

LEGAL FORUM

The Effect of Employee Conduct on Personal Grievance Remedies

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Introduction

Sections 40(2) and 41(3) of the Employment Contracts Act 1991 deal expressly with contributory conduct. These sections require that, in the context of a successful personal grievance, conduct of an employee which contributed to the situation giving rise to the grievance be taken into account by the Employment Tribunal or Court when determining the nature and extent of the remedies to be awarded. Employee conduct in a broader sense is also relevant to the initial determination of remuneration and compensation awards.

This note examines the relevant principles that are developing in these matters in the Employment Court ("the Court") by examining a number of recent decisions on unjustified dismissal. The paper is in two parts each of which is divided into sub-issues. The first part discusses the express statutory requirement contained in ss.40(2) and 41(3). First, the statutory language and the general approach espoused by the Court is outlined. This general approach encompasses three aspects: causation, blameworthiness and proportionality, each of which is examined in turn. A further issue discussed in this part is the reduction for contributory conduct of non-monetary remedies, particularly reinstatement. The second part discusses the relevance of employee conduct to the determination by the Employment Tribunal ("the Tribunal") or Court of the nominal, pre-reduction remuneration and compensation awards.

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Part I: The statutory requirement to reduce remedies for contributory conduct

Section 40(2) of the Act states that:

Where the Tribunal or the Court determines that an employee has a personal grievance by reason of being unjustifiably dismissed, the Tribunal or Court shall, in deciding both the nature and the extent of the remedies to be provided in respect of that personal grievance, consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance, and shall, if those actions so require, reduce the remedies that would otherwise have been awarded accordingly.

Section 41(3) of the Act states that:

Where-

- (a) The Tribunal or the Court is obliged to make an order under subsection (1) of this section; and
 - (b) The Tribunal or the Court is satisfied that the situation that gave rise to the personal grievance resulted in part from fault on the part of the employee in whose favour the order is made, -
- the Tribunal or the Court shall reduce, to such extent as it thinks just and equitable, the sum that would otherwise be paid to the employee by way of reimbursement.

The enactment of these sections occurred concurrently with (or perhaps as a result of) a decision to retain procedural unfairness as a discrete basis upon which a dismissal may be held unjustified¹. In this way ss.40(2) and 41(3) may be seen as balancing the effect of procedural fairness requirements against an employee's obligation to take responsibility for his or her own actions. However, contributory conduct is a potential issue in all personal grievances, most particularly those alleging unjustified dismissal, and extends beyond dismissals unjustified for procedural flaws alone.

Despite differences in wording, ss.40(2) and 41(3) require the application of the same test. In *Paykel v Ahlfeld*, Travis J held that s.40(2) requires a series of findings before a reduction is required. First, there must be a successful unjustified dismissal rather than some other form of personal grievance. Given this, the Tribunal or Court is required to consider the extent, if any, to which the actions of the employee contributed, not to the dismissal itself, but to the situation which gave rise to the grievance. This is a question of causation. Actions include omissions. If those actions so require, the Tribunal or Court must then reduce the remedies it would otherwise have awarded. Actions requiring reduction are those that are culpable or blameworthy. In s.41(3) the second and third steps are compressed into one. The Tribunal is directed to inquire if there was fault and if so, whether the situation giving rise to the grievance resulted in part from that fault.

¹ Readers interested in the debate over the role of procedural fairness in dismissals, and of the relevant legislative history of clause 17 Employment Contracts Bill are referred to Boon, Bronwyn, (1992), Procedural Fairness and the Unjustifiable Dismissal Decision, *New Zealand Journal of Industrial Relations*, 17(3): 301-317.

Section 41(3) applies to all personal grievances. This creates an anomaly in that a remuneration award can be reduced for contributory conduct in any personal grievance, whereas compensation and reinstatement (which may, for example be a remedy to an employee unjustifiably disadvantaged by a demotion) can only be reduced in an unjustified dismissal grievance.

