

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Anthony De Young (Applicant)
AND Pedersen Holdings Limited (Respondent)
REPRESENTATIVES Ms L Foley
Ms A Wills
MEMBER OF AUTHORITY Dzintra King
INVESTIGATION MEETING 22 March 2002
**FURTHER EVIDENCE
TAKEN** 3 April 2002
SUBMISSIONS RECEIVED From applicant 10 April 2002
From respondent 12 April 2002
DATE OF DETERMINATION 16 April 2002

DETERMINATION OF THE AUTHORITY

The applicant, Mr Anthony de Young, was employed by the respondent, Pederson Holdings Ltd. Mr de Young was employed as a yard hand. On 23 March 2001 Mr Pedersen was dismissed for possession of drugs on site. Mr de Young says that his dismissal was unjustified.

On the morning of 23 March Mr de Young's supervisor Mr Karaitiana asked him for a rollie. Mr de Young gave Mr Karaitiana his packet of tobacco. In the packet was a piece of tin foil. Mr Karaitiana said nothing to Mr de Young at that stage but at 7.15am asked Mr de Young to go the office with him. He did not tell Mr De Young why he wanted him to go to the office.

Just before they went into the office Mr Karaitiana asked for another smoke so Mr de Young gave him the packet again. Mr Karaitiana kept hold of the packet. When they entered the office Mr Kerry Roberts, another supervisor, was present. Mr Karaitiana gave Mr Roberts the packet and asked him to look inside it.

Mr de Young said that at that stage he suddenly recalled that the tinfoil was on the packet and that it had been there from the previous evening. There is a dispute between the parties as to whether or not Mr Roberts opened the tinfoil and looked inside it. Mr Roberts said he did and Mr de Young said he did not. I am satisfied that Mr Roberts did look inside the packet. Mr de Young accepted that Mr Roberts said something along the lines of "oh, that's not much." Mr Roberts is unlikely to have made such a remark if he had not opened the packet. I think that in the stress of the situation Mr de Young simply did not see the tinfoil being opened.

Mr Karaitiana did not ask to see what was in the tinfoil. He said that from where he was sitting he did not see the contents and that Mr Roberts did show it to him. Neither did Mr Roberts expressly say that he believed the contents to be marijuana. Mr Karaitiana simply assumed that.

Mr Roberts handed the packet back to Mr de Young including the tinfoil. Mr Roberts suggested that they get another manager to come in but Mr Karaitiana did not agree. Mr Karaitiana then proceeded to dismiss Mr de Young.

Mr de Young stated that there had been nothing left in the tinfoil as the contents had been consumed the previous evening.

There is also a dispute about events that occurred after the dismissal but they are not pertinent to the justification to the dismissal.

Both Mr Karaitiana and Mr Roberts stated that the company policy was that possession of drugs on site would automatically lead to dismissal and that there was no need for any enquiry as to how or why the drugs were in that person's possession. Mr Pedersen, who gave evidence later, endorsed that view. No explanation was requested of Mr de Young prior to his having been he was dismissed.

The company has an employee handbook which incorporates an alcohol and drugs policy. It states, inter alia:

*The policy is designed to promote a Drugs and Alcohol use free workplace. As such the following is strictly prohibited and will be dealt with as **SERIOUS MISCONDUCT**:*

The use, sale, supply, transfer or possession of elicit (sic) drugs or controlled substances while on company property or other work locations. Any illicit drugs found on company property will be turned over to the appropriate authorities.

The Employee Handbook also contains a disciplinary procedure which states:

If you break a company rule, the matter will be investigated. You will be given the opportunity to offer an explanation. You may ask a co-worker or employee representative if you are a union member to assist in representing you. During the period of investigation, you may be stood down, on pay, from your normal duties. If the employee feels the reprimand to be unjustified he/she may contest it through the personal grievance procedures.

The respondent was clearly wanting to treat drug possession as defence for which no explanation would be possible. However, employment law does not permit this. Whatever the nature of the allegation, the employee has to be provided with the minimum criteria constituting fairness: NZ Food Processing Union v Unilever [1991] NZILR 35. This did not happen in this case.

While I have every sympathy for the company and I recognise that drug use is endemic in the forestry industry and constitutes a real health and safety problem the procedure adopted by the company in dismissing Mr de Young was not fair. The company did not abide by its own disciplinary policy which gave Mr de Young the right to representation. He was never offered this. Neither was he told the purpose of the meeting or that it might result of his employment. Most significantly, Mr de Young was not asked for an explanation prior to the dismissal being effected.

Mr de Young asserted that there was no cannabis in the tin foil. A witness for Mr de Young who had been present the night before said there might have been a few crumbs left. Mr Roberts said he thought there might have been enough for half a joint.

Mr de Young has a personal grievance. However, I am obliged to consider the issue of contribution. Mr de Young was careless in leaving the tinfoil in his tobacco packet. He knew the company's policy on drug possession. I prefer the evidence of Mr Roberts that there was marijuana (however small the quantity) remaining in the tinfoil. Mr de Young gave minimal evidence about distress and humiliation. Were it not for the contribution, which I set at 100%, I would have awarded him \$500.00.

I am satisfied from the evidence that Mr de Young did make adequate efforts to mitigate his loss. I am unable therefore to make any award for loss of wages.

Costs

The applicant is legally aided. I suggest that the parties endeavour to resolve the matter of costs between themselves. If that is not possible then a memorandum should be filed within 28 days of the date of this determination by the applicant and within 14 days of receipt of the applicant's memorandum by the respondent.

Dzintra King
Member of Employment Relations Authority