

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2011] NZERA Auckland 214
5314944

BETWEEN VIPULKUMAR PATEL
Applicant

AND PEGASUS STATIONS
LIMITED
Respondent

Member of Authority: R A Monaghan

Representatives: V Patel in person
S-J Davies, counsel for respondent

Investigation Meeting: 5 April 2011

Determination: 19 May 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Vipulkumar Patel says his former employer, Pegasus Service Stations Limited (Mobil) dismissed him unjustifiably from one of its Mobil service stations. He seeks reinstatement.

[2] Mobil says the dismissal was justified on the ground of Mr Patel's failure to follow procedures in respect of a customer discounting scheme.

Background

[3] Mr Patel began full time permanent employment at Mobil's Royal Heights service station in September 2007. He was employed as a member of the retail frontline staff. His duties centred on serving customers in the retail store attached to the service station, together with associated ancillary duties.

[4] The parties' written and signed individual employment agreement incorporated a set of house rules as a second schedule. The rules included the following:

1.4 Serious misconduct

*The following are examples of the standards of behaviour which PSL will **not** accept and which may lead to immediate dismissal. This means dismissal without warnings.*

...

(o) failing to follow the company's cash handling, cash reconciliation or accounting procedures;

...

1.5

We recognise that it is inappropriate to draw up a detailed and exhaustive list of offences warranting disciplinary action. Each breach of discipline will be considered on its merits, taking into account the particular circumstances of the individual case.

2.0 Disciplinary procedure

2.1 You will be given a proper opportunity to explain your actions.

2.2 No form of disciplinary action will be taken without a full enquiry, discussion and investigation to establish the facts.

...

2.4

2.5 In the case of your action constituting serious misconduct you will be liable to summary dismissal ie dismissed without notice.

[5] Mobil operated what it called an Under Canopy Discount Programme (UCD). This was a scheme which discounted fuel purchases for customers who, at the same time as their fuel purchase, purchased goods to the value of \$4 or more in the store.

[6] During an audit in or about September 2009 it came to Mobil's attention that the procedure for handling UCD transactions was not being followed correctly. Mobil took steps to reinforce to staff the need to follow the procedure, which included the belated issue to Mr Patel of a 'coaching note' in November and the taking of varying degrees of disciplinary action against other staff members.

[7] The 'coaching note' was set out in a letter dated 17 November 2009. Mobil notified Mr Patel that on 5 September 2009 it had noticed that a shop purchase

qualifying the purchaser for a fuel discount had not been cashed off immediately on completion of the purchase, rather it was rung up after a fuel purchase from another customer. The letter ended by saying that a future failure to follow correct practices could result in serious misconduct including termination of employment. Despite this wording, the note was not intended as a disciplinary warning.

[8] In December 2009 store managers were instructed to reinforce the requirements during staff meetings, and staff were issued with a set of written UCD Compliance Guidelines (the guidelines). In addition to re-stating the criteria applying to UCD transactions, the guidelines addressed the required procedure. They included in bold type an instruction that: *Cashiers must not 'Hold' a sale from a previous customer and attach another sale to make up a UCD sale.* Another provision read: *Cashier must ensure UCD is only applied to current fuel purchase Transaction cannot be held over for the customer.* The guidelines, too, ended with a warning that failure to comply with any of the outlined conditions was a serious breach of company policy which may lead to disciplinary action including termination of employment.

[9] Mr Patel received a copy of the guidelines in December 2009, and accepted that the store manager at the time went over the guidelines during a staff meeting.

[10] During a site visit in May 2010 the territory manager, Tim Fulton, noticed in the course of a routine check that Mr Patel had failed to follow the UCD procedure. He reviewed CCTV footage and identified 5 errors occurring over the preceding fortnight, one of which he considered particularly significant.

[11] The relevant incident occurred on 8 May and concerned a transaction involving another staff member, A. A purchased some drinks in a transaction that commenced at 5.54 pm and was rung up on the till at 5.57. The amount of the purchase would qualify for a fuel discount for a customer who purchased the drinks at the same time as making a purchase of fuel. A's transaction was put on hold at 5.58 pm, when a customer came to the till. Over the next few minutes more customers came to the till, and A's transaction remained on hold. When it was completed at 6.03 pm two fuel purchases by customers had been added to it. The effect was that the fuel purchased by the customers was combined with A's purchase from the retail store, with a discount on the fuel purchases being applied to A's purchase.

[12] When errors such as this were made, staff were required to identify them in a 'UCD Errors and Exceptions Log' to be handed in at the end of the shift. No error log was handed in at the end of Mr Patel's shift on 8 May. Mr Patel said in evidence that he forgot to attach the log to his end of shift material, and left it under the counter.

[13] By letter dated 17 May Mr Fulton informed Mr Patel that there appeared to be a discrepancy with his processing of UCD transactions. He said the supporting CCTV footage would be discussed at a disciplinary meeting, and offered the opportunity to view the footage before the meeting. The meeting was to be held on 21 May.