In *Davis Trading Company Ltd v Lewis*, when referring the question of remedies back to the Tribunal, Goddard CJ provided a number of guidelines that are instructive of the general approach to be taken to contributory conduct. The human factor makes determination of all the elements that contributed to a situation a more difficult task than where purely physical agencies are involved. Given this difficulty the answer must be found by applying common sense to the facts. For Goddard CJ this means that too much weight should not be attached to any single fact but that no facts should be discarded as irrelevant which, in combination with other facts, may have had a bearing on the situation. It is the *relative* importance of the grievant's acts that requires consideration, and in this regard the Tribunal should bear in mind that an employee has a responsibility to act with due regard for his or her own interests.

Goddard CJ draws from a draft Bill, *Apportionment of Civil Liability*² which deals with contributory conduct in contract and tort claims. He cites (p.287) as instructive in an employment setting the following principles:

... apportionment must be to such an extent as is just and equitable having regard to:

- (a) the nature, quality and causative effect of (i) the wronged person's failure (if any) to act with due regard for that person's own interest, and (ii) the acts and omissions of the wrongdoer ... and
- (b) the rights and obligations of the wronged person and the wrongdoer ... in relation to one another.

Thus, the essential ingredients of contribution are causation, blameworthiness and proportionality (*Macadam v Port Nelson Ltd (No.2)*) which are encompassed in a common sense approach (*Adams Sawmilling Company Ltd v Patrick; Country Fare (Christchurch) Ltd v Dixey*).

Causation

In *Macadam (No.2)* Goddard CJ (p.304) states:

Misconduct, however bad, which had no bearing upon the situation which gave rise to the personal grievance, cannot be taken into account.

² This Bill is contained in Law Commission Paper No.19, March 1992. Goddard CJ cites extensively from clause 17. This Bill has still not been passed into law.

In this regard the following propositions apply:

- Misconduct after the grievance arose is not causative of the situation giving rise to the grievance (*Macadam (No.2)*).
- Misconduct not known to the employer at the time of the dismissal is not causative (*Paykel v Ahlfeld*).
- To be causative, the conduct must not be a long time before the grievance (*Macadam (No.2)*) or conduct which has been affirmed by the employer (*Ashton v Shoreline Hotel*).
- Employees generally do not contribute to procedural unfairness (*Donaldson & Youngman v Dickson*) although they may do so if they have by their actions caused the employer to act precipitately (*Macadam (No.2)*). The fact that a dismissal is unjustified on procedural grounds alone, grounds to which the employee did not contribute, does not always preclude the Tribunal from reducing for contributory conduct (see *Country Fare*).
- Reasons not communicated to the employee at the time of the dismissal are unable to be relied upon as justification but may still be causative of the situation giving rise to the grievance. However, the employer bears the heavy onus of showing that those reasons were in his/her mind and weighed upon any decisions made (*Ashton and Hollobon Hire Service v Wooden*). The longer the delay before the reasons are raised the heavier this onus.
- Similarly, inadequately investigated reasons, provided they were in the employer's mind, and are proved on the evidence, may be relevant to contribution (*Davis Trading and Albany Rest Home Ltd v Somerville*). They "may" be relevant because, unlike the principles discussed above, this issue has yet to be explicitly dealt with. Rather, it is a case of interpreting from the decisions in *Davis* and *Albany* what the Court actually did.

Blameworthiness

Employees have a responsibility to act with due regard for their own best interests, and if they do not, they may have their actions held against them in a remedy setting (*Davis Trading*). In *Paykel v Ahlfeld* the range of actions included in the concept of culpability or blameworthiness is discussed. It includes conduct amounting to a breach of contract or a tort, conduct which is perverse or foolish or bloody-minded, and it may also include actions which, though not meriting any of those more pejorative epithets, is nevertheless unreasonable in all the circumstances. It is not necessary for contributory conduct to amount to misconduct before it can be said to be blameworthy. For example, in *Macadam (No.2)* a reduction of wage reimbursement of fifty percent was imposed for actions that amounted to an exhibition of bad taste which could not justify dismissal but which nevertheless contributed to the situation that gave rise to the personal grievance.

