

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2019] NZERA 306
3042931

BETWEEN	ISTIYAK SYED Applicant
AND	VODAFONE NEW ZEALAND LIMITED Respondent

Member of Authority:	Eleanor Robinson
Representatives:	David Prisk, Advocate for the Applicant Elizabeth Coates, Counsel for the Respondent
Investigation Meeting:	1 May 2019
Submissions received:	1 May from Applicant and from Respondent
Determination:	24 May 2019

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Mr Istiyak Syed, claims that he was unjustifiably dismissed by the Respondent, Vodafone New Zealand Limited (Vodafone) on 12 September 2018 when he was dismissed for serious misconduct after he was alleged to have worked under the influence of drugs.

[2] Mr Syed further claimed that he had been unjustifiably disadvantaged by Vodafone having conducted a flawed investigation into the allegations against him.

[3] Vodafone deny that Mr Syed was unjustifiably dismissed or unjustifiably disadvantaged and claims that he was dismissed for serious misconduct after it had conducted a fair and reasonable process in good faith.

[4] Vodafone further denies that there was any unjustifiable disadvantage arising from the process it followed.

The Authority's investigation

[5] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence heard or in submissions received.

Issues

[6] The issues requiring investigation and determination are whether or not Mr Syed was:

- (a) unjustifiably dismissed by Vodafone;
- (b) unjustifiably disadvantaged by Vodafone.

Background

[7] Vodafone is a telecommunications company that provides a number of different telecommunication services to individual and corporate customers.

[8] Mr Syed was employed by Vodafone in November 2016 as Business Consultant and on 16 April 2018 became an after-hours Service Desk Analyst on the Night Operations Team. He was based in Auckland and reported directly to Mr Adam King, Team Leader (Enterprise Service Centre Nigh Operations) – Service Delivery.

[9] Mr King is based in Wellington together with the majority of the Night Operations Team with some team members being based across two further sites in Auckland.

[10] Mr King said that the Night Operations team identify and triage any potential service-impacting network alerts, escalating these for further investigation without delay. The service is of the highest importance to Vodafone customers as any business impact can result in the customer being unable to use the systems critical to carrying out their business function. This can result in a loss of income and/or penalties for Vodafone's enterprise and government customers.

[11] Mr Syed's core duties and responsibilities included:

- (a) acting as a first point of customer contact for any service issues;
- (b) call logging, troubleshooting, resolution and/or assignment of customer issues to support teams;
- (c) monitoring core network services; and

(d) managing critical priority incidents.

[12] Mr Syed mainly worked shifts between 12am and 8am on a Saturday, Sunday and Monday. Mr Syed worked autonomously for at least one of these shifts and sometimes for two of the shifts. During those shifts he was responsible for Vodafone's entire service desk operations. Mr King said Mr Syed was expected to operate autonomously, making decisions relating to customer queries without input from team leaders or colleagues.

[13] Mr Syed was employed pursuant to an individual employment agreement dated 18 November 2016 (the Employment Agreement). The Employment Agreement contained the following clauses:

11 Vodafone policies and procedures

You will be required to comply with Vodafone's current policies and procedures, which are set out in detail on the Vodafone intranet ...

15 Vodafone Group

Vodafone New Zealand Limited is part of the Vodafone group of companies. You must always act in a manner that is consistent with the Vodafone group of companies' policies to the extent allowed by New Zealand law.

20 Leaving Vodafone

... In the event of misconduct is defined in Vodafone's current policies and procedures or gross negligence by you, termination without notice may occur.

21 Suspension

Vodafone may suspend you from the performance of all or any of your duties pending investigation of serious misconduct or gross negligence or in any other situation that Vodafone deems if necessary.

26 Health and safety

To maintain a safe working environment you are required to comply with Vodafone's health and safety rules and procedures and take all practical steps to ensure your fitness for work and safety and the safety of others in the workplace.

[14] Mr Syed had signed the employment agreement below the paragraph headed "28 Acknowledgement", which stated:

I have read and understand the terms and conditions contained in this agreement, my personal employment statement and letter of offer ... I acknowledge that breach of any of the policies contained within My HR or the clauses contained in this individual employment agreement may result in disciplinary action.

