mr Morton would not be returning to work until late October.

Following the telephone discussions on 3 August Mr Bradley advised Mr Barnett that Mr Morton's specialist had decided upon surgery, that the waiting list for that was between 2 and 3 weeks, that the time to be spent in hospital after surgery would be a further week and that recovery and physiotherapy would take approximately a further 6 weeks before a return to work might be expected.

The decision to operate on Mr Morton's back condition was made by his surgeon on 3 August 1992. On that day the respondent telephoned both Messrs Barnett and Bradley and advised them of this development. On about 20 August Mr Morton was told that his operation had been scheduled for 29 September. To relieve the pressure that he was under to return to work Mr Morton was able to have the operation brought forward to 1 September.

Mr Morton explained to the Tribunal that he did not immediately contact the company when he was first allocated an operation date (that is on 20 August advising him the operation would be on 29 September) because he was hopeful and indeed confident that this date could be brought

forward. Mr Morton was advised of the earlier operation date on or about 25 August and although he immediately attempted to contact the Christchurch branch of the company where Mr Bradley was located, he was unable to do so. Mr Morton was aware that Mr Bradley was to travel to Invercargill and to stay at the Ascot Park Hotel on 26 August and arranged to leave a message for him there.

It was not only Mr Bradley who was in Invercargill on 26 August. Mr Barnett was also there to interview a short-listed replacement branch manager. This person had been selected by an employment agency or consultancy at the request of the appellant and Messrs Bradley and Barnett were in Invercargill on that day for a final interview of this prospective branch manager. Neither Mr Bradley nor Mr Barnett contacted Mr Morton in Invercargill on 26 August. Rather on 27 August Mr Bradley telephoned Mr Morton. The latter told him of the date of his operation. There was no intimation given to Mr Morton by Mr Bradley of the possible appointment of a successor and the South Island manager's response to Mr Morton's advice of the operation date was, at best from the company's point of view, merely neutral and, from Mr Morton's, encouraging that progress was at last being made towards a return to work.

On 27 August, upon his return to Auckland and after advice from Mr Bradley concerning the latter's telephone discussions with Mr Morton, Mr Barnett wrote to Mr Morton terminating the latter's employment. That letter is instructive of the appellant's reasons and grounds for termination of employment then and materially included the following:

"The news, confirmed today that your back is not healing well, that an operation is required, and that a prolonged period of post-operative recovery will be necessary is clearly most unfortunate news.

"As you know your position as Branch Manager is critical to the effective operation of that branch and your ongoing absence is making it very difficult to manage the Branch. We have already indicated a number of times to you, that it has been extremely difficult to run the Invercargill operation efficiently during your unfortunate absence. You have now been away from the branch since April 2nd this year and until today it has not been possible to reach any conclusions about when you might be able to continue to keep your job open. However, to summarise the facts as we now know them after todays conversation it would seem that your operation is to take place on Tuesday 1st September. You then face at least one week in hospital recuperating and a further six weeks of recuperation at home before there is any question of your being able to return to work. Obviously while the doctors are optimistic they have also indicated that there is no certainty that at the end of this time you will be able to resume full normal duties.

"We have had to consider the above information against the damage we know is being done to the branch by your continued absence (following the five months you have already been absent). After considering all these matters we have, with some regret, reached the conclusion that knowing what we now know it is not possible to continue to keep your position open. Accordingly we must advise that we feel we have no choice but to terminate your employment on the grounds of frustration of Contract effective immediately."

Neither Mr Barnett nor any other representative of the appellant had spoken to Mr Morton's surgeon. There had been a telephone discussion with the respondent's general medical practitioner about one month previously, but his advice had been, in part, that inquiry as to progress and prognosis should be made of the specialist surgeon.

The company's challenges to this decision are several. First, it says that the adjudicator was wrong to find that the failure of the senior manager, whose decision it was to dismiss Mr Morton, to have travelled from Auckland to Invercargill to interview the respondent, was a procedural unfairness. The Tribunal approached its task in part by setting out what it said the appellant should have done and more particularly:

"As at August 3, 1992 the company knew that Mr Morton's operation was to take place at the beginning of September, and that he could not be expected to return to work until at least mid-October. At that stage Mr Morton had been unable to perform his normal functions as branch manager for a period of four months, and was not expected to return to work for another two and a half months. At that stage Mr Barnett should have caught a flight from Auckland to Invercargill. He should have called on Mr Morton personally, and told him that the company was forced to contemplate terminating his employment, and would be interviewing [*prospective*] replacements.

. . . . .

