

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 218/09
5137394

BETWEEN

AMANDA HUBLEY
Applicant

AND

WILSON & MACINDOE
LIMITED
Respondent

Member of Authority: Alastair Dumbleton

Representatives: Applicant in person
Ray Lome, advocate for Respondent

Investigation Meeting: 2 July 2009

Determination: 3 July 2009

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The Authority has investigated the dismissal of Ms Amanda Hubley from her employment with Wilson & Macindoe Limited, an action that Ms Hubley claims was unjustified.

[2] Mediation did not resolve this employment relationship problem.

[3] Until her dismissal in August 2008, Ms Hubley had been employed for about six months by Wilson & Macindoe as a Customer Services Representative.

[4] On 14 August 2008 there was a meeting Ms Hubley attended with Mr Mark Chapman, the General Manager of Wilson & Macindoe. Also present was Ms Jan Mathis-Collins, Customer Service Team Leader.

[5] During the meeting Ms Hubley was shown a small tin and its contents. When asked, she confirmed that the tin belonged to her. When asked if she knew what was

in it, I find she acknowledged (whether by words or by silence in the face of what all could plainly see) that the tin contained a small packet of marijuana and a pipe for smoking.

[6] Ms Hubley explained that the marijuana belonged to her boyfriend and confirmed she had brought the tin to work where it had been found and its contents examined.

[7] Mr Chapman then told Ms Hubley that bringing the drug to work was strictly against the company's zero tolerance policy regarding drugs in the workplace and that under the employment agreement and provisions of the company's employee conduct manual, possession of the marijuana constituted grounds for instant dismissal.

[8] I find that Ms Hubley was told she was then suspended from work and would be advised of the outcome of Mr Chapman's further consideration of the matter.

[9] I accept from the evidence of Ms Mathis-Collins that Ms Hubley was asked more than once during the brief meeting on 14 August if she had understood what Mr Chapman said to her and she confirmed she had. She was then asked to take her belongings from her desk and go home to await a decision on the future of her employment.

[10] The following day Ms Hubley received a letter written by Mr Chapman on 14 August advising of her dismissal for serious misconduct. The reason given for that action was "*your admission that you had both marijuana and the means of smoking it at your place of work.*" In his letter Mr Chapman referred to clause 9 of Ms Hubley's employment agreement which provides for dismissal without notice in cases of serious misconduct.

[11] The test of justification to be applied in a personal grievance claim is provided by s 103A of the Employment Relations Act 2000. The question of whether a dismissal is justifiable must be determined on an objective basis by considering whether the employer's actions and how the employer acted were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal occurred.

[12] I find that from the employer's investigation Mr Chapman had clear evidence that Ms Hubley had in her possession a substance that she thought at the time was

marijuana, and she had a pipe for smoking it. It was also clear to the employer that she had taken the substance and the pipe into her place of work.

[13] The company's employees' conduct rules provide that the possession of illicit drugs on the work premises during working hours is serious misconduct for which an employee may be immediately dismissed.

[14] Even without knowledge of the company rules, Ms Hubley knew that the possession of marijuana was an offence, and even if she had not actually known that the law would deem her to have had that knowledge. Ms Hubley confirmed to the Authority that she had known possession of the drug was an offence.

[15] As it carries a term of imprisonment as punishment, it is a relatively serious offence. Zero tolerance of illegal drugs in workplaces is routine.

[16] Although the employer's investigation was quite brief there was I find no lack of fairness in it. The time taken over it was all that was necessary because the issue was quite straightforward and Ms Hubley readily cooperated in the employer's investigation.

Determination

[17] The determination of the Authority is therefore that the dismissal of Ms Hubley was justified. Dismissal was an action that a fair and reasonable employer would have taken in all the circumstances at the time the dismissal occurred.

[18] Shortly after the dismissal Ms Hubley came to believe from what her boyfriend told her that the substance belonging to him, and which she had placed in her tin for safe keeping, was not marijuana but Spice, a substance that can be obtained lawfully and smoked.

[19] Unfortunately that later discovered information does not assist Ms Hubley, as the employers justification under the s 103A test depends on what it knew at the time of dismissal. At that time the substance in the tin with the pipe appeared to be marijuana and Ms Hubley confirmed that she believed it to be marijuana. Closer analysis of it by the employer before concluding its disciplinary investigation was not required in the circumstances.

[20] With this determination, I do not need to consider the question of contributory fault, which Ms Hubley readily conceded had been present and rendered her at least partly to blame for what happened.

[21] Mr Lome confirmed that no issue of costs arises.

A Dumbleton
Member of the Employment Relations Authority