Mr Syed had signed and dated the agreement on 23 November 2016.

[15] The Vodafone Disciplinary Policy defines Serious Misconduct, stating:

Serious misconduct means some form of serious wrongdoing, which damages or destroys the basic trust and confidence essential to the employment relationship. Serious misconduct may result in the termination of an employee's employment without notice, following an investigation.

[16] Included in the list of examples of behaviour which was considered as serious misconduct was:

- Possession, use or distribution of illegal or other drugs (except as prescribed) whilst on Vodafone's premises and/or while performing any duties or responsibilities on behalf of Vodafone.
- Breach of Vodafone's Health and Safety policy, Absolute Rules

[17] In the case of serious misconduct the Disciplinary Policy stated that: "*dismissal without notice may be appropriate.*"

[18] The Vodafone health and safety policy stated at clause 2, entitled 'Vodafone Absolute Rules':

All Vodafone NZ employees, contractors and partners are required to obey the Vodafone Absolute Rules at all times. Breaches of the Absolute Rules are a reportable matter and may lead to disciplinary action up to and including termination of employment.

One of the Absolute Rules is: "We must never work under the influence of alcohol or drugs".

[19] Mr Dustin Stephens, Team Leader (Enterprise Service Centre) – Service Delivery, explained that all new employees must read Vodafone policies and complete mandatory learning modules which outline the details of the policies, particularly the Health and Safety policy and the Absolute Rules.

Car conversation 4 August 2018

[20] During the early part of August 2018 Mr King said he was in Auckland for work and met Mr Syed in person for the first time. On 4 August 2018 Mr King said he had been in a car with Mr Syed and another Service Desk Analyst. They had completed the night shift and were going to get breakfast together.

[21] Mr Syed said that during their casual conversation he had mentioned that he had smoked marijuana occasionally to help him sleep. He said that Mr King's response was that he had friends that smoked and that it was no big deal.

[22] Mr King said that Mr Syed had initiated a conversation about drug use during the car ride as he wanted to discuss the use of steroids. He had been surprised that Mr Syed was raising this topic with him and said that Mr Syed proceeded to tell him about his marijuana

use. More specifically he said that Mr Syed had told him he smoked marijuana on most days. Mr Syed also said that others in the business team at Vodafone had smoked drugs.

[23] Mr King said he was very surprised that Mr Syed had admitted to him that he had smoked marijuana most days given Vodafone's zero tolerance policy towards drugs. He was also unaware of any other Vodafone employee smoking marijuana.

[24] Mr King also said that Mr Syed described an incident during work when he and a colleague had gone to the staff carpark to smoke marijuana. Mr Syed said that his colleague had been worried when a team leader approached the car, but he had thought it was funny himself and had not been worried because he knew the team leader and said they were: "all good". Mr King said that he had asked Mr Syed who the other colleague had been, but he would not tell him.

[25] Because Mr Syed had referred to the fact that the incident had happened in the staff carpark with another colleague and a team leader was concerned, Mr King said it had triggered alarm bells for him that Mr Syed had engaged in marijuana use during shift hours. In addition, the incident was closely connected to his workplace, given that the incident took place with the work colleague in the staff carpark.

[26] During the conversation Mr Syed had also told him that colleagues came up to him at work from time to time to ask for a "fiddy bag" (i.e. a bag of marijuana). Mr Syed had then told him that people at work were not "low-key at all" about their drug use.

[27] Mr Syed said that he had been smoking marijuana in a public car park located near to the Vodafone offices, not in a Vodafone car park. He said he had not supplied other employees with drugs but because other employees were aware that he was a marijuana user they had approached him at work to ask for drugs as they and he had reported this to the Business Manager; however he did not know if there had been a report produced as a result.

[28] Mr King said that following the conversation he had been concerned about Mr Syed returning to the workplace and he believed that because Mr Syed had admitted to smoking marijuana most days, this indicated that he was likely to be under the influence of illegal drugs whilst at work. He had also been concerned that Mr Syed may have been in possession of drugs at work and may have sold or distributed drugs to other colleagues.