"Not only could the inquiry have been completed, but Mr Barnett would have been able to deal with Mr Morton personally. Mr Barnett struck the Tribunal as both a concerned manager, and a manager with some considerable inter-personal skills. The situation could have been discussed in full, and Mr Barnett could have offered to consider Mr Morton's future employment in the event that the operation was successful, and another vacancy was to become available. The offer would have been made personally, and its effect would not have been demolished by its attachment to an unexpected dismissal letter. Mr Morton could have been made to understand the necessity of the company interviewing prospective employees. Mr Morton would have felt that the company had done all it could do, and that his termination was for reasons beyond the control of the parties. The necessary decision of the company would have been made more palatable, and the dismissal effected in a humane manner. The Tribunal is not critical of the essential reason for this dismissal, but critical of the dismissal's timing, and the company's dismissal procedure.

. . . . .

"If the company was going to dismiss him, then it is logical that they would have raised this possibility in the conversations which took place on August 27. While [the advocate for the company in the Tribunal hearing] submitted that an interview was not necessary, the Tribunal cannot accept this. The company was dealing with a long serving employee who was about to have a serious back operation.

. . . . .

"The report of the specialist submitted to the Tribunal indicated that the specialist would have been optimistic if consulted prior to Mr Morton's dismissal. Because Mr Barnett did not have the benefit of a personal interview with Mr Morton and his specialist, he did not have the benefit of sharing that optimism. Mr Barnett should have flown to Invercargill and consulted Mr Morton. The Tribunal does not consider, in most instances, that fair procedures include effecting a dismissal of a long serving employee by letter at long distance. One critical element of procedural fairness requires that the person responsible for making the decision should conduct the dismissal interview. (See Labour Law in New Zealand/Hughes at page 1943 — 'It is now clearly settled as a matter of principle that

'a person exercising authority to dismiss a worker cannot avoid responsibility for doing so in a fair manner by relying on the recommendation of another person, even though that other may be the worker's immediate superior. The responsibility for having sufficient reason and for following a fair procedure must rest with the person who is exercising the authority to dismiss.')

"Mr Morton was dismissed from Auckland. The South Island Manager, Mr Bradley, relayed his account of his discussions with Mr Morton. Mr Bradley's testimony before the Tribunal revealed that he held a pessimistic prognosis. He stated that he knew Mr Morton had a previous operation because of back problems. He personally felt considerable uncertainty about the outcome of the second operation. He, however, testified that Mr Morton was optimistic, but he could not remember whether he conveyed this optimism to Mr Barnett, who in consultation with the managing director of the company, decided that Mr Morton should be dismissed. The Tribunal concludes from Mr Bradley's testimony and demeanour that the message conveyed to Mr Barnett was pessimistic. It turns out that his pessimism was not shared by Mr Morton's specialist.

"Mr Morton was not pessimistic, and his optimism was buoyed by discussions with the specialist. Had Mr Barnett travelled to Invercargill he would have been informed of this optimism, and the basis of this optimism. Mr Barnett then would have contacted the specialist and completed his enquiry into the prospects for continuing to employ Mr Morton."

Next, the appellant says the Tribunal gave insufficient weight to the deteriorating commercial and personnel situation at its Invercargill branch that had arisen at least in part from Mr Morton's absence. As to this the Tribunal found:

"The branch was having staff morale problems. There was conflict between staff members, and discontent over an uneven distribution of the work load. Sales were not meeting budget. Sales to the company's largest customer which was located in Invercargill had declined significantly. Mr Bradley, the South Island Manager, testified convincingly to these problems, as did Mr Barnett, the New Zealand Operations Manager. Specific evidence as to the range of problems suffered because of Mr Morton's absence as branch manager were also given by Barry Finnerty, and Anne Thomson, two employees employed at the branch when Mr Morton was absent. Clearly, Mr Morton's absence was having a detrimental effect on the functioning of the branch. The effective management of the branch required the company to make a decision as to Mr Morton's future. Despite having received assurances as to Mr Morton's return to work in mid-October, the company told the Tribunal that it was necessary to terminate Mr Morton's employment.

. . . . . .

"The Tribunal accepts the company's evidence that the branch was suffering significant problems due to Mr Morton's absence which required the company to make a decision in respect to Mr Morton's contract of employment."