The extent to which poor performance can be said to be blameworthy is a contentious issue. In *Paykel v Ahlfeld* and *Donaldson* the Court held that poor performance by an employee, while it may be causative, cannot be blameworthy unless the employee is warned of his or her shortcomings, given the opportunity to improve, and then fails to respond. Thus, unless the elements identified by Goddard CJ in the seminal performance case *Trotter v Telecom Corp of NZ Ltd* are satisfied, an employee's poor performance is not blameworthy.

However, subsequent decisions indicate there are no hard and fast rules. The decision in *Lavery v Trust Bank Wellington Ltd* carries a suggestion that an admission of poor performance by an employee may result in a finding of contribution, even if the *Trotter* elements have not been met. However, is knowledge by the employee of poor performance sufficient by itself to warrant censure? Perhaps there is a further requirement that the failure to perform be deliberate or the result of an unwillingness to improve. Against this, such reasoning could leave an employer stuck with an employee, who although blameless, is inadequate. The employer must take responsibility for his or her selection and promotion systems and is obliged to counsel and train employees, but at some stage the parties must surely be free to terminate an unproductive or frustrated relationship.

In *Pascoe v Covic Motors* the employee had been shown to have poor attendance, timekeeping and attitude, however the *Trotter* requirements had not been met. Even so, Travis J analyzed the extent to which the employee's actions, on the evidence presented at hearing, had contributed. He concluded that a one sixth reduction was warranted, and reduced both compensation and remuneration accordingly. However, this case may be distinguishable from *Paykel v Ahlfeld* and *Donaldson* in that the "poor performance" may be seen as minor misconduct and to a degree, blameworthy. In *Donaldson* itself, Goddard C.J. (p.930) recognised an exception if the employee, "was guilty of gross, and obvious defaults such as not turning up for work at all on some days without good reason." This also appears to be misconduct and thus blameworthy in and of itself. There is, however, force in the argument that while poor performance without notification is not blameworthy *per se*, some degree of blatant poor performance is. This is to say that at some stage the employee must be taken to know that he or she is not performing. The other side of the coin is that if the poor performance is blatant, one would expect an employer to have been aware of it and thus to have followed the necessary procedural steps.

In *Garland v McHerrons* Palmer J felt that an employee who had been given only two months to improve his performance should have been given three. In this one respect, then, *Trotter* had not been adhered to. However, Palmer J reduced the remedies by two thirds. Given that the employee was entitled to a three month period within which to improve, and was given only two, it is questionable how his conduct can, on the *Paykel v Ahlfeld* and *Donaldson* approach, be said to have been blameworthy. Perhaps blameworthiness exists on a continuum which the employee moves further along as each aspect of the *Trotter* approach is satisfied?

In *Wholesale Plant Nursery Ltd v Johnston* Palmer J suggested that the *Paykel v Ahlfeld* approach should not be strictly construed. In this case the employee was on a one week trial, and was dismissed at the end of it. On appeal, Palmer J (p.23) accepted that the *Trotter* elements had not been complied with. The Tribunal had held, in reliance on *Paykel*

v Ahlfeld, that the employee could not then be said to have culpably contributed. However, Palmer J went on to hold that aspects of the employee's manner of communication in dealing with customers and other staff members significantly and culpably contributed in such a way as to require reduction for fault. Palmer J distinguished the facts of *Paykel v Ahlfeld*, emphasising that here the employee knew she was on trial, and that the instances where the employer had raised problems with performance, although worded and reasonably seen as advice, contained a "critical connotation", and a "cutting edge". He concluded that a fifty percent reduction of remedies was warranted.