[29] Upon his return to Wellington Mr King said that he had taken the first available opportunity to speak to his line manager who advised him to (i) obtain advice from Human Resources and (ii) that he might need to start a formal investigation.

[30] Mr King had a meeting with the Vodafone HR consultant on 10 August 2018 and she had advised him of the process for a formal investigation. Following some time spent obtaining an understanding of the disciplinary process, Mr King said he decided to proceed with a disciplinary process and had received authorisation to do so.

Disciplinary process

[31] Mr King said he had messaged Mr Syed on 20 August 2018 and had told him that Vodafone had concern that he had been under the influence of drugs at work and had sold or distributed drugs to other colleagues at work. As a result, Vodafone was going to commence a disciplinary investigation process.

[32] Mr King sent a letter to Mr Syed dated 19 August 2018 in which he invited Mr Syed to a disciplinary meeting on 27 August to respond to allegations of serious misconduct. The allegations were set out as being:

1. It is alleged that you have been working under the influence of drugs at work and during your working hours.
 - This appears to be in breach of the disciplinary policy which states examples of serious misconduct are:
 - Possession, use or distribution of illegal or other drugs (except as prescribed) while on Vodafone's premises and/or while performing any duties or responsibilities on behalf of Vodafone
 - Breach of Vodafone's health and safety policy, absolute rules or behaviour otherwise causing or having the potential to cause any risk to health and safety.
 - This appears to be in breach of the health and safety policy which states one of the absolute rules is that we never work under the influence of drugs or alcohol.
2. It is alleged that you may be in possession of drugs and that you may have sold or distributed drugs (potentially to your colleagues) at work and during work hours.
 - This appears to be in breach of the disciplinary policy.

The letter concluded by advising Mr Syed that Mr King was to be the decision maker in the process and that Mr King would meet with him together with Mr Stephens on 27 August 2018. Mr Syed was also invited to bring a support person or representative if he wished to do so.

First Disciplinary Meeting held on 24 August 2018

[33] Mr Syed had requested that the meeting be rescheduled to 24 August 2018 and this had been agreed. Present at the meeting on 24 August were Mr Syed, Mr Stephens and Mr King. Mr Stephens' role was to be a witness and note taker.

[34] During the investigation Meeting Mr Syed confirmed that the detailed notes taken by Mr Stephens of the meetings in the disciplinary process were an accurate account.

[35] During the disciplinary meeting held on 24 August 2018 Mr Syed confirmed that he was happy to proceed without a support person.

[36] Mr King had talked Mr Syed through the invitation to the disciplinary meeting letter and ensured that Mr Syed knew the purpose of the meeting.

[37] He had read out the relevant sections of the Vodafone policies to him and Mr Syed had confirmed when questioned that he had understood the company's drug and alcohol policy.

[38] Mr Syed said that during the meeting he had been asked about the conversation he had with Mr King on 4 August 2018. His response had been that he did not recall the conversation.

[39] Mr King said that because Mr Syed had told him he could not recall the conversation in the car and was therefore unable to answer any questions about it, he had called a short adjournment during which he conferred with Mr Stephens and decided that there was nothing to be gained by continuing to ask Mr Syed any questions about the conversation in the car on 4 August 2018.

Drug Test

[40] Mr King had asked Mr Syed if he would undertake a drug test and Mr Syed agreed to do so.

[41] Following the meeting Mr Syed said that he returned home and did his own home drug test. He subsequently sent a text message to Mr King saying:

Hey I'm not gonna do the drug test on Wednesday, I did a home test for THC today and it failed. There's no point in me giving a sample to a third party, just proceed with ur case against me under the assumption that it's positive result.

[42] Mr King said that because Vodafone had wanted to ensure that it had more accurate test results, he continued to arrange the testing through a formal agency.

[43] He said he had told Mr Syed during a telephone conversation that Vodafone believed it was in his best interests to do the drug test and that if Mr Syed removed his consent to the drug test, he (Mr King) would need to obtain advice from Human Resources to find out how that would affect the process and possible outcomes.