Thirdly, the appellant says that the adjudicator gave insufficient weight to Mr Morton's conduct in the lead up to his dismissal and even though it reduced the compensation otherwise payable from $6,000 to $4,500, this was insufficient. It said those deficiencies on the part of Mr Morton should have caused the Tribunal to find the dismissal justified. The part of the Tribunal's decision concerning Mr Morton's contributory role was as follows:

"The employer complained to the Tribunal that Mr Morton failed to meet the employer's verbal and written requests to provide a medical report regarding his condition, and his likely date of return to work. The Tribunal finds as fact that Mr Morton created some considerable uncertainty by not responding promptly to these requests. The Tribunal recognises that there may have been problems in obtaining a definite medical report identifying a likely date for returning to work, however Mr Morton should have been more forthcoming. Any difficulties in obtaining a medical

certificate, or identifying with greater certainty a return to work date, should have been explained promptly and in full to the employer. The Tribunal determines that an appropriate level of compensation would have been $6,000, but in carrying out the requirements of section 40(2), this amount is reduced to $4,500. In determining this amount the Tribunal takes into account the letter of June 5 which states that the company requires Mr Morton to confirm in writing within the next seven days the date upon which he is to resume full normal work, or if he cannot give such written confirmation then his employment may be terminated. Mr Morton's response to the company's specific requirement was late. Even if he had not received a medical report at that stage, he should have informed the company of that fact."

The respondent's cross-appeal challenges the level of compensation allowed by the Tribunal in view of what counsel says were a number of features of Mr Morton's distress after dismissal. Also challenged is the reduction of some 25 percent in the amount that would otherwise have been awarded under s 40(1)(c)(i) but for what the adjudicator found were Mr Morton's contributions to his unjustified dismissal.

I deal first with the ground of appeal challenging the adjudicator's finding that for the dismissal to have been effected fairly Mr Barnett should have travelled from Auckland to Invercargill to interview the respondent and to advise him of the dismissal decision. On its own, a finding of absence of justification for dismissal for this reason might well have been successfully challenged by the appellant. I think there is some merit in Mr Pollak's submission that the adjudicator may have substituted the Tribunal's decision for that of the employer instead of considering whether the dismissal could have been said to have been the justifiable action of a reasonable employer in all the circumstances.

Rather than Mr Barnett's failure to specifically travel to Invercargill, I find that in other, but not necessarily unassociated, aspects of the whole process the appellant breached its obligations of trust of and confidence in Mr Morton. Focusing just on the events of late August it instructed a consultancy to advertise or otherwise look out for a potential branch manager. It did not tell Mr Morton of this significant move to appoint a replacement. Next, on 26 August, that is the day before Mr Morton's dismissal, both Messrs Bradley and Barnett were in Invercargill. They interviewed Mr Morton's successor and took a decision to appoint him. It was the corollary of that decision that Mr Morton would be dismissed as he was on the following day. It is remarkable that neither Mr Barnett nor Mr Bradley made contact with Mr Morton whilst in Invercargill to inform him of what was clearly known to and intended by them then. The decision to dismiss was made on 26 August. On the next day Mr Bradley spoke to Mr Morton by telephone. He not only omitted to tell Mr Morton of the appointment of his replacement following the previous day's interview but Mr Bradley misled the respondent into believing that his job was still open to be taken up after surgery. Obligations of fair dealing with an employee of very long standing in a senior and responsible position required those company representatives to communicate with Mr Morton and to disclose to him their intentions and actions. Their failure to do so amounted in my view to quite fundamental breaches of the company's obligations of trust, confidence, and fidelity towards a senior employee of long standing. In these circumstances it would have been open to the Tribunal to have found the dismissal, which was an integral part of their presence in Invercargill and arose directly from it, to have been unjustified because of these breaches.

I would place less emphasis upon the mode of communication of the decision to dismiss than apparently did the adjudicator. The importance of open, direct, and even face to face communication lay in my view in the process leading up to the decision to dismiss rather than the communication of that fait accompli. That is because, had the appellant been candid with Mr Morton, the respondent would have had an opportunity to realise contrary to his assumption when he was telephoned by Mr Bradley, that his position was not secure. Mr Morton would further have had an opportunity to have sought to persuade Messrs Barnett and Bradley that the prognosis for his recovery and return to managerial duties was good. Most importantly, perhaps, Mr Morton would have had the opportunity to have either obtained a report from his specialist physician or at least to have invited the appellant's representatives to contact Mr Fosbender to learn of that prognosis from the person best qualified to make the assessment. The evidence discloses that had Mr Bradley or Mr Barnett spoken with Mr Fosbender his view of Mr Morton's long-term recovery after surgery would have been more optimistic than the assumptions which Mr Bradley made and conveyed to Mr Barnett immediately before the latter's dismissal of Mr Morton.

For these different reasons, therefore, I conclude that the absence of direct, personal, and investigative discussions between representatives of the appellant and Mr Morton represented inadequate adherence to minimal requirements of fair process in all the circumstances of this case. The appellant's breach in this regard causes its decision to dismiss taken in reliance upon these insufficient and flawed inquiries to have been unjustified.

