

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 27/09
5138026

BETWEEN SHARON MARFELL
Applicant

AND AFFCO NZ LIMITED
Respondent

Member of Authority: Robin Arthur

Representatives: Simon Mitchell for Applicant
Graeme Malone for Respondent

Investigation Meeting: 20 January 2009 at Hamilton

Determination: 30 January 2009

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] On 18 June 2008 managers at AFFCO's Horotiu meat works arranged a random drug search of the premises. A handler using a specially trained dog was engaged to carry out the search.

[2] Part of the search included checking cars driven into the staff car park by workers who had left the plant during a meal break.

[3] Sharon Marfell was one of those workers. In her car the dog and its handler located a metal tin containing cannabis. The handler also found some small but empty plastic bags of the type known to be used for carrying the methamphetamine drug commonly called 'P'. One of these bags was in Ms Marfell's handbag.

[4] Ms Marfell was suspended from work for the remainder of the day. She was dismissed at the end of a disciplinary meeting held the next day.

[5] AFFCO says Ms Marfell admitted during the search of her car that the tin was hers and – before the dog handler showed her its contents – that it contained cannabis.

[6] The terms of the applicable collective employment agreement include “*rules for personal conduct*”. These rules give “*possession*” of “*illicit drugs*” on the worksite as an example of an offence “*which would normally warrant dismissal*”.

[7] The company says the cannabis found in Ms Marfell’s car amounted to possession of illegal drugs on its premises and it was entitled to dismiss her under its “*zero tolerance*” policy.

[8] Ms Marfell says the dismissal was unjustified because she did not make the admission relied on by the company and she did not know that either the tin or the cannabis inside it were in her car. She says the company unfairly applied its zero tolerance policy rather than considering her explanation. She seeks remedies of reinstatement to her employment with AFFCO, lost wages and compensation for humiliation caused by her dismissal.

Issues

[9] The issues for determination are:

- (i) whether the circumstances discovered during the search of Ms Marfell’s car amounted to “*possession*” as contemplated by the collective agreement; and
- (ii) whether a fair and reasonable employer would have decided to dismiss Ms Marfell on 13 June 2008 in all the circumstances at the time.

[10] Resolution of both issues in the particular circumstances of this case ultimately depends on a factual finding – that is whether or not Ms Marfell admitted knowing what was in the tin before it was opened by the handler during the search of her car.

Investigation

[11] Written witness statements were provided by Ms Marfell, AFFCO’s Horotiu

plant manager Jamie Ginders, operations manager Kevin Casey, dog handler Peter White and Meat Workers Union branch president Don Arnold. Each witness, under oath or affirmation, confirmed their written statement at the investigation meeting and answered questions from the Authority. The parties' representatives had the opportunity to ask additional questions and provided closing submissions on the law and the facts.

Was Ms Marfell in “possession” of the cannabis found in her car?

The law

[12] While the collective agreement identifies possessing illegal drugs as an offence normally warranting dismissal, what amounts to “*possession*” is not defined in that agreement.

[13] As a matter of construction of this particular agreement I find that implied into the word “possession” is some element of knowledge about the presence or whereabouts of the illegal drugs at the workplace by the person said to possess them. I do so for three reasons.

[14] Firstly, at the level of principle, employment law generally considers findings of serious misconduct require deliberate actions that have serious consequences.¹ Usually this would be where the worker knew what she or he did was wrong rather than an inadvertent act or oversight. An example is found in an Employment Court case where the actions of a worker who said he “*found*” a bag of cannabis, but later hid it under the seat of his forklift, were described as “*intentional unlawful possession*”.²

[15] Secondly, the courts in criminal cases have implied elements of knowledge, intention and some direct or indirect control of the drugs by the accused when considering the meaning of the word “*possession*” in the Misuse of Drugs Act 1975: see *Adams on Criminal Law* MD 7.03. Such elements may be implied in the similar use of the plain word “possession” in an employment agreement (particularly where

¹ *Angel v Fonterra Co-operative Group*, [2006] 1 ERNZ 1080 (Shaw J) at [78]-[81].