[14] Mr Patel asked his store manager, Ali Riaz, about the nature of the concern. Mr Riaz explained the concern was with the 8 May incident, went over the footage and told Mr Patel to provide his explanation at the meeting. Mr Patel said he was also told to produce the error log, which by then he had obtained, at the meeting.

[15] Mr Patel also sought advice from a union, although at the time he was not a member. He said the advice he received was that he may receive a warning, but if he received more than that the union would assist him. He proceeded on that assumption and did not seek the services of a representative for the purposes of the disciplinary process.

[16] The meeting went ahead on 1 June. Mr Patel summarised what was a correct understanding of the UCD procedure before being shown the CCTV footage of the transaction involving A. As it was being viewed, the transaction was discussed. Mr Patel explained his actions by saying he had become confused and made an error, mixing the customers' and A's transactions in a way he was unable to correct. He said he was busy, but it was clear from the footage that the store was not busy at the time A made his purchases although it became busy some minutes later. The footage shows that during the minutes before the store became busy Mr Patel and A conversed.

[17] Mr Fulton was dissatisfied with Mr Patel's explanation. He had intended to focus on the transaction involving A, but believed the additional errors he had noted indicated Mr Patel had a habit of putting transactions on hold. Accordingly he raised the additional errors with Mr Patel. Mr Patel's explanation was that he was

attempting to balance the till, and that till 'errors' in the amounts in question were within the company's stated tolerance. Even so, there was a procedure for balancing till 'overs' and 'unders' which was not followed.

[18] Mr Patel was also asked why he had not recorded the transaction with A on the error log, and provided it at the end of his shift instead of at the meeting. The answer given at the time was that he had since found the log in a file, and had forgotten to give it to the manager at the end of his shift.

[19] Mr Patel admitted he had a habit of holding transactions but alleged other people were holding transactions too. Mr Fulton was unaware of this and said that on his information Mr Patel was the only one doing so. Mr Patel was unable to name anyone in support of his allegation.

[20] Mr Patel sought to further defend himself by alleging that others had failed to follow various policies, yet had not been disciplined. He referred during the disciplinary meeting to a concern that A had signed a wage change slip on his behalf when his employment changed from part time to full time, without authorisation. Although he complained, A was not dismissed. A had signed the document in Mr Patel's absence to facilitate the necessary payroll action.

[21] During the disciplinary investigation Mr Patel also queried whether any action was being taken against A regarding the 8 May transaction, although he acknowledged that A was unaware of precisely how the transaction had been processed. A was questioned separately about his role in the transaction, and Mobil was satisfied with the response. In particular it accepted A was unaware of how his transaction had been rung on the till, and noted from the CCTV footage that he was not given the receipt. No disciplinary action was taken against him.

[22] During the Authority's investigation meeting Mr Patel sought strongly to argue that his dismissal was unfair because others had been guilty of serious breaches of policy but were not disciplined. He also considered that his error concerned a very small sum of money yet others, who, by their errors had been responsible for causing much greater cost to the company, were not dismissed. Finally, he complained that Mr Riaz had been guilty of a breach of health and safety policy in the way he

addressed a complaint of Mr Patel's that he was ill while on duty on 29 May, yet Mr Riaz was not disciplined. Mr Patel was complaining of a stomach ache on the day in question.

[23] The disciplinary meeting was adjourned pending a decision. It resumed on 15 June. Mr Patel reiterated his understanding of the procedures and his explanation that he was seeking to balance the till, and repeated his allegation regarding the signing of wage change slip. Otherwise, in response to the concerns about disparity he had expressed, when asked for examples of people acting in the same way as he was he did not give any names. He said he would not act that way again himself.

[24] Mr Patel said in evidence that another reason for his mistakes was that he had been suffering from depression, and he explained this at the time. Mr Fulton and Mr Riaz denied that such explanation was given. In the face of these denials, and the absence from the notes of any record of such explanation being given, I do not accept Mr Patel's evidence that such explanation was given during the disciplinary meeting. If he disclosed a state of depression to Mr Riaz on another occasion - although Mr Riaz did not recall such disclosure - this did not amount to an explanation of his actions of 8 May in a disciplinary context.

[25] After a further brief adjournment Mr Fulton advised that Mr Patel's employment was terminated with immediate effect. He said in evidence that his decision was based on Mr Patel's: experience and acknowledged understanding of the required UCD procedure; failure to complete the error log; and admission that he held transactions to cover till balances even though he was aware of the correct procedure. Further Mr Fulton did not accept the explanation that the errors in the transaction involving A were a mistake or that Mr Patel was confused. He considered it important that cashiers follow till procedures, as Mr Patel was aware. Mr Patel's failure was all the more significant because of the recent efforts to reinforce to staff the importance of following procedures.