The second broad challenge to the adjudicator's decision is to what the appellant says was the lack of regard had to the deteriorating commercial and personnel position at the branch Mr Morton managed which had arisen at least in part, or had been exacerbated, by his prolonged absence. Put succinctly, Mr Pollak submitted that the adjudicator ought to have found that the appellant was entitled to say "enough!" after an absence of 5 months and with the certain prospect of a period of a further 2 months at least before Mr Morton could resume his duties.

It is not irrelevant that Mr Morton's replacement in the position of Invercargill manager for Paykel Ltd did not effectively assume his duties until early October, that is at about the same time as Mr Morton might have returned to work at the earliest. As did the adjudicator, I consider that a combined absence and prospective absence of 7 months coupled with adverse effects on the appellant's business operations may well, in a substantive sense, have amply justified bringing the situation to a head. But now well-established principles of law require an employer in these circumstances to nevertheless proceed fairly from a justifiable wish to restore effective management in an important branch, to the termination of the absent manager's employment and his replacement. Mr Morton was entitled to be made aware of his employer's views at all material times. There could have been no conceivable disadvantage to the appellant by keeping Mr Morton informed and giving him the opportunity to have some input into the process by which the business of the branch was to be restored to its former stability. Mr Morton was, after all, not a reluctant employee or one whose intentions were at odds with those of his employer. It was not a desire to remain on leave that prevented his return but rather the nature of his injury, its treatment and the physical exertions expected of him by the

appellant that were the cause of this unsatisfactory situation. If, after having extended these courtesies of knowledge and opportunity to respond to Mr Morton, the appellant had, in view of such information as I am satisfied the respondent and his specialist would have provided to Paykel, made its decision to terminate Mr Morton's employment, such could not have been challenged successfully. The difficulty now in retrospect is to know what the appellant might, as a reasonable employer, have done had it met these minimal requirements of fairness and had it reasonably considered such explanations or submissions as Mr Morton, I am satisfied, would have chosen to make.

In my conclusion it is not possible to simply say that the company would have made the same decision to terminate the respondent's employment even if it had met these minimum requirements and more particularly it had received and acted reasonably upon the knowledge that all now have with the benefit of hindsight. That is because Mr Morton was an experienced employee of very long standing in whom there is no suggestion the company did not have trust and confidence. Even if it may have taken Mr Morton some little time longer to fully resume his duties than that taken up by his replacement, factors such as the inexperience of his replacement and the uncertainty of that appointment may reasonably have persuaded the appellant that a relatively short delay might have been an acceptable cost to ensure certainty and consistency. It may also have been that, following his operation and recovery, Mr Morton might have returned to full-time managerial duties but ones that allowed for an avoidance of the heavy lifting expected of him, at least initially.

It is inescapable that the appellant acted both without any effective communication with Mr Morton and without recourse to the specialist medical advice which the respondent had specifically invited the company to obtain. In these circumstances, I conclude, the appellant is unable to say that it acted fairly and therefore with justification in dismissing Mr Morton as it did.

It is not for the Court or the Tribunal to substitute its views of what might or should have eventuated for those of the employer. The importance of these possibilities is to illustrate the rationale for requirements of fair procedure in terminations of employment. In this regard the law expects compliance with minimum standards of fairness as it does in cases of redundancy. Terminations of employment in each of these circumstances are similar to the extent that in most instances there is no fault or culpability on the part of the employee causing the employer to consider ending the contract. Rather, factors beyond the effective control of the parties nevertheless appear to bring about a situation in which the employer may be entitled, to protect and enhance its legitimate interests, to end the employment relationship. As to like requirements of procedural fairness in redundancy situations, see those cases to this effect summarised in *Unkovich v Air NZ Ltd* [1993] 1 ERNZ 526, 576-578.

Next, the appellant says that it complied with such obligations of fair treatment of Mr Morton by its express advice to him of 5 June that unless he could advise the company of a return date or if that was too far in the future, termination of employment would be considered. It is, of course, correct that this explicit advice was given in writing at that time. What was "too far in the future" does not seem to have been defined and so it may, in fairness, have been necessary for the appellant to have nominated a cut-off point and so advised Mr Morton a reasonable period in advance if he was unable to specify the date upon which he was able to and would return.

