IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

CA 220/09
5156939

BETWEEN	COREY WILKINSON Applicant
AND	SAXON APPLIANCES LIMITED Respondent

Member of Authority:	Philip Cheyne
Representatives:	David Beck, Counsel for the Applicant Michael Hodges, Advocate for the Respondent
Investigation Meeting:	22 September 2009 at Christchurch
Further Submissions Received:	22 & 24 September 2009 from the Applicant
Determination:	21 December 2009

DETERMINATION OF THE AUTHORITY

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[1] Corey Wilkinson worked for Saxon Appliances Limited from late 2005 until he was summarily dismissed on 30 March 2009 for alleged serious misconduct. Mr Wilkinson says that he was unjustifiably dismissed. He also says that Saxons' disciplinary process amounted to a breach of its good faith obligations for which a penalty should be imposed. Saxons denies these claims.

[2] To resolve these problems I will set out more fully what happened before applying the test for justification of the dismissal and considering the penalty claim. It will also be necessary to resolve some evidential disputes along the way.

What led to the dismissal

[3] Mr Wilkinson worked fulltime as a technician repairing customers' appliances at their home. He had a work van for that purpose and a company cellphone. With

the exception of the matter that led to the dismissal, Mr Wilkinson was regarded as a good employee.

[4] At some point Mr Wilkinson was given another cellphone and returned the original one to the company. It was decided to give Mr Wilkinson's original phone to another employee so existing messages were being deleted from it. Geoff Trotter is Saxons' general manager. He was made aware of the following message found on Mr Wilkinson's old phone:

> *Yeah Hey Corey, it's Phil um just wondering if you're able to get any stuff, um give me a call back on this number, right catch ya*

[5] When questioned, Mr Trotter gave the following evidence, which I accept. He immediately thought that the message was evidence of Mr Wilkinson supplying or selling drugs to another employee, especially given some rumours about two years previously that Mr Wilkinson was involved in drug use at work. Mr Trotter sought some advice from his HR advisor (Mr Hodges) and then arranged to meet Mr Wilkinson.

Saxon's disciplinary process

[6] On 16 March 2009 while he was out working Mr Wilkinson received a call to return to the office to see Mr Trotter. Mr Wilkinson asked why but was just told to see the manager. When he returned to the office there was a meeting between Mr Wilkinson, Mr Trotter and Carol Downing who is another employee of Saxons. There is some dispute about precisely what was said and in general I prefer the evidence of Mr Trotter and Ms Downing where it differs from Mr Wilkinson's. Mr Trotter said that this was a *semi-formal* meeting. He claims to have told Mr Wilkinson that there was no obligation to answer any questions but that is not Ms Downing's evidence. I do not accept Mr Trotter's evidence on this point. What Mr Trotter did was tell Mr Wilkinson that the meeting concerned him supplying drugs to another staff member. Mr Wilkinson laughed and denied supplying drugs. Mr Wilkinson then said that they had proof as in a phone message. Mr Wilkinson then admitted he had come across two tinnies the year before which he had sold to another staff member. It late became a point of some controversy whether Mr Wilkinson had admitted to selling two tinnies or had said he could not recall whether he had sold them or given them away. I prefer Mr Trotter's and Ms Downing's evidence on the point. Mr Wilkinson was asked but

would not name the other employee. Mr Trotter then played the message, Mr Wilkinson confirmed the other person's identity and said that he had repeatedly told him that he no longer had any tinnies to sell. Mr Wilkinson was asked if he had anything else to say and Mr Trotter closed the meeting saying that he would talk to Saxon's HR advisor.

[7] On 17 March, Mr Wilkinson was again called back to the office to meet with Mr Trotter. Mr Trotter had a letter which he gave to Mr Wilkinson to read. The letter says there will be a formal meeting on 19 March about concerns of serious misconduct given Mr Wilkinson's admission of selling illegal drugs to another staff member, that Mr Trotter was taking the concern very seriously because of Saxon's zero tolerance for the use of illegal drugs, that Mr Wilkinson's employment might be terminated and that he was suspended on full pay pending the meeting. It is common ground that this announcement about suspension was the first mention of such a possibility.