² *Pallet Supplies Co Limited v Yates* [1998] 1 ERNZ 532, 541 (Travis J).

the accusation is so serious as possessing illegal drugs). That implication may be made without requiring a level of deliberation to that act in sense of having *mens rea* or criminal intent, that is without imposing a criminal standard of proof rather than the appropriate civil standard.³

[16] Thirdly, to take possession to mean mere physical or incidental possession of the drugs risks unduly harsh or arbitrary outcomes. It would not allow for what might be described as “innocent” possession. Here the word ‘innocent’ refers to whether the whether the physical act occurs with or without factual knowledge of the possession. Illegal drugs could be found on a worker’s person or in a bag, locker or car on work premises without the worker knowing about those drugs, how they came to be there, or having any intention to use or sell them. This could occur – by way of example – if the drugs would put in one of those places as a ‘prank’, a mistake by someone else, or a malicious act by another. In each such scenario, the worker cannot be said to have the knowledge or deliberation necessary to amount to “*possession*” of illegal drugs.

[17] On this basis I consider that it was necessary for AFFCO to establish not just that there was cannabis in Ms Marfell’s car but also that she knew it was there so that she could truly be said to have been in possession of it.

[18] Decisions of the Employment Court confirm that an allegation of serious misconduct by possession of illegal drugs in the workplace must be supported by evidence as compelling as the allegation is serious.⁴

[19] The standard of proof for that evidence is not to the criminal standard of beyond reasonable doubt. It is to the civil standard, which in employment proceedings is described as to “*the balance of probabilities flexibly applied according to the gravity of the matter*”.⁵

The facts

[20] Mr White’s evidence was that he first found some empty P bags in the glove box of Ms Marfell’s car and then two P bags in her hand bag. She told him that she

³ *Angel*, *ibid*, at [81].

⁴ *Pallet*, *ibid*, at 542 and *Morrell v AFFCO New Zealand Limited* [2004] 1 ERNZ 437 at [31] (Shaw J).

⁵ *Whangarei College Board of Trustees v Lewis* [2000] 1 ERNZ 397 at [20] (CA).

had used P in the past, with the most recent occasion being on the previous weekend.

[21] He says his search dog showed interest in the area under the driver's seat. He checked this area and found a small silver tin with an image of Marilyn Monroe on its lid. He looked in the tin and saw that it contained some cannabis. Ms Marfell was standing near the car and he showed her the tin. She said: "*Ah, I was wondering where that was*". He asked if it was her tin and she replied yes. He then asked her what was in it and she replied: "*Just weed*" ('weed' being slang for cannabis).

[22] He showed the contents of the tin to Ms Marfell and she agreed it was cannabis. (Her evidence was that the tin contained enough cannabis to make one 'joint'.) He also asked if she knew having drugs on AFFCO premises was a breach of its rules and she agreed that she knew that.

[23] At this point Mr White says he handed over the investigation to Mr Ginders who suspended Ms Marfell and arranged a disciplinary meeting for the next day.

[24] Mr Ginders and Mr Casey gave evidence that they were standing less than two metres from Ms Marfell during the search of her car and they each heard the questions Mr White asked and the answers Ms Marfell gave. Both Mr Ginders and Mr Casey support Mr White's account of the conversation.

[25] Ms Marfell strongly denies key parts of that conversation – the most important being that she said the tin contained "*weed*" before being shown its contents by Mr White. She accepts that she acknowledged the tin was hers but it had been missing. She also denies saying she had used P on the previous weekend. Her oral evidence to the Authority was that she told Mr White that she had a "*relapse*" of P use after her partner was recalled to prison. Ms Marfell said she "*had a hard time dealing with things*" after that recall which occurred six months before the search.

[26] Her explanation for the presence of the tin, its contents and the P bags is that a friend had borrowed her car and left those items in it. On the day of the search Ms Marfell was not driving her usual car but a second car that she owned and had loaned to that friend for some weeks. Ms Marfell had only got that second car back from her friend six days earlier as her usual car was in the garage for repairs.

[27] Ms Marfell says that following her dismissal, her friend admitted that she had taken the tin and that the drugs were hers. She says this friend has since moved to Australia and she has not been able to contact her.

[28] Ms Marfell says she would not have knowingly left any drugs in her car as she regularly visited her partner in prison. She said she was “*very, very careful*” about this because cars used to visit prison were regularly searched for drugs.

[29] She also challenges whether Mr Ginders and Mr Casey heard her alleged admission that she knew what was in the tin. She says that the two AFFCO managers were standing more than 10 metres away in the car park attending to a queue of other workers in cars waiting to be checked.