In *Wholesale Plant Nursery Ltd* Palmer J made comment upon what he saw as a misapplication of the law by the Tribunal, stressing that it was not necessary for all the elements of *Trotter* to be met before a finding of culpability could be made. While common sense requires that the *Paykel v Ahlfeld* not be inflexibly applied, the key issue remains culpability. In the absence of full adherence to the procedural requirements identified in *Trotter* some other culpable factor must surely be identified. *Pascoe* and *Garland* appear to be examples of this.

Proportionality

Proportionality involves the distribution of blame between the employer and the employee. In *Macadam (No.2)*, Goddard CJ gives as an example that an award of one third of wages lost is a finding that the employee has been twice as culpable as the employer in causing the personal grievance to arise, and that (p.305):

Once the matter is put in that way it becomes apparent just how difficult such a conclusion must be in most cases.

In *Paykel Ltd v Morton* Colgan J (p.886) held that;

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.

In *Donaldson* Goddard CJ concurred with this decision and stated that cases involving reductions of fifty to seventy five percent should be very rare. However, more recently, Colgan J suggested in *obiter* that a one hundred percent reduction would have been warranted if the dismissal had been unjustified (*Pritchard v ADT Securitas Ltd*). However, because there were only minor procedural defects the Court preferred to approach the case as one of justified dismissal.

Aside from value judgements as to what is a "significant" reduction, and which reductions should be "rare", it is desirable that there be internal consistency in the approach of the Court and Tribunal to the issue of proportionality such that conduct of similar culpability receives a similar reduction. In *Pritchard* there would have been a 100 percent reduction given that the employee had abused a customer and there were only minor procedural defects. In *Quest Rapuara v Rahui* the employee was dismissed for assault, however the dismissal was unjustified on minor procedural grounds. Although not explicitly stated it

seems that the reduction for contributory conduct was at least 80 percent. In *Country Fare* Palmer J increased the Tribunal's assessment of contributory conduct from twenty five percent to two-thirds. The dismissal was substantively justified because of the employee twice telling his supervisor to "get fucked" and refusing to obey a reasonable command. However, there were procedural defects, primarily a failure by the employer to inform the employee beforehand of the nature of the dismissal meeting.

These instances of substantial contribution do appear to exhibit a degree of consistency. However, in *Albany Rest Home* the employee's conduct in endangering a rest home patient by leaving him alone in the bath resulted in a one-third reduction. This is perhaps comparatively light. An example of a comparatively heavy reduction is *Adams Sawmilling Company Limited v Patrick*. In that case the employee had been unjustifiably dismissed upon the ground of abandonment. He had been off sick with, as it was held, the consent of the employer. However, the employee had not communicated to the employer his healing progress and had in fact unplugged or failed to answer his phone, actions which wholly frustrated the employer's attempts to contact him. Palmer J held that this was incompatible with his obligations of confidence, trust and fairdealing. Palmer J also held that the employee was "playing up" while the employer was away. Palmer J accordingly reduced the remedies awarded by forty percent on account of this "significant culpable contribution."

The applicability of contributory conduct to non-monetary remedies

While reduction of remedies might be thought to be primarily concerned with monetary sums, contributory conduct may also prevent the granting of reinstatement. Such conduct would be a factor in determining whether reinstatement is an appropriate remedy in the first place (*Northern Distribution Union v BP Oil Ltd*), or may be used to "reduce" the remedy after an initial determination in the employee's favour (*Macadam v Port Nelson Ltd (No.1)*; *Macadam (No.2)*); see also *Preston v Otago Area Health Board* and *Irvines Freightlines v Cross*. The first approach appears to favour employers as contributory conduct must then (by virtue of ss.40(2) and 41(3)) be explicitly dealt with in relation to any other remedies awarded. However, the refusal to reinstate an employee may be a factor inflating the size of the initial monetary award. The second approach favours employees as the requirement for proportionality between the employer and the employee might preclude further extensive monetary reductions once reinstatement had been "reduced". Presumably other non monetary remedies such as the award of a company car can also be reduced.