[8] Mr Trotter's evidence, which I accept, is that Mr Wilkinson sought to explain his admission about selling tinnies by saying he had meant to say that he had given them away. Mr Wilkinson's evidence is that he asked if he should start looking for another job to which Mr Trotter said *yes*. Mr Trotter's evidence, which I prefer, is that Mr Wilkinson asked if he was going to lose his job, that he said that there was a possibility as explained in the letter and that Mr Wilkinson said *good* and that he would start looking for another job. This was a brief meeting and Mr Wilkinson was asked to take his personal belongings from the work van, hand over his keys, job book, cellphone and company jacket. Mr Wilkinson was then taken home by another employee.

[9] As events transpired, there was no meeting until 27 March. Both sides blame the other for this delay and both are critical of the manner in which the other side dealt with arrangements. There were a number of exchanges between Mr Trotter, counsel for Mr Wilkinson (Mr Beck) and Saxon's adviser (Mr Hodges). Not all of these exchanges were in writing and neither Mr Beck nor Mr Hodges gave evidence. In these circumstances, I decline to make any findings to the detriment of either party about the delay.

[10] The 27 March meeting was attended by Mr Wilkinson, Mr Beck, Mr Trotter and Mr Hodges. Much of the meeting appears to have been taken up with Mr Beck

and Mr Hodges attempting to control the conduct of the meeting. Again, however, I am in a difficult position. Neither representative gave evidence, but Mr Beck's notes, apparently taken during the meeting, are exhibited by Mr Wilkinson. During the investigation meeting, handwritten notes made by Mr Trotter during the 27 March meeting emerged for the first time. There is also a letter dated 27 March from Mr Beck to Mr Trotter in which Mr Beck is critical of Mr Hodges' behaviour during the meeting that day. This is all unsatisfactory so I will defer resolving the disputes in the evidence about the conduct of Mr Beck and Mr Hodges for the meantime.

[11] It is common ground that there was mention of Mr Wilkinson's admission during the 16 March meeting of selling the two tinnies but Mr Wilkinson said he could not recall whether he had sold the tinnies or given them away. Mr Beck insisted on access to Saxon's notes of earlier meetings while Mr Hodges refused to supply these notes. The meeting ended acrimoniously and without any resolution.

[12] On 30 March, Mr Wilkinson received a letter terminating his employment. The letter referred to his admission on 16 March, Saxon's view that this was serious misconduct, Mr Wilkinson's claim on 27 March that he could not remember whether he had sold or given away the drugs, Saxon's policy of *zero tolerance* of such illegal activities, and Mr Trotter's conclusion that he had no option but to terminate Mr Wilkinson's employment immediately.

Justification

[13] Whether a dismissal was justified 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.

[14] Parties to an employment relationship must deal with one another in good faith. That duty requires an employer who is proposing to make a decision that will have an adverse effect on the continuation of an employee's employment to provide the employee with access to information relevant to the continuation of their employment and an opportunity to comment on the information before the decision is made. In addition, there are well known and long established minimum standards of procedure applicable to disciplinary situations. In *NZ (with exceptions) Food Processing etc IUOW v. Unilever New Zealand Ltd* [1990] 1 NZILR 35, the Labour Court said:

> *The minimum requirements can be said to be:*
>
> *1. Notice to the worker of the specific allegation of misconduct to which the worker must answer and the likely consequences if the allegation is established;*
>
> *2. An opportunity, which must be real as opposed to a nominal one, for the worker to attempt to refute the allegation or to explain or mitigate his or her conduct; and*
>
> *3. An unbiased consideration of the worker's explanation in the sense that that consideration must be free from pre-determination and uninfluenced by irrelevant considerations.*
>
> *Failure to observe any one of these requirements will generally render the disciplinary action unjustified. That is not to say that the employer's conduct of the disciplinary process is to be put under a microscope and subjected to pedantic scrutiny, nor that unreasonably stringent procedural requirements are to be imposed. Slight or immaterial deviations from the ideal are not to be visited with consequences for the employer wholly out of proportion to the gravity, viewed in real terms, of the departure from procedural perfection. What is looked at is substantial fairness and substantial reasonableness according to the standards of a fair minded but not over-indulgent person*
> .

