

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

CA 107/09  
5272597

BETWEEN                      SAMUEL                      WILLIAM  
   TENNENT  
   Applicant

AND                              CANON    NEW    ZEALAND  
   LIMITED  
   Respondent

Member of Authority:    Philip Cheyne

Representatives:        Nicole Ironside, counsel for the Applicant  
   Christine Meechan, counsel for the Respondent

Investigation meeting:    16 July 2009 at Nelson

Determination:            21 July 2009

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**DETERMINATION OF THE AUTHORITY**

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[1]     Samuel Tennent worked for Canon New Zealand Limited from July 2005 until he was summarily dismissed on 30 June 2009 following a disciplinary investigation into alleged serious misconduct. Mr Tennent says that his dismissal is unjustified and he seeks interim reinstatement to his position pending disposition of his personal grievance claim. This determination resolves the claim for interim reinstatement. The findings expressed here are solely for that purpose; final findings will have to wait for the opportunity to question relevant witnesses and fully consider justification for the dismissal.

[2]     There is agreement between counsel about the tests to be applied by the Authority currently. I must determine whether Mr Tennent has an arguable case of unjustified dismissal, where lies the balance of convenience and whether the overall

justice of the case supports Mr Tennent or Canon. It is useful to briefly explain what resulted in Mr Tennent's dismissal before turning to an assessment of these factors.

**What caused the dismissal?**

[3] There are some issues about the adequacy of Mr Tennent's performance and justification for a warning dated May 2009. It is not necessary to deal with those matters at present.

[4] Mr Tennent lives in Blenheim and his work principally was in Marlborough and thereabouts repairing and servicing photocopy machines for Canon's customers. Mr Tennent was sole charge and his supervisor was based in Nelson. Rachel Bright is Canon's South Island customer care manager based in Christchurch who managed Mr Tennent.

[5] Canon decided to fit GPS devices to its vehicles and in April 2009 one was fitted to Mr Tennent's company car. It is not mentioned by Mr Tennent in his affidavit but in early June 2009 it was noticed that there appeared to be an intermittent fault in his GPS unit so that the vehicle was reported at the same location for some hours then reported at another location without tracking data between the two points. Mr Tennent was asked to take the vehicle to Nelson for the unit to be checked by Nelspecs, which he did on Monday 8 June. The unit had come away from the dashboard so Nelspecs relocated it to the footwell and secured it with cable ties. Ms Bright asked Nelspecs if the unit had been tampered with and was told *No comment*. It is not clear when this discussion took place.

[6] Mr Tennent took the car back to Blenheim later on 8 June. On 9 June he called in sick. It came to Ms Bright's attention that Mr Tennent's GPS log was showing alerts for power disconnection and aerial disconnection. Ms Bright arranged for Mr Tennent to take the car back to Nelspecs which he did on 10 June. Nelspecs reported to Ms Bright that they were absolutely sure that the GPS unit had been tampered with because a different brand of tape had been used to resecure the connections.

[7] Ms Bright phoned and left a message for Mr Tennent on Thursday 11 June and also sent him an email for him to phone her that day because she had a serious matter she wanted to discuss with him. Mr Tennent did not respond but on Friday 12 June Mr Tennent's supervisor received an automated alert saying that Mr Tennent was

applying for sick leave. On 12 June Ms Bright sent a further email repeating her instruction for him to contact her urgently upon his return to work regarding a serious matter. Ms Bright then received a fax from Mr Tennent's lawyer concerning his personal grievance claim in respect of the May warning. Ms Bright replied the same day rejecting any grievance, explaining her attempts to contact Mr Tennent and scheduling a disciplinary meeting for Wednesday 17 June to discuss her concern that Mr Tennent had tampered with the GPS unit installed in the company car.

[8] There followed an exchange of correspondence between the lawyer and Ms Bright which I do not intend to detail at present. Eventually a meeting was convened on Monday 22 June. Mr Tennent and his lawyer were present along with Ms Bright. The meeting was tape recorded by either Mr Tennent or the lawyer with Ms Bright's knowledge, as was a subsequent meeting with the same parties on 30 June.