Part II: The relevance of employee conduct to the determination of awards

A further development of particular significance is the recognition afforded contributory conduct outside of the express statutory framework provided in ss.40(2) and 41(3). It appears that the existence of contributory conduct is of significance in the determination of an appropriate pre-reduction remuneration award (ss.41(1) and (2)). Also, in certain

circumstances, an employee's actions can affect the size of any compensation awarded under s.40(1)(c)(i) or (ii).

Remuneration awards

Sections 41(1) and (2) state that;

- (1) Subject to subsections (2) and (3) of this section, where the Tribunal or the Court determines, in respect of any employee,-
 - (a) That the employee has a personal grievance: and
 - (b) That the employee has lost remuneration as a result of the personal grievance,-
 the Tribunal or the Court shall, whether or not it provides for any of the other remedies provided for in section 40 of this Act, order the employer to pay to the employee the lesser of a sum equal to that lost remuneration or to 3 months' ordinary time remuneration.

- (2) Notwithstanding subsection (1) of this section, the Tribunal or the Court may, in its discretion, order an employer to pay to an employee by way of compensation for remuneration lost by that employee as a result of the personal grievance, a sum greater than that to which an order under that subsection may relate.

Subject to a stated maximum (the whole of the wages lost (s.40(1)(a)) as the result of the grievance) and minimum (the lesser of three months wages or the amount actually lost; s.41(1)), the Tribunal has a discretion as to the amount of remuneration to award. It appears to be the common approach of the Tribunal to presume the minimum amount and to then consider if there is any reason for awarding a greater sum. The onus, then, is generally on the employee to persuade the Tribunal to award more than the minimum. This accords with the wording of s.41 in that the Tribunal "shall" award the minimum and "may" award a greater sum. This approach is not without contention as is exemplified in the statements of Goddard CJ in *Ashton, Trotter and Macadam (No.2)* that reimbursement generally means full reimbursement. Discussion of this debate is, however, outside the scope of this paper.

The presence of contributory conduct is often a factor weighing against the exercise of the discretion to award a greater amount. In *Davis Trading* Goddard CJ (p.288) stated:

Once contributory fault is established, there seems no warrant for exercising in the [employee's] favour the discretion to award more than the minimum loss and even that requires to be reduced ...

This approach was also approved explicitly in *Quest*, and implicitly in both *Country Fare* and *Adams Sawmilling*. However, it is arguable that contributory conduct should not be relevant when initially determining the size of a remuneration award under ss.41(1) and (2). If contributory conduct is considered at this level then there is the potential for double counting. This is because ss.40 and 41 impose a mandatory requirement to reduce the remedies awarded when contributory conduct has been established. In this sense, it is conceptually clearer and perhaps fairer to avoid consideration of contributory conduct in the initial stages of remedy determination.

There is also a lack of consistency in the approach of the Court. In *Macadam (No.2)*, *Pascoe, Preslands Investments Limited v Chandra* and *Wholesale Plants*, fault appears not to have been a factor relevant to the exercise of the Court's discretion to award more than three months reimbursement; rather it was a factor solely relevant to the reduction of that amount for fault.

Compensation awards

While conduct of an employee which was not known to the employer at the time of dismissal lacks causality and so is not contributory in terms of s.40(2) (*Paykel v Ahlfeld*), it may be relevant to the initial determination of a compensation award. In *Carlton and United Breweries (NZ) Pty Ltd v Bourke* Palmer J stated (p.8) that serious misconduct not known to the employer at the time of dismissal should nevertheless, "except for wage reimbursement - be justly brought to account in a remedies setting." In that case the employee, a senior manager, had fraudulently charged personal expenses to the company. The Court held (pp.10-11) that:

Independently of the statutory directions provided for by ss.40(2) and 41(3) of the Act ... in my view the Tribunal must also, in equity and good conscience, take into appropriate account in a remedies setting serious misconduct by a particular grievant in his employment setting, notwithstanding that the employer was ignorant of that misconduct when it dismissed the offending worker for other misconduct ... the Tribunal's approach in equity and good conscience to determine appropriate compensation under s.40(1)(c)(i) and (ii) in favour of a successful grievant against a particular employer, necessarily encompasses, as I conclude, a full and balanced consideration of all factors in a remedies/compensation setting which materially bear upon the issue of what is just compensation in the material circumstances ...