[44] Mr King said that shortly before the drug test scheduled to be on 29 August 2018, Mr Syed had texted him saying he could no longer make the test due to university commitments and requested that the test be rescheduled until 31 August 2018.

[45] The drug test was carried out by The Drug Detection Agency (TDDA) on 31 August 2018. TDDA had emailed Mr King following the test and stated that the test had showed the presence of cannabinoids (THC).

[46] Mr King said that TDDA had telephoned him and told him the result of the test and that the test sample had been destroyed.

[47] Mr Syed said at the Investigation Meeting that he had not been surprised at the positive test result as a urine sample for show the presence of marijuana for some days and could stay in the system for four weeks.

[48] Mr King said the test, which was returned as positive, occurred on a day on which Mr Syed was rostered to work at midnight. He decided to proceed with the disciplinary process by setting up a second meeting. However, prior to sending the disciplinary meeting invitation letter he had telephoned Mr Syed to explain the contents of the letter.

[49] During the call he had discussed the proposal to suspend Mr Syed with him, and the reasons for it, and Mr Syed had agreed to the suspension. Mr King had detailed the conversation in an email to Mr Syed dated 31 August 2018 in which he had stated:

As discussed and agreed over the phone, due to the nature and seriousness of the allegations against you, and as a result of your positive drug test, we propose suspending you on pay in accordance with the terms of your employment agreement and our disciplinary policy. You understood the reasons and have agreed to suspension.

[50] The invitation to a further disciplinary investigation meeting letter dated 31 August 2018 set out the allegations as previously and said the purpose of the meeting was to provide Mr Syed with a further opportunity to respond to the allegations of serious misconduct.

Second disciplinary meeting held on 2 September 2018

[51] The second meeting was held on 2 September 2018. Mr Stephens was again present as witness and note taker. Mr Syed confirmed he was happy to proceed without a support person present.

[52] During the meeting Mr King said Mr Syed was more open about his drug use and more cooperative with the questions.

[53] Mr Syed said that since the first disciplinary meeting he had spoken to the work colleague who had been with him and Mr King in the car on 4 August 2018. The colleague

had told him what he could recall of the conversation and Mr Syed had based his responses predominantly on what that colleague told him of the content of the conversation.

[54] The meeting notes as taken by Mr Stephens included that:

- Mr Syed maintained he did not remember the conversation in the car between Mr King and a colleague
- Mr Syed denied he took drugs other than marijuana stating: *“that’s one reason why I was happy to go through with the drug test, to prove there is nothing else that I take”*.
- He had failed the drug test because he smokes marijuana recreationally. He was not at work on the day he was drug tested.
- He smoked marijuana around two or three times a week and had been doing that for eight or nine years.
- He believed he was not addicted to drugs and had given up smoking in periods of a month or two and that this helped him.
- He believed he smoked so often it did not affect him and said he did not smoke at work.

[55] During the meeting Mr King had raised concerns with Mr Syed in respect of the period of time between April and May 2018 where Mr Syed was in training and working from 8 a.m. to 5p.m. five days a week instead of shift work.

[56] Mr Syed said he had only smoked once during the whole period, but he continued to smoke more regularly once the training period had finished.

[57] Mr King had also told Mr Syed that with a 24/7 rotating roster he needed to be able to call upon people at short notice to cover shifts and asked Mr Syed how he could trust him to be called into work and perform his work duties and not pose a health and safety risk to himself and others in light of his drug use.

[58] Mr Syed’s response was that he would be honest with Mr King about when he was high and would not come into work if he was high.

[59] Mr Syed confirmed that the notes of the meeting compiled by Mr Stephens were an accurate transcript of what had been discussed during the meeting. He stated that he had told Mr King he never smoked at work, never smoked the day before work, never brought drugs to work, and never attended work under the influence of drugs.

