

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2020] NZERA 390
3064072

BETWEEN

RINGO L PETERS
Applicant

AND

THE WAREHOUSE GROUP
LIMITED
Respondent

Member of Authority: Michele Ryan

Representatives: Greg Lloyd, counsel for the Applicant
June Hardacre, counsel the Respondent

Investigation Meeting: 23 January 2020 at Wellington

Submissions [and further Information] Received: Orally from both parties on the day of the investigation meeting
Written from the applicant on 23 January 2020
Written from the respondent on 24 January 2020

Date of Determination: 29 September 2020

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Ringo Peters was employed as a Team Leader/Loss Prevention Officer (LPO) with The Warehouse Group Limited (the Warehouse) at its Petone store for over 5 years. He was dismissed on 22 November 2018 following an inquiry by the Warehouse into his conduct towards a customer whom he had observed shoplifting eyelash curlers.

[2] Mr Peters claims the Warehouse's decision to dismiss was too harsh a sanction in the circumstances, and says he was unjustifiably dismissed. He further says he was unjustifiably disadvantaged when he was suspended without any opportunity to comment on the matter.

[3] The Warehouse says the dismissal was justified as it no longer had trust and confidence in Mr Peters to perform his role. It says its decision to dismiss was justified following Mr Peters' admissions to having breached its policies and procedures on which he had recently received repeated training, particularly where it says his conduct created a serious health and safety risk.

The events leading to dismissal

[4] On 15 November 2018 Mr Peters observed a customer in the store discard a small box having already placed its contents into his pocket. Shortly thereafter the customer entered the self-service counter area to pay for other goods.

[5] The following events were recorded by CCTV cameras. The recordings do not contain sound.

[6] Mr Peters approached the customer and produced the discarded box. He says he told the customer he "*needed to pay for that too*". The customer is said to have denied knowing to what Mr Peters was referring. Mr Peters says he told the customer "*Don't lie to me you little shit, I was watching you on the CCTV camera*".

[7] Mr Peters reached towards the customer and swept the front of his jacket to one side. The customer responded by side stepping out of Mr Peters' immediate reach. There appears to be a brief verbal discussion between them. The customer then walks away, and the pair are out of camera view for a short period.

[8] CCTV footage then shows the right hand side of the customer's jacket has been pulled away from his shoulder. In a meeting held on 22 November 2018 Mr Peters advised he had "*grabbed [the customer's] jacket*" at this juncture.¹

[9] The customer twisted away from Mr Peters' grasp. He followed the customer and positioned himself in front of the exit lane. Mr Peters denies he pushed the customer backwards when the customer moved towards the exit, but I am satisfied he did. Another staff member, Tracey Macneil, intervened. She uses her arm as a barrier to prevent physical contact with the customer by Mr Peters. That stance is maintained whilst Mr Peters stretched one hand out and

¹ Meeting notes taken on 22 November 2018.

the customer appeared to empty a pocket. Mr Peters subsequently reached over Ms Macneil and wrested a small article (safety pins) out of the customer's hand.

[10] The customer then walked through an exit lane but was blocked from the external doors by Mr Peters. Ms Macneil placed herself between them in the same manner as previously.

[11] The Trade Manager arrived. He escorted the customer off the premises and it is reported the customer relinquished the eyelash curlers.

[12] The incident was reported quickly to Store Manager, Daniel Clark who asked Ms Macneil, the Trade Manager, and another staff member who witnessed the event, to record what occurred.

[13] A letter dated 19 November 2018 invited Mr Peters to a disciplinary meeting on 21 November 2018. Mr Peters was informed of his right to bring a support person or representative with him and who, from the Warehouse, would be attending. The letter then records the following:

Allegations

- *It has been alleged that on 15 November at approximately 8.10am you approached a customer at the checkouts as you had cause to suspect him of shoplifting. In this interaction is alleged you used offensive language and physical actions to stop this person leaving the store.*

[14] A range of policy or house rules that were alleged to have been breached were listed, to which I shall return. Mr Peters was advised he would be required to provide a response to the allegation(s) and if these were substantiated summary dismissal was an action that may be taken.

[15] Mr Peters attended the scheduled meeting on 21 November 2018. It is not necessary to itemize every point discussed. Material to this case, Mr Peters agreed he “*went a bit far by touching and swearing*” but advised his role was “*to get as much stuff back*” and considered it a failure if he did not do so.

