



## New Zealand

### Employer's disciplinary investigations under fire by Employment Court.

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**The case of X v Auckland District Health Board demonstrates that the Employment Court will now examine every detail of an employer's dismissal to determine whether it was substantively and procedurally fair.**

In this case, a senior physician, Dr X, took photos of his genitalia on his work mobile phone, and attempted to email them on his work email to a colleague. However, he was unsuccessful at sending the email, and it was retained in the employer's IT system. Dr X also forwarded an email of an inappropriate calendar. Both of these emails were discovered by his support staff. After conducting a disciplinary investigation, the employer decided to dismiss Dr X for serious misconduct. Dr X brought a claim for an unjustified dismissal and unjustified disadvantage.

The Court held that the decision to dismiss was both substantively and procedurally flawed. The Court held that the employer was in breach of the Employment Relations Act 2000, his employment agreement, and the employer's own policies. The Court held that the unfair investigation led to an unfair and unreasonable outcome of dismissal. There were multiple failures in the employer's process including failing to advise Dr X of the nature of the initial meeting, and advising him that although he had a right to representation it would not be necessary. The employer then "ambushed" Dr X by inviting an experienced employment lawyer to attend the meeting.

The Court held that given that the employer did not believe Dr X, it should have put its disbelief of his explanations to him, especially given that these formed significant grounds for Dr X's dismissal. The Court found that an employer cannot act as a "proverbial sponge" but must interact with the employee and question their responses in a disciplinary meeting.

A significant element of this decision was that the Court held that Dr X should not have been dismissed, despite the finding of serious misconduct. Rather, the employer should have considered alternative sanctions and behavioural correctives. Such a finding by the Court has now made it much harder for employers to justify dismissing an employee.