[60] Mr King said that having considered Mr Syed’s responses, he formed a preliminary view that his concerns were substantiated. In particular he considered:

- (a) Mr Syed did not deny that he smoked regularly;
- (b) Mr Syed admitted that he knew about the policies which showed Vodafone's strong zero tolerance towards drug use;
- (c) Vodafone's zero tolerance towards drugs was clear and well understood by staff;
- (d) Mr Syed admitted that at least on one occasion he had smoked marijuana at work and he (Mr King) had reasonable reason to believe that this had occurred more than once based on Mr Syed's disclosures to Vodafone (that he had smoked at least two to three times a week and returned two positive tests);
- (e) Overall, Mr Syed's explanations and responses differed from the initial meeting with him in which he said he could not recall anything. This had impacted on his credibility of what he had told Mr King at the second disciplinary meeting.

[61] Mr King said that Mr Syed did not appear to be apologetic about the marijuana use and did not seem to appreciate why it was such a concern to Vodafone. On the basis that Mr Syed had claimed he did not recall the conversation in the car regarding his marijuana use, he believed he had been dishonest in his explanations and smoked at work more than he admitted. As a result he formed a view that Mr Syed blatantly acted in breach of Vodafone's policies.

[62] After the second disciplinary meeting with Mr Syed, Mr King liaised with HR and his Manager on 4 September 2018 about his thoughts in respect of Mr Syed's feedback. His view was that termination was the likely outcome, however, prior to confirming the outcome he had wanted to hear Mr Syed's thoughts on the proposed penalty.

[63] Mr King said that in considering an appropriate outcome he had taken a number of matters into account, including alternatives to dismissal, Mr Syed's employment record, the seriousness of the breach and the nature of Mr Syed's position which required autonomous working in a remote location.

[64] Mr King said that he did not have authorisation to make termination decisions and he therefore completed and submitted a form to HR in order to get authorisation to propose termination of Mr Syed's employment. After completion of the form and discussion with HR, he had received authorisation to propose to Mr Syed that Vodafone was considering terminating his employment.

Preliminary Decision

[65] On 6 September 2018 Mr King called Mr Syed to let him know that there would be a further meeting to provide him with a proposed outcome letter. During the call Mr King said he had informed Mr Syed that he had reconsidered his suspension and his proposal was to continue it. Mr Syed said he agreed that suspension was appropriate. Mr King had confirmed Mr Syed's agreement to the suspension being continued and asked that he confirm by way of reply that he agreed with the suspension and was available for a meeting on Tuesday 11 September.

[66] At the meeting held on 11 September 2018, Mr King presented Mr Syed with the proposed disciplinary investigation outcome letter which stated: "*We consider that your conduct amounts to serious misconduct and propose termination of your employment without notice. ...*"

[67] The allegations were set out together with the information that had been provided during the investigation process and set out the preliminary decision as being in regard to allegation 1:

- **Allegation 1** - As a result of the positive cannabinoids (THC) test the one you privately undertook on your own accord and the test we arranged by NZ DDA, your conversation held with me on 4 August and your responses throughout this investigation including specifically your confirmation that you regularly use marijuana recreationally, it is our view that you have worked under the influence of drugs (marijuana).
- **Allegation 2** – As a result of the investigation along with the explanation and information provided by you it is our view that you may have been in possession of drugs in the workplace. However we cannot uphold this allegation as there is no direct evidence to constitute it other than the conversations held.

We do not accept your explanation regarding allegation 1 because of the positive cannabinoids THC test along with the frequency of nature of your drug use. We believe you have worked under the influence of drugs especially cannabinoids THC. We accept your explanation regarding allegation 2 because there is no evidence to directly corroborate the allegations. On this basis we consider that:

- Allegation 1 – your conduct amounts to serious misconduct
- Allegation 2 – was not substantiated.

The proposed disciplinary outcome in relation to allegation 2 was termination without notice as the allegation constituted serious misconduct and was a breach of the absolute rules.

Also stated was

... We have considered your employment record with us and other disciplinary outcomes. However based on the serious nature of the breach and the nature of your role as an after-hours team member you are required to work unsupervised we will consider termination to be the appropriate

outcome under the circumstances. We believe your conduct has resulted in a significant breakdown in our trust and confidence in you as an employee.

[68] The letter concluded by inviting Mr Syed to respond to the preliminary findings and proposed outcome either in writing by 12 September or at a meeting on 12 September.

[69] Mr King said that he had met with Mr Syed on 12 September together with Mr Stephens as witness and note taker. However, Mr Syed did not provide any response to the proposed penalty.

