

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Allan David Milton (Applicant)
AND Vodafone New Zealand Limited (Respondent)
REPRESENTATIVES Matthew Young for Applicant
Penny Shaw for Respondent
MEMBER OF AUTHORITY Alastair Dumbleton
INVESTIGATION MEETING 29 July 2005
SUBMISSIONS RECEIVED 16 August and 9 September 2005
DATE OF DETERMINATION 11 October 2005

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant Mr Allan Milton was dismissed by his employer, the respondent Vodafone New Zealand Limited, in June 2002. He challenged the justification for the dismissal by invoking the personal grievance procedure contained in his employment agreement. In particular Mr Milton was critical of the manner in which the decision to dismiss was reached and carried out by Vodafone.

[2] For reasons he has explained Mr Milton chose not to bring his grievance to the Authority until June 2004.

[3] After he had lodged his application the Authority held an investigation meeting in October 2004 to consider an objection from Vodafone that the grievance had not been raised with the company within 90 days of the dismissal, as required by the provisions of the Employment Relations Act 2000. The Authority gave its determination on that issue on 13 October 2004 (under AA 334/04), finding that Mr Milton had raised his grievance in time.

[4] Commencement of a full investigation of the grievance was affected by witness availability but eventually took place in July 2005, after the fixture for an earlier meeting date had to be abandoned.

[5] To resolve his grievance Mr Milton does not seek reinstatement but asks the Authority for orders against Vodafone requiring the company to reimburse him for lost remuneration and to compensate him for hurt feelings, humiliation and injury to his feelings. He also asks for an order requiring Vodafone to pay his legal costs.

Grounds for dismissal

[6] Vodafone summarily dismissed Mr Milton because of his involvement with the drug pure methamphetamine.

[7] There is no dispute that in about March 2002, a few weeks before he was dismissed, while he was engaged in answering the telephone at Vodafone's customer call centre Mr Milton had used "P". He bought some points of the drug off a Vodafone employee and during a work break used it in the toilet area of the call centre, along with three Vodafone employees. Before and after using P, he carried out his job assisting Vodafone customers who rang the call centre for advice.

[8] P is a Class B prohibited drug, as Mr Milton admitted to Vodafone he had known when using it.

[9] Mr Milton challenges Vodafone's conduct when investigating his involvement with drugs on company premises. During that investigation he admitted his guilt but complains that a company employee intimidated him, and he complains that he was not allowed access to full representation during the disciplinary meeting that followed the investigation. Further, Mr Milton complains that following his dismissal when he had obtained a new job, Vodafone improperly disclosed to his new employer information about the dismissal. He says the effect of this communication was to delay by some months his advancement from temporary to permanent status with his new employer.

[10] Mr Milton does not disagree that it is serious misconduct for any employee to do what he did. However he draws attention to the fact, which is not in dispute, that when he bought and used the drug P at Vodafone's call centre in about March 2002, he was not employed by Vodafone. It was not until May 2002 that he became an employee of Vodafone, after successfully applying for a position. In March he had been working for a temping agency engaged by Vodafone for its call centre work.

[11] It only became apparent to Vodafone during the investigation meeting that it had not appreciated this fact at the time it conducted the disciplinary enquiry into Mr Milton's misconduct and when it decided to dismiss him.

Intimidation – lack of access to representation

[12] The notes of the interviews conducted by Mr Ian Varley, the Vodafone employee who investigated Mr Milton's misconduct, indicate that Mr Milton's assistance in the disciplinary enquiry was not coerced by implicit threats or intimidation at all but was voluntary. It seems more likely that he wanted to be cooperative, so that in return his employer might extend leniency and not dismiss him. The notes record that after readily admitting his involvement with drugs Mr Milton emphasised to Vodafone that he was enjoying working for the company and wanted to stay. He said he had made a stupid mistake, that it was in the past and that it would not happen again. During his interview Mr Milton apologised for what he had done.