[30] While I accept that Ms Marfell’s explanation is possible, I find on the balance of probabilities that the events of that day were as described by Mr White and the two AFFCO managers. I do so for the following reasons:

- (i) Ms Marfell’s evidence on how close Mr Ginders and Mr Casey were standing to the car (and what they may have heard) is unreliable given that her attention was most likely distracted by paying attention to the search of her car and answering Mr White’s questions. The managers were likely to pay attention to a car being searched and move closer to it if a search appeared to be finding items of interest.
- (ii) Ms Marfell’s explanation regarding her caution due to regular searches of her car while visiting prison is unconvincing. She had visited the prison on the previous Sunday, two days after getting her car back from her friend. If she was that cautious she would have checked the car and found the tin under the driver’s seat.
- (iii) The overall credibility of her explanation was also affected by inconsistencies in her evidence on whether or not her car had in fact been searched during her prison visit on the previous Sunday – her oral evidence to the Authority was that it was not, yet the notes of Mr Casey

and Mr Arnold of the disciplinary meeting both record Ms Marfell saying her car had been searched during the prison visit and was “*clean*” or “*OK*”.

- (iv) Ms Marfell’s explanation does not account for the presence of an empty P bag in her handbag – it does not fit with the suggestion that her friend was responsible for what was found in the car. While that item is not directly related to the cannabis found, the weakness of her explanation regarding that P bag does affect the credibility of her whole explanation.
- (v) The evidence of Mr White, Mr Ginders and Mr Casey was consistent on what they had heard Ms Marfell say before the tin was opened. That consistency was tested during the investigation meeting by separate questioning of those witnesses without any significant variation or difference being identified.

[31] On balance I find Mr Ginders reasonably concluded that it was more likely than not that Ms Marfell did know the cannabis was in her car that day and consequently she was in “*possession*” of it.

Would a fair and reasonable employer have dismissed Ms Marfell?

[32] Ms Marfell attended a disciplinary meeting on the day after the search. Before the meeting she had met with Mr Arnold and he came to the meeting as her representative.

[33] She says that she felt Mr Ginders was “not interested” in what she had to say and simply applied the company’s zero tolerance policy for drugs on site without considering her explanation that the cannabis had been left without her knowledge by the friend who had used the car.

[34] The safety-sensitive environment of a meat works justifies zero tolerance for the presence of illegal drugs and managers are bound to take possession of cannabis or other drugs very seriously.⁶ However managers seeking to apply such a policy must still make a “*critical assessment*” of all the evidence and relevant circumstances

⁶ *Morrell*, *ibid*, at [65].

of the alleged misconduct.⁷

[35] In the particular circumstances of this case, Ms Marfell's admissions during the search of her car were central to the critical assessment Mr Ginders had to make during the disciplinary investigation.

[36] Where an employee admits the act of alleged serious misconduct, there is no requirement for an employer to continue investigating the possible existence of innocent explanations for apparently irregular conduct: *Murphy and Routhan (t/a Enzo's Pizza) v van Beek* [1998] 2 ERNZ 607, 620. As the Court explained in that case:

... if the employer is, in the course of carrying out the procedure, presented with the truth by the employee admitting responsibility for the very activity that the employer to the employee's knowledge was looking into, then it does not matter that no further attempt was made afterwards to follow the procedure. It is the employee's admission that then cloaks the employer's decision with legitimacy. Nor does it matter that there are differences in detail between the admission and the complaint if the differences bear only on the extent or frequency of the apparent wrongdoing but do not contradict the basic premise that it had taken place.

[37] In the present case Mr Ginders had himself heard Ms Marfell's acknowledgement that she knew what was in the tin before it was opened. It was evidence as compelling as the accusation against her was serious. He resolved, as I accept a fair and reasonable employer would in all the circumstances, not to accept what he called her "*change of story*" on the following morning.

[38] In reaching that view I accept that Mr Ginders applied what the notes of both Mr Casey and Mr Arnold confirm he referred to during the disciplinary meeting as the company's "*zero tolerance*" policy. I accept that in doing so he had critically assessed the evidence available to him and reached an honest belief that Ms Marfell had committed the act of serious misconduct – that is possession of drugs on the company's premises – to which the policy could reasonably be applied.