[15] Saxons falls short of these minimum requirements for the following reasons.

[16] Having heard the phone message Mr Trotter formed the suspicion mentioned above, rang Mr Hodges to get advice, arranged for Ms Downing to be present as a witness and to take notes, recalled Mr Wilkinson from a job, put the allegation directly to him, played him the incriminating recording following the initial denial, had a similar meeting with the other employee and had notes made of these employees' responses. The arrangements indicate that Mr Trotter always intended to have regard to Mr Wilkinson's initial response.

[17] I do not know whether Mr Trotter acted in accordance with or contrary to advice in conducting these *semi formal* meetings at which his concerns were put to each employee and their responses were noted, but that is not important. What Mr Trotter did not do is give notice to Mr Wilkinson about the allegation and the likely consequences if it was established, or allow him the opportunity to seek support, advice and representation prior to confronting him with the allegations.

[18] For Saxons, it is argued that the 16 March meeting was not a disciplinary meeting. I reject that submission. As I have made clear, Mr Trotter strongly suspected Mr Wilkinson of selling drugs to another employee, that being an action

considered by Saxons to amount to serious misconduct. He intended to put the allegation to Mr Wilkinson, note his response and planned to play the recording if need be. It is not possible to distinguish the 16 March meeting from an assessment of how Saxons acted when dismissing Mr Wilkinson.

[19] The circumstances of Mr Wilkinson's suspension are set out above. Mr Wilkinson was not given any opportunity to comment on that decision before it was made or before it was announced to him. However, I have not been asked to make a finding about any separate grievance arising from that so I decline to do so. The relevance of the unilateral suspension is that it indicates Saxon's intention to dismiss Mr Wilkinson based on his admission of conduct which Saxons regarded as serious misconduct. In other words, there was an element of predetermination.

[20] There are some other serious failures by Saxons prior to the decision to dismiss Mr Wilkinson. A request was made in writing by counsel on 20 March for Saxons to provide copies of notes made during the 16 March meeting. During the 27 March meeting, Saxons maintained its refusal to provide these notes and further refused to provide the notes made in relation to the meeting with the other employee. The request for these notes was repeated in counsel's 27 March letter. The notes made in relation to the 16 March meetings and subsequently were relevant to the employer's subsequent decision to dismiss and they should have been provided to Mr Wilkinson in a timely fashion.

[21] Barbara Allen is Saxons' sole director. She was summonsed to appear at the investigation meeting by the applicant. Her evidence is that she was consulted over the phone prior to the dismissal and that she also had a meeting with Mr Hodges *before we made the final decision*. When asked directly about whose decision it was to dismiss Mr Wilkinson, Ms Allen said that it was a consultation between the three of them, meaning herself, Mr Trotter and Mr Hodges. It is argued for Mr Wilkinson that Ms Allen had the *ultimate decision-making authority and took part … in the final decision (and attended mediation)*. I am not interested in who attended the mediation for Saxons and I decline to take any inference from that. The evidence did not go as far as attributing to Ms Allen the *ultimate decision-making authority*. Mr Trotter's evidence is that responsibility for the dismissal decision was *shared*. That evidence alongside Mrs Allen's evidence recorded above makes it clear that Mr Wilkinson did

not have a reasonable opportunity to explain himself to Ms Allen as one of the decision-makers.