[9] Neither the digital sound files nor transcripts were initially lodged with the Authority by Mr Tennent but counsel sought to refer to a transcript at the investigation meeting. At my direction, the files and transcripts were provided to the Authority and the respondent. I do not intend to canvass here the sequence of events at either meeting but note that I have now listened to both files.

[10] In between the two disciplinary meetings Mr Tennent's lawyer wrote to Ms Bright on 26 June providing a different explanation in response to the allegation of misconduct.

[11] On 30 June Ms Bright told Mr Tennent that the company had lost confidence in him because he had tampered with the GPS unit but initially denied it and that he had damaged company property and had not been honest about it. Arrangements were made for Mr Tennent to gather his personal possessions and get home to Blenheim. Mr Tennent subsequently received a letter dated 1 July 2009 repeating the reasons for the dismissal.

### **Arguable case?**

[12] Mr Tennent says that Canon failed to provide specific details of the allegation of tampering prior to the disciplinary meeting on 22 June, that he did not know exactly what was going to be discussed at the meeting and that he could not make inquiries and formulate a properly considered response.

[13] Ms Bright had documentary evidence supporting her stated concern in the form of a printed *Event Alert Report* for Mr Tennent's vehicle and a Nelspecs invoice saying *10.06.09 Definite tampering with Navman Qube, plugs tight but tape has been changed to a brand we don't use, less tape around plugs has also been applied.* Ms Bright could easily have supplied these documents to Mr Tennent or his lawyer at the beginning of the 22 June meeting or earlier. Indeed from the outset specific details such as timings of the alleged tampering, how the company knew of it and the current state of the GPS unit were sought on Mr Tennent's behalf. Canon's response was *We are not going to provide written details of the concerns ahead of the meeting. The "specific" concern is that Sam tampered with the GPS unit .... We wish to see Sam's spontaneous response to the evidence we have and do not wish to receive a contrived or pre-prepared response from Sam in relation to what we view as a serious matter.*

[14] In correspondence Mr Tennent's lawyer criticised this approach as a breach of good faith and unfair and indicated Mr Tennent's unwillingness to meet until provided with specific details. Canon countered by saying that a decision would be made regardless. The response for Mr Tennent was a denial of *tampering* and a warning that he would require an adjournment to consider and respond to any contrary evidence produced at the forthcoming meeting.

[15] The Employment Relations Act 2000 requires those in an employment relationship to deal with one another in good faith. The parties to an employment relationship must be active and constructive in maintaining a productive employment relationship in which they responsive and communicative: see s.4(1A)(b) of the Act. The duty requires an employer who is proposing to make a decision that will have an adverse effect on an employee's continued employment to provide that employee with access to relevant information and an opportunity to comment on the information before a decision is made: see s.4(1A)(c) of the Act. The significance of good faith is underlined by the provision of a penalty for certain breaches of good faith. These statutory provisions may place a higher onus on the employer in a disciplinary context than the requirement to justify a dismissal or the implied obligation of fair and reasonable treatment.

[16] What appears to be the case here is that Ms Bright wanted to keep the documentary proof of tampering up her sleeve as a way of testing the truthfulness of

Mr Tennent's response to the tampering concern. That may be because of Nelspecs' *No comment* about the 8 June inspection caused her to suspect previous tampering which she was not in a position to prove, it may be because of her feeling that it had been difficult to get a straight answer from Mr Tennent on previous performance issues or it may be for some other reason. Whatever the reason, it is strongly arguable that Canon's pointed refusal to provide the documents prior to requiring Mr Tennent's attendance at the disciplinary meeting and getting answers from him amounts to a breach of s.4(1A)(c) of the Act.

[17] Whether it is arguable that such a breach would sufficiently taint the dismissal so as to render it unjustifiable requires more to be said about the circumstances of this case.