The reason for the restriction of this principle to compensation awards is unclear but may be explained by the comprehensive statutory guide provided with regard to remuneration in s.41. A discovery such as occurred in *Carlton* could also be expected to make reinstatement an inappropriate remedy.

Concluding comment

Employee conduct has a significant effect on personal grievance remedies. First, while the approach in relation to remuneration is not settled, the significance of an employee's conduct to the initial determination of compensation and remuneration figures should not be overlooked. Second, a wide range of actions and omissions by an employee have the potential to be contributory in terms of ss.40(2) and 41(3). In particular, there is no requirement that there be misconduct of any sort. The actions in question need only be causative and blameworthy. Given this, the remedies which would otherwise be awarded to the successful applicant will be reduced to an extent that reflects the relative importance of the actions of the employee and the employer.

Some of the more interesting consequences of this approach include that contribution may be held to exist even in a situation where the dismissal is unjustified on both substantive

and procedural grounds. Also, an employer precluded from justifying a dismissal upon grounds which were not raised with the employee or which were inadequately investigated, may still be able to have those reasons held against the employee in a remedy setting. If some element of blameworthiness on the employee's part can be identified, then poor performance may also be held against the employee notwithstanding that the *Trotter* elements have not been met.

List of cases

Adams Sawmilling Company Ltd v Patrick (Unreported, 9 June 1995, CEC 25/95, Palmer J)

Albany Rest Home Ltd v Somerville (Unreported, 24 April 1995, CEC 15/95, Palmer J)

Ashton v Shoreline Hotel [1994] 1 ERNZ 421

Carlton and United Breweries (NZ) Pty Ltd v Bourke [1994] 2 ERNZ 1

Country Fare (Christchurch) Ltd v Dixey (Unreported, 13 April 1995, CEC 14/95, Palmer J)

Davis Trading Company Ltd v Lewis [1993] 2 ERNZ 272

Donaldson & Youngman v Dickson [1994] 1 ERNZ 920

Garland v McHerrons (Unreported, 9 March 1995, CEC 6/95, Palmer J)

Hollobon Hire Service v Wooden (Unreported, 27 April 1995, CEC 16/95, Palmer J)

Irvines Freightlines v Cross [1993] 1 ERNZ 424

Lavery v Trust Bank Wellington Ltd [1994] 2 ERNZ 339

Macadam v Port Nelson Ltd (No.1) [1993] 1 ERNZ 279

Macadam v Port Nelson Ltd (No.2) [1993] 1 ERNZ 300

Northern Distribution Union v BP Oil Ltd [1992] 3 ERNZ 483

Pascoe v Covic Motors [1994] 2 ERNZ 152

Paykel v Ahlfeld [1993] 1 ERNZ 334

Paykel Ltd v Morton [1994] 1 ERNZ 875

Preslands Investments Limited v Chandra (Unreported, 11 October 1994, AEC 62/94, Colgan J)

Preston v Otago Area Health Board [1993] 1 ERNZ 179

Pritchard v ADT Securitas Ltd (Unreported, 17 July 1995, AEC 70/95, Colgan J)

Quest Rapuara v Rahui (Unreported, 11 October 1994, CEC 41/94, Travis J)

Trotter v Telecom Corp of NZ Ltd [1993] 2 ERNZ 659

Wholesale Plant Nursery Ltd v Johnston (Unreported, 5 April 1995, CEC 13/95, Palmer J)