[22] Saxons' statement in reply is not the least bit equivocal, starting with the statement that *Corey Wilkinson after admission was dismissed for selling drugs to another employee at work and during work time*. Ms Allen's evidence is that they formed the view that Mr Wilkinson sold the drugs to the other employee at the workplace. Mr Trotter's evidence is that no conclusion was reached about where the sale had occurred but in light of Mrs Allen's evidence I do not accept Mr Trotter's evidence on the point. All this leads me to conclude that the whereabouts of the admitted transaction was a material factor in Saxons' decision to dismiss Mr Wilkinson. However, the evidence before the Authority is that the transaction between Mr Wilkinson and the other employee took place outside work hours, away from Saxons' premises. The same information was available to Saxons before the dismissal. Saxons failed to properly establish what it was that Mr Wilkinson had done.

[23] Saxons made it clear to Mr Wilkinson that it had a *zero tolerance*. The 17 March suspension letter says *I am taking these concerns very seriously for we as a company and the industry as a whole has a zero tolerance of the use of illegal drugs for obvious safety reasons*. The 30 March dismissal letter says *Saxon Appliances Ltd, and our industry as a whole, has a zero tolerance for such activities. We consider illegal activities as serious misconduct and as your contract states we may end your employment contract under these circumstances.* Saxons gave evidence to the effect that such a policy is required because the work involves servicing electrical equipment at the client's home.

[24] There is an employment agreement dated September 2005. It permits dismissal without notice for serious misconduct and it includes examples. One example is *consuming or being affected by intoxicating liquor and/or drugs while at work, or in company vehicles* but these are not the allegations made against Mr Wilkinson. The employment agreement makes no mention of a *zero tolerance* policy. I have not been given any policy document, induction or training record to establish that Saxons either had a *zero tolerance* policy at the time as claimed or that it publicised such a policy to its staff.

[25] Saxons' case as presented to the Authority rests on the basis that Mr Wilkinson committed a serious crime. It has never been the law that an employer can justifiably dismiss an employee simply because of actions by them that may amount to criminal offending. I should recap the circumstances as at the time of the dismissal. Sometime in 2008, away from work and outside work hours, Mr Wilkinson sold two tinnies to another employee. In February 2009, an employee left a message on Mr Wilkinson's work phone asking if Mr Wilkinson could supply some drugs. Mr Wilkinson did not respond to the message. When confronted, Mr Wilkinson admitted selling two tinnies but later sought to distance himself a little from that admission. Saxons had no policy about employees' use of illegal drugs outside the workplace. There is no good evidence about Mr Wilkinson's conduct outside of work having any adverse consequences for his work or his employer's business so as to bring it within the ambit of cases such as *Smith v Christchurch Press Company Limited* [2000] 1 ERNZ 624.

[26] I find that these circumstances would not have cause a fair and reasonable employer to conclude that there was any misconduct relevant to the employment so as to justify dismissal.

[27] Accordingly, I find that how Saxons acted and what Saxons did were not the actions of a fair and reasonable employer. Mr Wilkinson was unjustifiably dismissed and he has a personal grievance.

Subsequent allegations

[28] Wayne McNeil is an employee at Saxons. In August 2009 he wrote a letter for Saxons in which he makes allegations about drug use and drug supply by Mr Wilkinson. He gave evidence supporting that letter to the effect that he and Mr Wilkinson had a conversation at work about Mr Wilkinson obtaining cannabis in exchange for doing some motor vehicle repair work. That takes the allegation against Mr Wilkinson no further than his admission. He also gave evidence about overhearing a coded conversation between Mr Wilkinson and Phil at work where Phil was asking Mr Wilkinson if he had any *car parts* and Mr Wilkinson asking for the money first. Mr McNeil says that Phil later told him that the discussion was about drugs. The hearsay evidence does not prove that there was a conversation at work between Mr Wilkinson and Phil about a drug transaction.