[70] As a result Mr King confirmed that the proposed penalty was confirmed and that Mr Syed's employment was terminated without notice on 12 September 2018. This decision was confirmed in writing by letter dated 13 September.

Was Mr Syed unjustifiably dismissed by Vodafone?

[71] Mr Syed was dismissed from his employment with Vodafone by reason of serious misconduct. Justification for dismissal is stated in the Employment Relations Act 2000 (the Act), which at s 103A sets out the Test of Justification as being:

S103A Test of Justification

- (1) For the purposes of section 103(1) (a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).
- (2) The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

[72] The Test of Justification requires that the employer acted in a manner that was substantively and procedurally fair. An employer must establish that the dismissal was a decision that a fair and reasonable employer could have made in all the circumstances at the relevant time.

[73] As observed in *Ports of Auckland Ltd (no2)* the test of justification under s 103A of the Act means that there may be more than one possible justifiable outcome, stating at [36] and [37]:¹

The most important change to former s 103A is that by use of the word "could" in substitution for the former "would", Parliament has indicated that there may be more than one justified sanction available to an employer in any given situation in employment which might result in the employee's dismissal or in disadvantage to the employee in his or her employment.

¹ [2011] NZEmpC 160 at [36] and [37]

The effect of new s103A is that so long as what happened (and how it happened) is one of those outcomes that a fair and reasonable employer in all the circumstances could have decided upon, then the Authority and the Court will find that justified.

[74] Vodafone's policies on drugs and alcohol in the workplace were well known to employees, and Mr Syed confirmed in the first disciplinary meeting that he was familiar with them. Mr Syed had signed the Employment Agreement acknowledging that he had read and understood the terms and conditions, which included at clause 11 the Vodafone policies and that a breach of them could result in disciplinary action. Mr Syed further confirmed during the first disciplinary meeting on 24 August 2018 that he was familiar with the Vodafone Health and Safety policy and the Disciplinary policy.

[75] On that basis I find that Mr Syed was aware that a breach of Vodafone policies due to the use of, or being under the influence of, drugs whilst at work, would render him liable to disciplinary action up to and including dismissal.

[76] . Following the conversation in the car on 4 August 2017 Mr King considered that Mr Syed could have worked under the influence of marijuana. Mr King based this view upon the fact that Mr Syed said::

- he smoked marijuana most days;
- he had smoked marijuana in the carpark close by the Vodafone offices which had concerned Mr King given his perception of the proximity of the smoking to Mr Syed being on shift;
- the concern of Mr Syed's colleague when the Team Leader approached the car which confirmed Mr King in his view that it probably occurred during work hours; and
- the fact that Mr Syed had been approached by colleagues for supply of marijuana.

[77] Mr King had a clear recall of the car conversation on 4 August 2018 and had sought advice on the appropriate action as soon as was possible given his work commitments.

[78] Mr Syed claimed to have no recall of the car conversation at all in the first disciplinary meeting, provided more informative responses in the second disciplinary meeting following a conversation with the third Vodafone employee in the car on 4 August 2018, and in response to questioning during the Investigation Meeting had a detailed recall of some aspects of the car conversation.

[79] Mr King believed that Mr Syed's responses were not consistent especially in regard to the inconsistency of the responses about his drug use, noting that during the second

disciplinary meeting he stated that he ensured he only smoked marijuana outside of a 24 hour period prior to commencing work, but during the car conversation he had said he smoked on most days and in car park areas close to the Vodafone offices.

[80] Mr Syed had failed two drug tests, whilst one he had carried out himself, he had urged Vodafone to proceed with the investigation process without recourse to a second independent test. That test was also carried out and proved to be positive on a day when Mr Syed was scheduled to work.

[81] It was very important that Vodafone could have trust and confidence in Mr Syed who worked at a remote location and on occasion, autonomously. Based on Mr Syed's inconsistent responses throughout the disciplinary process including the two positive drug test, Mr King reached the conclusion he could not have trust and confidence in Mr Syed and that he had more than likely been under the influence of drugs at work.