[16] Mr Peters said Ms Macneil's intervention and her comments, said in front of the customer, not to swear or touch him, emboldened the customer and made the situation more difficult. He said if it had been left to just him, the customer would have returned the stock. Mr Peters expressed his frustration that the customer was able to leave but agreed he was aware

of the policies concerning apprehension of a customer and that the reason for these was to ensure “*our [staff] safety*”.

[17] The parties met again the following day. The Warehouse’s Regional Loss Prevention Manager, Iain Robertson, also attended, and took notes.

[18] In response to whether he wanted to add anything else to the discussion Mr Peters reiterated that things could have gone differently if Ms Mcneil had not been there. Mr Clark expressed his concern that Mr Peters’ language had escalated the situation before Ms Mcneil’s involvement.

[19] Mr Clark advised of his preliminary decision that he no longer had trust and confidence in Mr Peters to not do the same thing again and his reasons for holding that view. Mr Peters was asked if he wanted some time to consider and respond to the matter.

[20] Mr Peters responded by saying “*it is what it is*” but said he was sorry he put the store in that situation. He concluded by stating he would “*follow the rules*” if he got the chance. He advised he did not want to wait for an answer.

[21] Mr Clark’s advised his decision was to dismiss, effective immediately. Mr Clark says that his decision to dismiss Mr Peters was largely based on health and safety concerns and that Mr Peters showed no insight or understanding of the risk that he had put himself in.

[22] The parties have been unable to resolve their differences and it is left to the Authority to determine the matter.

The Authority’s Investigation

[23] Mr Peters is in receipt of legal aid. He attended the Authority’s investigation meeting and was supported by his wife, Faalima Peters. Mr Clark, Mr Robertson and Ms Macneil were also present on behalf of the Warehouse. The Authority was provided with written statements from each of the witnesses. An electronic copy of the CCTV footage was also produced as evidence.

[24] This determination has been issued outside the timeframe set out at s 174C(3)(b) Employment Relations Act 2000 (the Act), where the Chief of the Authority has decided

exceptional circumstances exist.² As permitted under s 174E of the Act, this determination does not set out all the evidence or information received from the parties. Rather, this determination makes findings of fact and law and sets out conclusions on the issues necessary to dispose of Mr Peters' claims.

Was Mr Peters' unjustifiably disadvantaged and/or unjustifiably dismissed?

[25] Section 103A of the Employment Relations Act 2000 (the Act) requires the Authority to determine whether an action or dismissal is justifiable, by considering on an objective basis:

... 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.

[26] Section 103A(3) further sets out a range of matters the Authority must consider when undertaking its assessment. These concern the process undertaken by the employer before it decides to dismiss the employee and whether those actions were procedurally fair.

[27] Excepting the claim regarding the way in which Mr Peters' suspension was decided, Mr Peters has not raised issues of procedural unfairness. Having assessed the evidence, it is clear the Warehouse investigated the allegations regarding Mr Peters conduct and raised these with him. Mr Peters was given a proper opportunity to respond to the Warehouse's concerns and his responses were genuinely considered before the Warehouse decided to dismiss. I am satisfied the Warehouse complied with the minimum standards of procedural fairness as set out at s 103A(3).

Was the suspension justifiable?

[28] As noted, Mr Peters alleges he was unjustifiably disadvantaged by the Warehouse's failure to provide him with an opportunity to comment on the proposal to suspend.

[29] He refers to the letter dated 19 November 2018 which informs of the allegations and invites him to meet on Wednesday 21 November to discuss. The letter included the statement:

After consultation with you, it has been decided to suspend you on full pay pending the outcome of the disciplinary matter. ...

² Pursuant to s 174C(4)

[30] To the right of the statement there is a tick box, and in this instance a computer generated “X” had been inserted when Mr Peters was given the letter. As I understand it, Mr Peters says the letter demonstrates that his suspension had already been determined when he was formally advised of the allegations. There was a suggestion in the initial documentation sent to the Authority that Mr Peters received the letter on 19 November 2018, but his evidence is that he did not receive the letter until the day of the meeting.

[31] Mr Peters was represented by an experienced barrister. If it was truly the case that the letter was not provided until the beginning of the disciplinary meeting at 10 am (or thereabouts) on 21 November 2019 I would have anticipated his grievance would have been accompanied by additional claims concerning the employers failure to provide Mr Peters with a reasonable period of time to be informed of, and consider, the allegations, before he was required to provide a response. No claim of this nature was raised.

[32] I have preferred Mr Clark’s testimony on this matter. He says on 19 November 2020 he sat with Mr Peters in his office and reviewed a draft copy of the letter on the computer. He says he went through content of the letter to ensure Mr Peters understood the allegations against him, including the proposal to suspend, before inserting the “X” and printing out the document. He says Mr Peters did not provide any feedback on the proposal to suspend other than to nod that he understood.