[18] At the 22 June meeting Ms Bright asked Mr Tennent if he had tampered with the GPS unit and he said *No*. She asked if he could explain the event alert about the aerial removal and he said *No*. She asked if he could explain the event alert showing the aerial reconnection and he said *No*. She asked if he could explain why the unit was found to have been taped in a different manner with different tape and he said *No*. Ms Bright tabled the GPS report on which her questions were based and the Nelspecs invoice. Mr Tennent's evidence is that he continued to deny the allegation that he had tampered with the GPS unit. It was suggested by and for him that the GPS unit was faulty. Ms Bright was asked if she had actually seen the allegedly different tape herself so arrangements were made and a Nelspecs technician came and demonstrated the differences. The meeting concluded with Mr Tennent or his lawyer to produce evidence about the GPS unit being faulty. In other words, Mr Tennent maintained his denials even though he had seen the relevant evidence.

[19] On 26 June Ms Bright received a fax from Mr Tennent's lawyer containing a different explanation. It includes the following: *Sam therefore went into Monday's meeting under significant stress and anxiety, not knowing the evidence against him. ... Sam has now had an opportunity to consider and reflect on Monday's meeting and he wishes to respond by telling the company that he was responsible for disconnecting the power to the GPS unit and disconnecting the GPS aerial ...on 9 June which was taken as a sick day. ...Sam does not consider his actions ...altered, changed or damaged the GPS unit ...and is unsure as to whether his actions amounted to tampering. ...In Sam's mind, he did not want the company to know that he had spent*

*his sick day at his mother's house and that he had attended a doctor's appointment. ... Sam does not consider that his actions are serious enough to warrant dismissal particularly as they occurred at a time of high stress and anxiety, on a day that was taken as a sick day and are out of character. Sam wishes to assure the company that he will not ever touch the GPS unit in his car again. He is sorry for his actions ....*

[20] As noted there was a disciplinary meeting on 30 June. There was some discussion about Mr Tennent's initial denials and then the admission and mitigation explanation conveyed in the 26 June letter. The meeting was adjourned for a time. When they reconvened, Ms Bright told Mr Tennent of her decision to dismiss him because he had deliberately damaged the GPS unit and lied to her when asked for an explanation.

[21] Counsel attempted to make something of the use of the word *tampering* but it adequately described the allegation; and in light of Mr Tennent's later admission, it properly describes what he did. Counsel also attempted to make something of Canon describing Mr Tennent's actions as damaging company property and submitted that this was not an allegation that had been put to Mr Tennent. The damage was minor and of little consequence – Mr Tennent purchased some cable ties and tape to replace the original items rendered useless by him disconnecting the GPS unit. Ms Bright's description of this as deliberate damage when dismissing Mr Tennent did not amount to any different sort of allegation from that which had been canvassed throughout the disciplinary process. Mr Tennent says that it appeared to him that Ms Bright had pre-determined to dismiss him. That is based on his evidence that Ms Bright sat passively listening to him, did not engage in any discussion and did not appear receptive to his explanation. However, the transcript of the 30 June meeting shows that Ms Bright did engage in some discussion about the issues. It is also apparent from the transcript and the dismissal letter that Ms Bright received and understood Mr Tennent's admission and mitigation explanation. Unsurprisingly, it did not satisfy her concern that she had been lied to. There is no taint of predetermination given the material available to the Authority.

[22] For the foregoing reasons I find that the only strongly arguable point of unfairness in how Canon acted was the refusal to give Mr Tennent the GPS report and the Nelspecs invoice before he denied tampering with the GPS unit.

[23] Various challenges are made to the reasons for the dismissal as being insufficient in all the circumstances.