[82] I find this to be a conclusion a fair and reasonable employer could have reached in all the circumstances at the relevant time.

[83] Mr Prisk on behalf of Mr Syed submitted that (i) Vodafone had no contractual right to test employees for drugs for reasonable cause; and (ii) that Mr Syed had not been told that he could refuse to take the test and there would be no consequence if he did not do so.

[84] I observe that the Vodafone policies do not state that an employee can be tested for reasonable cause by which is normally implied that there is a perception on the employer's part that the employee's performance has been affected by drugs. That does not apply in this case.

[85] I find that Mr Syed gave his consent to testing freely at the first disciplinary meeting.

[86] Following that meeting Mr Syed carried out his own drugs test which was positive and he urged Vodafone in the text message sent on 27 August 2018 to: *proceed with ur case against me under the assumption that it is a positive test.*"

[87] I do not construe this text message as Mr Syed withdrawing his freely given consent, rather to his intending to shortcut a process which he was finding stressful.

[88] Vodafone did not avail itself of the suggested option to move to the next stage without recourse to an independent drug test but instead Mr King discussed the drug test with Mr Syed and advised him that if he withdrew his consent, HR would need to be contacted for advice. I do not regard this as coercion.

[89] I find support for this view of a lack of coercion in the fact of Mr Syed's statement at the second disciplinary meeting held on 2 September 2018 that: "*that's one reason why I was happy to go through with the drug test ...*" which indicates that he gave his consent willingly and without coercion.

[90] Mr Prisk also submitted that further analysis was indicated on the TDDA form but this did not take place and had it done so, there may have been a different outcome for Mr Syed.

[91] I observe that both tests carried out on Mr Syed were positive. Whilst a further analysis might have indicated the presence or absence of other drugs this did not occur nor was other drug usage a factor in the reason for the termination of Mr Syed's employment.

[92] Further analysis may have indicated that by the time Mr Syed was scheduled to attend for work that evening, the marijuana may have cleared his system. This is at variance with Mr Syed's own evidence that a urine sample could show the presence of marijuana for some days and could stay in the system for four weeks.

[93] I also find it significant that at the time Mr Syed undertook the positive TDDA test he was scheduled to attend for work that night. Moreover he did not raise further analysis as an issue during the second disciplinary meeting despite having the opportunity to do so.

[94] I find that Vodafone acted as a fair and reasonable employer could have acted in finding that it was more likely than not that Mr Syed had been working under the influence of drugs.

[95] In regard to the procedure I find that during the disciplinary procedure Mr Syed was treated fairly and reasonably, in particular Mr Syed:

- was advised of the allegations against him;
- was advised of his right to have a support person present;
- was provided with a full opportunity to provide explanations;
- his responses were considered before Mr King made a preliminary decision; and
- he had an opportunity to comment before the final decision was made.

[96] In regard to the fact that Mr King was both the complainant and the decision maker during the disciplinary process I observe that other Vodafone employees were consulted throughout the process, principally Mr King's manager and HR. He also had to seek

authorisation before proceeding to a decision to dismiss Mr Syed by , completing a form for authorisation. This was not a decision Mr King made in isolation without advice or authorisation to proceed to stages in the process.

[97] Mr Stephens also was present during the disciplinary meetings, taking full and accurate notes. Mr Syed was provided with a full opportunity to offer an explanation at each stage of the disciplinary process.

[98] Moreover Mr Syed had been advised of the fact that Mr King was to be the decision-maker in the letter dated 19 August 2018 however neither then, or at any time subsequent, did he object to this.

[99] I find no unfairness resulted to Mr Syed in Mr King being the decision maker.

[100] In summary I find that Vodafone carried out a fair and reasonable disciplinary process.

[101] I determine that Vodafone acted as a fair and reasonable employee could have acted in all the circumstances at the relevant time and that Mr Syed was justifiably dismissed.

[102] I also determine that Mr Syed did not suffer an unjustifiable disadvantage in regard to the investigation and process carried out by Vodafone.

Costs

[103] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the Applicant may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Respondent will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

[104] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[105] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.²

Eleanor Robinson
Member of the Employment Relations Authority

² *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].