That advice to Mr Morton was given some 3 months prior to his dismissal. Much occurred between 5 June and 27 August which makes it in my view inequitable to permit the appellant to simply rely upon that warning. Mr Morton replied within 7 days outlining the current position to Mr Barnett. Although, because of delays due to breakdown of the CAT scanning equipment, this did not have the clarity and certainty which Mr Barnett would clearly have wished. Mr Morton nevertheless kept his employer's representatives more or less up with the play. That situation continued through July and although contact was initiated principally by Mr Barnett and not by Mr Morton, the lines of communication were nevertheless open and operating. There was a similar level of communication between the parties in early August. Although Mr Morton's advice was not that which the company might have wished for, it was nevertheless as certain and optimistic as Mr Morton could honestly have given and, importantly, there was no reiteration by more senior managers of the appellant's intention to consider termination of employment. Even if this had been in the minds of the company's senior officers (and their contemporaneous words and deeds do not indicate this) such was not conveyed to Mr Morton either expressly or by implication. Even as late as the telephone call by Mr Bradley to Mr Morton on 27 August in which the respondent confirmed the date of his operation there was no intimation of the appellant's intention to consider termination of employment let alone advice of what it had already by then done, that is to appoint a replacement for Mr Morton.

In all of these circumstances it would be inequitable to permit the appellant to rely upon its written advice of conditional consideration of termination of employment given some 3 months previously in circumstances where events subsequently show at least an acquiescence in, if not an acceptance of, a return to work by Mr Morton following surgery in about October.

The final challenge to the adjudicator's decision by the appellant can most conveniently be dealt with in conjunction with the respondent's cross-appeal. Both concern the level of compensation which the Tribunal nominally set at $6,000 but reduced by 25 percent to $4,500 for contributory fault.

The sum of $6,000 was not an excessive one and reflected a number of significant factors in the consequences to Mr Morton of his dismissal. I agree with the adjudicator that for an employee of long standing and seniority, advice of his dismissal by formal letter alone was insensitive. This was exacerbated by the fact, as was known to the appellant, that Mr Morton was on the eve of surgery which was the key to his return to work. It was also distressing for Mr Morton to learn from his replacement, Mr Taylor, of the circumstances in which Mr Taylor had been interviewed and appointed in Invercargill on 26 August and therefore that the decision to dismiss the respondent had been taken by the appellant's senior managers in the same city as Mr Morton resided without the courtesy of any advice to him. The award made by the Tribunal was pursuant to s 40(1)(c)(i) Employment Contracts Act 1991 and in all circumstances was certainly not an excessive starting point. Indeed it may even have been a conservative or modest amount for compensation.

In one respect only I find that the adjudicator's decision was in error. This is in respect of the reduction of 25 percent made pursuant to s 40(2) of the Act. Those factors which caused the adjudicator to make what is a not

insignificant deduction from an already relatively modest award of compensation were said to have been ". . . that Mr Morton created some considerable uncertainty by not responding promptly to [the requests for medical reports and likely date of return to work]". The Tribunal found in particular that Mr Morton's response to the company's letter of 5 June was late. Careful examination of the evidence discloses, however, that this was not so. Mr Morton replied on 12 June. He was asked for a reply within 7 days. Even if he had been technically and marginally outside the unilaterally imposed time scale, this was for good reasons explained by him at the time.

Although the evidence does disclose that in late June and early July in particular Mr Morton was tardy in reporting to his employer and failed to keep in contact as he had said he would, these are matters of inconvenience rather than of any great moment. The evidence discloses that when the respondent's representatives initiated contact on those occasions, Mr Morton was not evasive or otherwise uncooperative.

The Tribunal should carefully consider the exercise of its powers under s 40(2). Not every imperfection or peripheral fault on the part of an employee should attract a deduction. A reduction of 25 percent is one of particular significance. Taking all of the circumstances of this case into account I do not think that the Tribunal was warranted in making any reduction, let alone that which it did for the reasons stated.

For the sake of completeness I do not accept the respondent's argument on the cross-appeal that compensation of $6,000 as it now should be was so inadequate that the Court is obliged to increase this sum.

The formal result of this case is that, pursuant to s 95(5)(b) Employment Contracts Act 1991, the appellant's appeal is dismissed and the decision of the Tribunal confirmed. So far as the respondent's cross-appeal goes my decision pursuant to the same statutory provision is that the Tribunal's decision is modified by increasing the compensation payable to the respondent from the sum of $4,500 to the sum of $6,000.

The respondent has succeeded in opposing the appeal and in his cross-appeal. He is entitled to costs which I fix in the sum of $1,500 and disbursements including reasonable travel and accommodation costs of counsel and disbursements paid to the Court in respect of the cross-appeal which, if they cannot be agreed between counsel, are to be fixed by the Registrar.