Remedies

[29] I must consider the extent to which Mr Wilkinson's actions contributed in a blameworthy way to the circumstances giving rise to the grievance. I have already found that there was no work misconduct by him. I have also given consideration to whether Mr Beck's alleged conduct during the 27 March meeting might constitute blameworthy conduct on Mr Wilkinson's part for the purposes of s.124 of the Act. However, I conclude that it does not. As recorded above, I have only a limited amount of evidence about the clash between Mr Beck and Mr Hodges. As counsel observes, that was not really the focus of the investigation meeting and much more thorough evidence and scrutiny of it would be required before I could safely reach any findings about blame for the clash between the two representatives. Mr Beck also pointed out, and I accept, that s.124 expressly refers to the actions of the employee. The final point that supports a finding that Mr Beck's conduct on 27 March is not blameworthy conduct on Mr Wilkinson's part contributing to the grievance is the finding of an element of predetermination to Saxons' decision to dismiss Mr Wilkinson. I find that Mr Wilkinson did not contribute in a blameworthy way to the circumstances giving rise to the grievance.

[30] There is a claim for $15,000 for distress compensation. There is only Mr Wilkinson's evidence to support the claim. His evidence is of a loss of confidence, irritability, poor sleeping, a minor health issue and some financial difficulties. The humiliation and upset caused by the financial difficulties was the most significant of the losses suffered by Mr Wilkinson. These effects, which I accept are established by his evidence, call for a moderate award of compensation which I assess at $6,000.

[31] There is a claim for compensation for lost remuneration of an amount to be detailed at the hearing. It was not. In response to my questions, Mr Wilkinson referred to seven employers he had approached looking for work but without success. In July he started working for a friend hoping it would develop into a business partnership. I have not been given any details of these earnings. Mr Wilkinson's evidence is that he had no earnings from alternative employment after his dismissal until commencing this work with his friend. An exception to that emerged on further scrutiny. He did some work for his father in Nelson for about three weeks shortly after the dismissal for which he received some cash.

[32] In light of the lack of detail of the claim and the loss suffered, I will only allow recovery of three months' ordinary time remuneration pursuant to s.128(2) although the actual loss appears to exceed that amount. Leave is reserved in case of any difficulty over this calculation.

Penalty

[33] Not every breach of good faith renders a party liable to a penalty. The penalty claim appears to be based on both s.4A(a) and s.4A(b)(iii) of the Act.

[34] There is no good evidence that there was any intention on Saxons part to undermine its employment relationship with Mr Wilkinson. Mr Wilkinson offered some evidence to suggest that Mr Trotter wanted to be rid of him before the drug issue arose but I do not accept that evidence. To the contrary, Mr Wilkinson had been regarded as a good employee until Mr Trotter learnt of evidence that caused Saxons to think there had been serious misconduct. The breaches of good faith related to the disciplinary action were not about undermining the employment relationship. Rather they were breaches of the law made by Saxons in terminating the relationship.

[35] In the absence of sufficient evidence with which to resolve the claims of breach of good faith after 16 March and on 27 March there is no basis for a finding that Saxons breached good faith in a deliberate, serious and sustained manner.

[36] Accordingly there is no basis for the imposition of a penalty.

Summary

[37] Mr Wilkinson was unjustifiably dismissed and has a personal grievance.

[38] To remedy the grievance, Saxon Appliances Limited must pay Mr Wilkinson compensation of $6,000 pursuant to s.123(1)(c)(i) of the Employment Relations Act 2000.

[39] Saxon Appliances Limited must pay Mr Wilkinson compensation for lost remuneration amounting to three months' ordinary time earnings pursuant to s.128(2) of the Employment Relations Act 2000.

[40] Costs are reserved. If the issue cannot be agreed, counsel may lodge and serve a memorandum within 28 days and the respondent may lodge and serve any reply within a further 14 days.

Philip Cheyne
Member of the Employment Relations Authority