[24] First, it is submitted that Mr Tennent disconnected the power and the aerial on a sick day not a working day. It makes no difference. There is a sufficient nexus to the employment since it was a company car. It is submitted that because Canon let Mr Tennent continue working during the disciplinary process which took more than a fortnight there was not a complete loss of trust and confidence in him. The time taken after 12 June was largely to accommodate Mr Tennent and give him an opportunity to respond to the allegation. It is not necessary to canvass in detail the correspondence which shows several attempts by Canon to meet more quickly. Nothing harmful to Canon's case for justification can be taken from Mr Tennent not being suspended for the brief duration of the disciplinary process. It is said that Mr Tennent disconnected the GPS unit to protect his privacy, that he reconnected it promptly thereafter and that he was suffering significant stress, anxiety and depression at the time. An arguable case might arise from these factors if Mr Tennent had only been dismissed for disabling the GPS unit. However these factors do not assist him in challenging a dismissal for lying to Ms Bright.

[25] It is submitted that Mr Tennent did not act unreasonably in initially denying the allegations put to him on 22 June because he was unclear if his actions amounted to *tampering* and he should have been given the evidence of *tampering* beforehand. As to the first part, Mr Tennent knew what he had done and the questions asked of him addressed his actions more than adequately so as to place him under an obligation to disclose his conduct to Canon: see *Griffith v Sunbeam Corporation Limited*, 28/12/06, Couch J, WC13/06. He may have preferred to characterise his conduct as something other than *tampering* and he had the opportunity to do so which he should have taken. Accordingly I see no merit in the first part of the point. The second part brings us back to whether Canon's (strongly arguable) breach of good faith prior to the 22 June meeting must render the subsequent dismissal unjustifiable despite the disclosure of the relevant evidence before the decision to dismiss.

[26] I find that Mr Tennent has an arguable case of unjustified dismissal based on the strongly arguable breach of good faith just mentioned. In other respects, Mr Tennent does not have arguable grounds for an unjustified dismissal personal grievance. Whether Mr Tennent might be reinstated as a result of establishing this

unjustified dismissal is far from certain. Reinstatement, where sought, must be ordered if practicable. It could well be impracticable to reinstate an employee in Mr Tennent's circumstances who has lied to their manager. Overall, Mr Tennent only has a weak case for reinstatement at this point.

### **Balance of convenience**

[27] Mr Tennent owns his house subject to a loan and mortgage which he will not be able to meet without income from employment. He has minimal savings but some equity in his house. Mr Tennent says that prospects of alternative employment in Blenheim are not good so he will probably have to relocate to a city. However his mother lives in Blenheim and she relies on his care when she is unwell. It is not suggested that she currently needs his care. The other major effects of the dismissal relate to distress and humiliation.

[28] For the most part, the balance of convenience factors referred to by Mr Tennent can be remedied by awards of compensation for lost remuneration and distress if a grievance is established in due course. Mr Tennent's concerns about his mother's circumstances and how to meet his loan obligations are best answered by scheduling an early date for a substantive investigation meeting which should take no more than one day to deal with the dismissal grievance. Counsel for Canon indicated their co-operation to achieve this.

[29] For Canon it is said that there are very real concerns about putting Mr Tennent back in a position where he represents the company as its sole service agent with limited supervision. Material before the Authority indicates that Mr Tennent's work performance was not necessarily without blemish in the recent past before these issues. Canon's concerns are perfectly understandable and it is difficult to see how they might be later remedied if some harm results.

[30] I find that the balance of convenience favours Canon.

### **Overall justice**

[31] Viewed overall it is difficult to avoid the conclusion that Mr Tennent was significantly the author of his own misfortune. He disconnected the company GPS unit when perhaps he should not have; but denied tampering with it when perhaps he should have admitted what he had done. He has a case for a personal grievance at this

stage only because Canon did not at first disclose some evidence to back up its allegations; but that was all disclosed before Canon decided to dismiss him. None of that gives Mr Tennent much traction for a personal grievance that will result in his reinstatement.

### **Conclusion**

[32] Mr Tennent's claim for interim reinstatement is declined.

[33] Costs are reserved

[34] There should be mediation as soon as practicable and the Authority will also initiate arrangements for an investigation meeting. The Authority can schedule an investigation meeting for early August and will be in touch to make appropriate arrangements.

Philip Cheyne  
Member of the Employment Relations Authority