[33] I am not persuaded the Warehouse failed to provide Mr Peters with an opportunity to comment on the suspension.

Was the Warehouse’s decision to summarily dismiss Mr Peters substantively justified?

[34] In *Emmanuel v Waikato District Health Board* the Court summarised the nature of an assessment involving behaviour said to be justify summary dismissal, as follows:³

[58] When considering whether an employee’s conduct amounts to serious misconduct, justifying summary dismissal, the Court must stand back and consider the factual findings and evaluate whether a fair and reasonable employer could characterise that conduct as deeply impairing, or destructive of, the basic confidence of trust essential to the employment relationship, justifying dismissal. What must be evaluated is the nature of the obligations imposed on the employee by the employment contract, the nature of the breach that has occurred, and the circumstances of the breach.

³ [2019] NZEmpC 81

[59] This evaluation requires a two-step approach. The first step is to consider whether the conduct is capable of amounting to serious misconduct; if it is, then the second step is to consider whether dismissal is warranted in all the circumstances.

...

[61] When the Court then considers whether summary dismissal is warranted in the circumstances, it does not stand in the shoes of the employer. Rather it considers whether the decision to dismiss was one a fair and reasonable employer could have reached in all the circumstances at the time the decision was made. The employment history and an assessment of the employee's future reliability and trustworthiness may be relevant in this context.

[62] If the employer reasonably finds serious misconduct, and believes it can no longer trust the employee, it will be open to the employer to determine the dismissal is appropriate

Was the conduct capable of amounting to serious misconduct?

[35] The first allegation against Mr Peters concerned the language he used with the customer. Mr Peters accepts he did swear at the customer. In his written evidence he referred to another staff member who has sworn while speaking with him on the phone. I am not satisfied Mr Peters has established there was an acceptable pattern of swearing in the workplace which could mitigate his conduct, but the use of offensive language action is categorised by the Warehouse's House Rules as misconduct, as opposed to serious misconduct. I do not understand Mr Peters was dismissed for this action alone.

[36] The second limb of the Warehouse's concerns related to the physical actions taken by Mr Peters to prevent the customer leaving the store. The link between this allegation and the policies and House Rules said to have been breached could have been articulated more clearly in the letter of 19 November 2018 but I am satisfied Mr Peters understood the Warehouse's concerns. The breach of policies or House Rules were listed as follows.

- Bringing the company into disrepute
- Threatening, intimidating or interfering with another Team Member or anyone on Company premises
- Serious failure to observe safety requirements including safe working practices
- Conduct or behaviour that materially affects the continued trust and confidence in the employment relationship"

[37] Under the heading 'Apprehension Policy' in its Loss Prevention Manual, the Warehouse sets out minimum standards which a Loss Prevention Officer must observe before a customer may be apprehended. The introductory paragraph notes:

The policy and procedures outlined below must be followed accurately and carefully to ensure we don't breach legal guidelines and place customers and/or team members at unnecessary risk.

[38] Under "Business Rules" the policy goes on to say:

- Under no circumstances do team members have the right to search an offender;
- Team members must not lay a hand on a suspect, unless strictly as self-defence.

[39] The absolute exclusion on touching, searching, or using force on a customer is repeated in various ways elsewhere in the Warehouse's Apprehension Policy, and in its Code of Conduct for Loss Prevention Officers, and training modules: 'Loss Prevention L1', and 'Situational Awareness Training for Loss Prevention Team'.

[40] Submissions on Mr Peters' behalf assert the Warehouse wants the Authority to believe Mr Peters' actions were an assault, noting the Courts have dealt with allegations of assault in the workplace and have drawn a sharp distinction between technical and trivial assaults. It is further submitted Mr Peters' intention when touching the customers was simply to demonstrate to the shoplifter that he knew where the goods were stored. I am not drawn to this argument for several reasons.

[41] Firstly, the CCTV footage does not reflect the touching was as benign as is suggested. The CCTV footage records Mr Peters touched the customer on at least three occasions, and in one instance, pushed him. Mr Peters conceded during the Warehouse's second disciplinary meeting that he had grabbed the customer's jacket to stop him leaving and I consider it likely he pushed the customer for the same reasons. A level of force was used on both occasions. It may have been reasonable for the Warehouse to dismiss Mr Peters for these actions alone.

[42] However, Mr Peters was not dismissed on the basis of the touching in and of itself, but rather, the totality of this actions (language and physical) generated a potential health and safety risk for both himself and his colleague.