[39] In doing so he relied on what he had found to be the fact of Ms Marfell possessing illegal drugs on the company's premises when she knew that this was an offence for which instant dismissal usually applied. I accept his evidence that he put

⁷ *Housham v Juken NZ Ltd* [2007] 1 ERNZ 183 at [25] (EC, Colgan CJ).

aside from consideration the following other factors of which he acknowledged, in answer to questions from the Authority, he was aware at that time of his decision:

- (i) Ms Marfell's partner was a "Mongrel Mob" leader who was recalled to prison from parole and was awaiting trial on further charges of conspiracy to supply P and cannabis;
- (ii) Ms Marfell's other admissions that she had used P in the past and continued to use cannabis outside work;
- (iii) A rumour, not substantiated by any available evidence, that Ms Marfell had been involved in dealing drugs at the meat works.

[40] I accept that the so-called zero tolerance policy was not operated in a blanket or automatic manner. Mr Ginders gave a recent example where "*crumbs of dope*" were found during a search of a worker's car. On that occasion AFFCO accepted that other workers had also been in the car, that they may have been responsible for the cannabis found, and that the worker who owned the car did not know about it. That worker was not dismissed.

[41] I also accept it was not unreasonable for Mr Ginders to decline to review his decision to dismiss Ms Marfell following a later visit to his office by a friend of Ms Marfell who told him that she and not Ms Marfell was responsible for leaving the drugs in the car. Mr Ginders evidence was that Ms Marfell's friend was clearly drunk or 'high' at the time – he used the expression "*off her trolley*". The friend's attempt to claim responsibility was no more than a reiteration of the explanation which Mr Ginders had already reached the conclusion was unlikely in light of Ms Marfell's admission at the time of the search.

[42] I reject Mr Mitchell's submission that Mr Ginders' decision to dismiss Ms Marfell was contrary to a draft Drug Policy on which AFFCO was consulting with its workers, through their union, at the time. That policy refers to dealing with substance abuse issues to reduce or prevent workers coming to work under the influence of drugs. Firstly the policy was not in place at the relevant time and has still not been agreed between the union and the company. Secondly, while the policy does propose

some tolerance – in terms of disciplinary warnings – for workers found under the influence of drugs while at work, it also states that anyone caught consuming or possessing “*illegal drugs on company premises will be instantly dismissed*”. In that respect it is simply repeats a term of the collective agreement term.

[43] The reference to company premises clearly includes the staff car park on AFFCO property. It was an area which Ms Marfell and other workers used during their work breaks. Mr Arnold’s notes record that Ms Marfell told him that she always took her breaks out in her car and sometimes other workers would join her. In that light it was also reasonable for the company to be concerned about any illegal drugs that workers kept in their cars and to which they had access during breaks.

[44] Ms Marfell accepted that the company could search her car in the car park and specifically consented to the search when asked by Mr White. I do not accept Mr Mitchell’s submission that Mr White should have asked no further questions of Ms Marfell once he located the tin and – on looking inside it – became suspicious about its contents.

[45] Mr White’s inquiries were made as the employer’s agent in a workplace context and were not for the purposes of a criminal investigation by a state agency subject to Bill of Rights standards.

[46] The questions went no further than establishing ownership of the tin, knowledge of its contents and knowledge of the company’s policy on drug possession. At that point Mr White stopped and handed over the investigation to Mr Ginders whose task it was to inquire further through a disciplinary meeting, including ensuring an opportunity for representation and considering any explanations offered.

Determination

[47] For all the reasons outlined above I find that Mr Ginders decision to dismiss Ms Marfell was one that a fair and reasonable employer would have made in all the circumstances at that time. Accordingly Ms Marfell’s personal grievance application is dismissed.

Undertaking

[48] Mr White still has the metal tin found in Ms Marfell's car and Ms Marfell wants this item of property returned to her. I record Mr Malone's undertaking given at the Authority investigation meeting that he will arrange for the tin to be sent to Mr Mitchell 29 days after the date of this determination, if it is not under challenge. If this determination is challenged, the tin would be part of the evidence that might be needed for an Employment Court hearing and it is for the Court to control any arrangements about its possession meanwhile.

Costs

[49] There was no reference to costs in the statements of problem and reply or closing submissions of either party. I take it that AFFCO is content for costs to lie where they fall. If that is not so, AFFCO's counsel may lodge a memorandum as to costs within 28 days of the date of this determination and Ms Marfell's counsel will have 14 days to reply before the Authority determines costs, if any. No application outside this timeframe will be considered without prior leave.

Robin Arthur
Member of the Employment Relations Authority