[13] I am satisfied that the complaint of intimidation is not made out. I accept from Mr Varley that he did not deliberately or improperly or even actually threaten or intimidate Mr Milton. Mr Varley is a former Police detective and is now an investigating officer with the Serious Fraud Office. It may be that his physical presence was experienced as overbearing by Mr Milton, and Mr Varley's polished use of professional techniques he had been trained in during 22 years with the Police might also have seemed intimidating to Mr Milton, but there is no reasonable basis for criticism in any of these things.

[14] I consider that Mr Milton was not concerned at the time with the extent to which he was entitled to representation, because his attitude towards the misconduct accusation was not one of defence and denial but one of acceptance, remorse and contrition. Notes made by Mr Ian Varley and produced to the Authority record that in the course of two interviews Mr Milton had said he was “very open and comfortable” talking about the alleged misconduct and doing so “by myself with Ian.” I accept that Mr Milton’s response to an enquiry from Mr Varley was to the effect that, “support person not required.”

[15] Notes also record that when Mr Milton arrived at the 17 June disciplinary investigation without a representative he was asked whether he wanted to have the meeting rescheduled. He confirmed that he wished the investigation to proceed as he wanted to get the matter “sorted, regardless of outcome.” The notes also indicate that Mr Milton had his “rights” explained to him before the interviews proceeded. I do not accept that he was prevented from having the representative of his choice, including a lawyer, if he wished to have a representative.

[16] I am therefore satisfied that in relation to representation during the disciplinary enquiry there was no significant lapse by Vodafone that made the enquiry and its outcome unfair and unreasonable.

Unauthorised disclosures to new employer

[17] Mr Milton believes that following his dismissal and after he had found work again, his former Vodafone supervisor rang his new employer and improperly disclosed details of his dismissal. This belief is based solely on the fact that an offer made to him of permanent employment with the new employer was suddenly withdrawn without explanation. He was subsequently re-offered the permanent job some time later and has remained with the same employer since 2002.

[18] I find from the evidence that Mr Milton’s belief is simply based on hearsay, rumour, speculation and surmise (his own word). Ms Brigid Archer, who was Mr Milton’s Team Manager, denied disclosing any information about his dismissal or even the fact of it, in the way he alleged. I accept her evidence as truthful. This particular complaint is rejected by the Authority.

Absence of employment relationship at time of misconduct

[19] In March 2002 when Mr Milton bought and used P, the conduct for which he was dismissed by Vodafone, he owed no duty to Vodafone as an employee in respect of any of his conduct.

[20] I consider that the conduct of an employee before the employment relationship has been entered into is capable later on of providing grounds for dismissal, where there is a sufficient nexus between that conduct and the bonds of trust and confidence that must hold together the relationship between employer and employee.

[21] It is clear to the Authority that when Vodafone carried out its disciplinary enquiry and dismissed Mr Milton in June 2002, its principal concern was about the present and future impact of that past conduct on the employment relationship which by then had come into existence. Vodafone was entitled to be concerned about Mr Milton’s past conduct because of the strong connection between it and the subsequently formed employment relationship; the conduct had occurred in work hours at Vodafone’s premises, a workplace required by law to be kept safe and healthy for other employees. Also, the misconduct involved others who were Vodafone employees (and who were dismissed for their part) and it could have been harmful to the reputation Vodafone enjoyed with its call centre customers.

[22] Vodafone's letter to Mr Milton confirming the dismissal did not expressly refer to his relationship with the company at the time of the misconduct. What is expressly emphasised in the letter is the nature of the misconduct itself, his involvement in buying and using illegal drugs, and also the place and time of the misconduct, which was "on Vodafone premises and during rostered hours."

[23] I accept the evidence of Ms Bridget Annesley-Smith for Vodafone that the company's primary concern was in relation to Mr Milton's conduct being carried out while he was on company premises and while he was working with company customers. Its concern then was not principally that Mr Milton had been an employee or had been in any particular work relationship directly or indirectly with Vodafone at the time of the misconduct.