[43] The Warehouse refers to a range of policies which emphasise safety (personal, public and team) must be prioritized in all circumstances where apprehension of a customer is being

undertaken, as is demonstrated in the Apprehension Policy which provides under the heading “Priorities”.⁴

With every apprehension made, the following priorities must be adhered to:

1. Personal safety
2. Recovery of Goods
3. Police Notification
4. Apprehension

[44] The policy goes on state:

... if any team member or customer is likely to be placed at unnecessary risk, then the offender should be asked to leave. It is not the role of a LPO to act as the police in these situations.

[45] “Safety” is again recorded as the first priority in the concluding statements of the Apprehension policy. Further, the Code of Conduct for Loss Prevention Officers includes a statement that the Loss Prevention Officer agrees to:

Make every attempt to protect myself, ... team leaders and members of the public from harm during an apprehension and abide by the ... Apprehension Policy.

Ensure that public and team safety take precedence over the immediate apprehension of an offender

[46] The Warehouse also points to level 1 and 2 Loss Prevention training modules undertaken by Mr Peters in the first 1.5 years of his employment. The evidence is that the procedure used to apprehending customers had remained unchanged over this time and did not involve physical touching of the customer.

[47] More recently, Mr Peters had attended Situational Awareness Training for Loss Prevention Officers nine days prior to the incident. The course had focussed on managing risk as a central feature of a Loss Prevention Officers’ role. Amongst other things, the training canvassed communication styles and other techniques to de-escalate difficult situations including how to best engage with customers suspected of theft.

[48] Mr Peters’ written evidence suggests complex new concepts had been introduced which he was still assimilating at the time of the incident. However at the Authority’s meeting it

⁴ For example: Apprehension Policy pg 1 & 3; Code of Conduct for Loss Prevention Officers, pg 1; Loss Prevention L1 Handbook, pg 26

became apparent that the course was a refresher programme which repeated training Mr Peters had received two years earlier.

[49] As reason for his conduct, it is suggested the role of the Loss Prevention Officer was stressful, and the actions of the customer were provocative. This explanation seems at odds with Mr Peters' initial response to the Warehouse that he acted so as to have the customer return the goods. I note also there is no evidence that those matters were raised with the Warehouse prior to the dismissal and the Authority is only able to assess the reasonableness of the employer's decision against the information the employer had, or should have had at the time the dismissal occurred.

[50] I am unwilling to accept Mr Peters' actions should be considered less serious where he says the customer did not present a health and safety risk. That argument misconstrues the Warehouse's concerns. But for Ms Mcneil's intervention there can be no certainty as whether Mr Peters would have continued in his attempts to physically restrain the customer, or how the customer may have responded to Mr Peters' encroachment. Equally, Mr Peters' actions increased the potential for harm to both himself and Ms Mcneil.

[51] The concessions Mr Peters made during Warehouse's disciplinary meeting leads me to conclude he was aware of the policies concerning apprehensions and their purpose. I must find that the Warehouse was entitled to view Mr Peters' actions, particularly where he had so recently received training for managing difficult situations, were not only a breach of its procedures but in direct opposition to the primary requirement that safety was paramount. I find it was reasonable for the Warehouse to conclude Mr Peters' actions towards the customer did not comply with its policies and procedures and were a "*serious failure to observe safety requirements*", and constituted serious misconduct.

Was dismissal warranted in the circumstances?

[52] Mr Peters says it was unfair of the Warehouse to dismiss him for a one-off event, and that he never been subject to disciplinary action as a consequence of how he dealt with offenders. In contrast, the Warehouse produced evidence that Mr Peters had received disciplinary warnings on two separate occasions where he had wrongly accused customers of theft.

[53] There was nothing in Mr Peters' evidence to suggest he did not understand the Warehouse's expectations regarding the apprehension of a customer. Concessions made during the Warehouse's disciplinary meetings lead me to have no doubt that Mr Peters was fully aware of the material policies and procedures and the reason for that approach. I am satisfied his failure to adhere to the Warehouse's apprehension procedures was deliberate and wilful. I accept also that his omissions resulted in an increased risk of harm to himself and to others around him. It was open to the Warehouse, in this situation, to conclude it could no longer have trust and confidence he would perform as required.

[54] It follows that I must find the Warehouse's dismissal of Mr Peters was a decision that a fair and reasonable employer could make in the circumstances.

[55] Mr Peters' dismissal was justified. His claims are dismissed.

Costs

[56] Costs are reserved.

Michele Ryan
Member of the Employment Relations Authority