[26] By letter of dismissal dated 21 June 2010 Mr Fulton identified the reason for the dismissal as Mr Patel's failure to follow the correct process for Under Canopy Discounts.

Whether the dismissal was justified

[27] The test of the justification for a dismissal is set out in s 103A of the Employment Relations Act 2000. It concerns whether the employer's actions were what a fair and reasonable employer would have done in all the circumstances.

[28] Since the fact of the errors in the 8 May transaction was not disputed, an issue for determination is whether a fair and reasonable employer would have accepted Mr Patel's explanation.

[29] It was reasonable to rely on the CCTV footage to reject the explanation that Mr Patel made a mistake because the store was busy. The store was not busy at the time and the transaction could and should have been processed. Because the store was not busy the likelihood of a mistake was also low. It was reasonable to take into account that Mr Patel admitted deliberately holding transactions on other occasions, explaining that he did so in order to balance the till. That explanation, too, amounted to a deliberate breach of a known procedure. It was reasonable to conclude that Mr Patel's actions on 8 May did not amount to a one-off error.

[30] The failure to produce the error log at the end of the shift was taken into account. The failure was explained, albeit weakly, and there was nothing to contradict the explanation. Otherwise the matter remained part of the unsatisfactory nature of Mr Patel's actions in respect of the transaction and it was reasonable to regard it in that light.

[31] Secondly, it was reasonable to conclude the conduct was serious misconduct. It was within a category expressly identified in the code of conduct as capable of amounting to serious misconduct. While that factor is not itself determinative, the degree of seriousness of Mr Patel's misconduct is increased because the importance of following the UCD guidelines had recently been reinforced through the store meeting and the issue of the guidelines, which included statements regarding the serious approach the company would take to any breach.

[32] That Mr Patel had received a coaching note was relevant. The note included a description of conduct which would be taken seriously if it occurred in the future, and

which was very similar to the conduct of which Mr Patel was guilty in May 2010. The relevance of the note was that, whether or not Mr Patel was guilty of the conduct described in it, in the context of the company's wider effort to educate staff the note drew to his attention that such conduct was unacceptable and would be viewed seriously.

[33] Thirdly, I find the conclusion about the seriousness of Mr Patel's conduct was reached after a fair investigation, and that a fair and reasonable employer would have reached it.

[34] Mr Patel's principal argument was one of unfair disparity of treatment. The applicable legal test is set out in *Chief Executive Officer Department of Inland Revenue v Buchanan (No 2)*¹. It poses three questions, namely, -

- . is there disparity of treatment?
- . if so, is there an adequate explanation?
- . if not, is the dismissal justified notwithstanding the disparity?

[35] Further to the third question, even without an explanation the mere existence of disparity does not necessarily render a dismissal unjustified. All of the circumstances must be taken into account.²

[36] Mr Patel's allegations of disparity are based on his allegations of other conduct he says amounts to serious misconduct under Mobil's code of conduct, but which did not lead to dismissal. None of the alleged conduct, including an apparent error in a UCD transaction which occurred several months after Mr Patel's dismissal, concerned the known and deliberate holding of a transaction contrary to the UCD guidelines. In the absence of such directly comparable conduct Mr Patel's allegations lose force.

[37] Mr Patel's approach to the matter of disparity was to measure the seriousness of his own conduct against the seriousness of the alleged conduct of others, by comparing the small amount of money involved in his case with what he said was the

¹ [2005] ERNZ 767 (CA); leave to appeal declined in [2006] NZSC 37; [2006] ERNZ 512

² *Samu v Air New Zealand Limited* [1995] ERNZ 636

far more significant effect of the conduct alleged against the others. However that is not the test. All of the circumstances of the conduct must be taken into account.

[38] I conclude the three questions posed in *Buchanan* can be answered by saying:

- . the conduct Mr Patel invoked was too dissimilar to his own to warrant a finding of disparity of treatment;
- . even if this is wrong, the explanations of the conduct Mr Patel invoked were adequate; and
- . the quality of Mr Patel's conduct meant I do not accept there was any disparity of treatment sufficient to vitiate the justification for the dismissal.

[39] For the above reasons I find the dismissal was justified.

The coaching notes

[40] I comment further on the coaching notes because Mr Patel has addressed them as if they amounted to a disciplinary warning. He expressed concern at the delay before they were provided to him, the lack of information about the incident on which they were based, his inability to recall the incident himself and the lack of opportunity to provide a response. If the matter was capable of amounting to a personal grievance, it was not raised in the time required under s 114 of the Employment Relations Act and was not included as a grievance in its own right in the statement of problem. Accordingly I have not addressed the notes in that context.

Costs

[41] Costs are reserved. If either party seeks an order for costs from the Authority there shall be 28 days from the date of this determination in which to file in the Authority and copy to the other party a written statement setting out what is sought and why. The other party shall have a further 14 days in which to file a written reply in the Authority and copy to the other party.

R A Monaghan

Member of the Employment Relations Authority