[24] The company's concern was to show its employees that it would not tolerate illegal drugs being bought, sold or used on its premises no matter who was involved. It dismissed all who had been concerned in Mr Milton's misconduct and sent an email to staff advising them of this action. It seems quite possible that if Mr Milton had merely been a visitor to the premises he would have received a trespass notice to keep away.

[25] I find there was a direct link between the misconduct of Mr Milton in March 2002 and the legitimate interests of Vodafone in June 2002, making it reasonable for the employer to conduct a disciplinary investigation into that misconduct. In the circumstances Vodafone had a reasonable basis for feeling that Mr Milton's conduct before he became an employee may have seriously damaged or destroyed the relationship of trust and confidence both parties were required to maintain, once that conduct became revealed to the employer.

Justification for dismissal

[26] Since December 2004 the Employment Relations Act 2000 has expressly provided a test of justification to be applied for the purposes of resolving claims of unjustified dismissal. From its language it appears that the new provision, found at s.103A of the Act, is addressed to the Authority at the time it is investigating and determining a dismissal or disadvantage grievance. It must therefore be applied even when the dismissal occurred, as in this case, before the change to the Act.

[27] The new test does not expressly require the existence of an employment relationship at the time any misconduct is committed, and there is no implication to that effect either.

[28] Although several Vodafone employees made a basic and avoidable mistake about Mr Milton's standing or capacity at the time of the misconduct, that does not erode the justification for dismissal in the particular circumstances of this case. Under s.103A the "circumstances" to be considered are the relevant or material circumstances. The employer's error was not a matter of any real relevance in the circumstances that Vodafone was aware of and was entitled to be concerned about, and I find that it does not detract from the fairness and reasonableness of the employer's actions.

[29] The question is not whether a fair and reasonable employer would have avoided making this mistake at all, but whether the mistake was material to the decision making. When Ms Brigid O'Connor was assisting in interviewing Mr Milton she at least was aware from his file that he had not been a Vodafone employee in March 2002. It is then some reflection of the relative unimportance of this fact that she did not raise it with her colleagues. Neither did Mr Milton himself raise it, as he could easily have done. I am satisfied that the employers real concern was with the nature of his misconduct rather than the capacity or standing he had when he committed it. I find that it was open to Vodafone as a fair and reasonable employer to take that particular view of

the circumstances.

Determination

[30] I find that the test of justification at s.103A of the Employment Relations Act has been met. Viewed objectively, Vodafone's actions were what a fair and reasonable employer would have done in all the material circumstances at the time the dismissal occurred.

[31] Even if s.103A does not apply to pre-December 2004 dismissals, I consider that the *Oram* test of justification that applied until the amendment was passed would have produced the same result in this case.

[32] Accordingly, Vodafone has no legal responsibility for the dismissal of Mr Milton. No orders are required to be made against the company, as the dismissal was justified.

Contribution

[33] Had the Authority found the dismissal to be unjustified it would have been required by s.124 of the Act to take into practical account the degree of blame that Mr Milton should bear for the situation that gave rise to his personal grievance.

[34] Again, under this particular provision of the Act there is no express or even implied requirement that the contributory conduct of the employee is confined to actions that were carried out within the employment relationship, rather than at some time before that came into existence. What is looked for is blameworthy conduct which is causally linked to the dismissal. I am satisfied that Mr Milton's actions could have attracted blame from Vodafone in March 2002 in a practical way, even although the company was not then his employer. Mr Milton could not have been disciplined in March 2002 as an employee for his actions, but he could have had blame visited on him by Vodafone requiring his employer to remove him from the call centre.

[35] I would have found that the degree of contribution arising out of the conduct of Mr Milton was total or was so massive as to extinguish all or most of any entitlement he had to monetary remedies.

Costs

[36] Costs are reserved to allow the parties an opportunity to resolve the question themselves, through Ms Shaw and Mr Young. Application can be made in writing to the Authority for an order if no agreement is reached.